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Discussion paper proposed by the Coordinator

Part 6 of the Rome Statute: The Trial

N.B. This discussion paper replaces the following rules:

(a) **PCNICC/1999/DP.1 (submitted by Australia): rules 76–87, 90, 91, 93–100, 101 (i, ii, iii) and 102.**

The following rules contained in this document remain and need to be discussed: rules 74, 75, 88, 89, 92 and 101 (iv).

(b) **PCNICC/1999/DP.10 (submitted by France): entire document replaced.**

I. Rules 6.1 to 6.9 Evidence¹

Rule 6.1 General provisions

(a) All evidence submitted by the parties shall, in accordance with the discretion described in articles 64, paragraph 9, be assessed freely by a Chamber of the Court to determine its relevance² and admissibility in accordance with article 69.

(b) A Chamber of the Court shall rule on a motion concerning admissibility when it is based on the grounds set out in article 69, paragraph 7.

¹ Consideration needs to be given as to how to recognize familial relationships in connection to the taking of evidence.

² Consideration needs to be given that in assessing relevance the Court shall consider reliability.

(c) Corroboration is not required for proof of any crime within the jurisdiction of the Court, including crimes of sexual violence.³

(d) The rules of evidence set forth in rules (x) to (xx), together with article 69 of the Statute, shall apply in proceedings before all Chambers of the Court. The Chambers shall not be bound by national law governing evidence.

Rule 6.2 Procedure relating to the relevance or admissibility of evidence

(a) An issue of irrelevance or inadmissibility must be raised at the time when the evidence is submitted to a Chamber of the Court or as soon as possible thereafter. The Chamber may request that the issue be raised in writing. The written motion shall be communicated by the Court to all those who participate in the proceedings, unless otherwise decided by the Court.

(b) A Chamber shall give reasons, which shall be placed on the record, for any rulings it makes on evidentiary matters.

(c) Evidence ruled irrelevant or inadmissible shall not be considered by the Chamber.

Rule 6.3 Agreements as to evidence

The 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.

Rule 6.4 Privileges^{4,5}

(a) Communications between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure, unless:

(i) The person consents to such disclosure; or

(ii) The person voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure; or

(iii) The Chamber is satisfied that the communication was not for the purpose of giving or receiving legal advice.

(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:

³ The words “including” in French should be interpreted as “y compris”.

⁴ Consideration needs to be given to the creation of rules in the sections related to the disclosure of evidence and the protection of victims and witnesses concerning issues of confidentiality, including the disclosure of information or records related to, or deriving from, the counselling or treatment of sexual violence.

⁵ See also report of the Paris international seminar on access of victims to the ICC for types of privileges that should be considered, in particular rule D (4) of the conclusions of Workshop 3, and other applicable rules of that report concerning confidentiality.

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

Rule 6.5 Evidence in cases of sexual violence

In cases of sexual violence:

- (a) No consent exists where the victim:⁶
 - (i) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, abuse of power or other coercive circumstances; or
 - (ii) Reasonably believed that if the victim did not submit, another person might be so subjected, threatened or put in fear.

(b) In cases where the Trial Chamber is not satisfied that the conditions in subparagraph (a) exist, the Trial Chamber shall satisfy itself in camera that the evidence is highly relevant and credible before evidence of the victim's consent is admitted.

N.B. Consideration needs to be given to the issues concerning evidence regarding prior sexual conduct, as contained in PCNICC/1999/DP.1, rule 101 (iv).

Rule 6.6 Amicus curiae and other forms of submission

(a) A Chamber of the Court 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.

(b) The Prosecutor, the Defence, and the victims or their legal representatives when they participate in the proceedings pursuant to rules (x) to (xx), shall have the opportunity to respond to these observations submitted to the Court under paragraph (a).

(c) For the purpose of paragraph (b), a brief submitted under paragraph (a) shall be filed with the Registrar, who shall provide copies to the Prosecutor, the Defence and the victims or their legal representatives when they participate in the proceedings pursuant to rules (x) to (xx). The Chamber shall determine what time limits shall apply to the filing of such briefs.

⁶ Consideration needs to be given as to whether this subparagraph should be placed in the Elements of Crimes.

Rule 6.7 Solemn undertaking⁷

(a) Except as described in paragraph (b), every witness shall, in accordance with article 69, paragraph 1, make the following solemn undertaking before testifying:

“I solemnly declare that I will speak the truth, the whole truth and nothing but the truth.”

(b) 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 the person understands the meaning of the duty to speak the truth.

Rule 6.8 Findings and evidence from other proceedings⁸

(a) Without prejudice to the rights of an accused under article 67, the Chamber may, on its own motion or at the request of the Prosecutor, the Defence, or victims or their legal representatives when they participate in the proceedings pursuant to rules (x) to (xx), admit as evidence the specific factual findings of a Chamber from other proceedings or documentary or other physical evidence from other proceedings, which are relevant to matters at issue in the current proceedings.

(b) The Chamber shall hear the participants to the proceedings prior to admitting any such evidence.

Rule 6.9 Self-incrimination by a witness

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.

II. Rules 6.10 to 6.25 The Trial

Rule 6.10 Status conferences

(a) As soon as possible after it is constituted, the Trial Chamber shall hold a status conference in order to set the date of the trial. The Trial Chamber, on its own motion, or at the request of the Prosecutor or the Defence, may postpone the date of the trial.

(b) In order to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber may confer with the parties by holding status conferences as necessary, and in doing so, the Trial Chamber shall exercise, *mutatis mutandis*, all the powers of the Pre-Trial Chamber.

⁷ Consideration needs to be given to including in the Rules, a solemn undertaking for interpreters and translators.

⁸ Consideration needs to be given as to whether this evidence may be admitted only with the consent of the accused.

Rule 6.11 Motions challenging admissibility or jurisdiction

(a) Challenges to the jurisdiction of the Court or the admissibility of the case, pursuant to article 19, paragraph 2, must be submitted in writing prior to the commencement of the trial. The Trial Chamber shall transmit the motion to all those who participated in the proceedings. Participants may respond by written observations to the motion within a time period determined by the Trial Chamber. The Trial Chamber may decide to hold a hearing before ruling on any such motions.

(b) Concerning any motion on admissibility or jurisdiction at the commencement of the trial, the Presiding Judge of the Trial Chamber shall proceed *mutatis mutandis* in accordance with rule 5.10.

Rule 6.12 Other motions⁹

(a) The Trial Chamber on its own motion, or at the request of the Prosecutor or the Defence, may rule on any issue concerning the conduct of the proceedings prior to the commencement of the trial. Any request from the Prosecutor or the Defence shall be in writing and, unless the request is submitted *ex parte*, served on the other party. For all requests other than those submitted *ex parte*, the other party shall have the opportunity to file a response.

(b) At the commencement of the trial, the Trial Chamber shall ask the Prosecutor and the Defence whether they have any objections or observations concerning the conduct of the proceedings which have arisen since the confirmation hearings. Such objections or observations may not be raised or made again on a subsequent occasion, without leave of the Trial Chamber.

Rule 6.13 Medical examination of the accused

(a) The Trial Chamber may, for the purpose of discharging its obligations under article 64, paragraph 8 (a), or for any other reasons, or at the request of a party, order a medical, psychiatric or psychological examination of the accused, under the conditions set forth in rule (x).

(b) The Trial Chamber shall place its reasons for any such order on the record.

(c) The Trial Chamber shall appoint one or more experts from the list of experts approved by the Registrar, or an expert approved by the Trial Chamber at the request of a party.

⁹ Consideration needs to be given as to whether provision should be made to grant the Prosecutor and the Defence the right to make other motions, not necessarily in writing, regarding issues that may arise during the course of trial.

Rule 6.14 Instruments of restraint

Instruments 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.

Rule 6.15 Joint and separate trials

(a) The Trial Chamber, on its own motion or at the request of the Prosecutor or the Defence, may order that persons accused jointly be tried separately, if it deems it necessary, in order to avoid serious prejudice to the accused, or to protect the interests of justice.

(b) In joint trials, each accused shall be accorded the same rights as if such accused were being tried separately.

Rule 6.16 Transcripts

(a) In accordance with article 64, paragraph 10, the Registrar shall cause to be made, and preserve, a full and accurate record of all proceedings, including transcripts and audio and video recordings.

(b) A Trial Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering its non-disclosure no longer exist.

(c) Photography, video recording or audio recording of the trial, otherwise than by the Registrar, may be authorized at the discretion of the Trial Chamber.

Rule 6.17 Custody of evidence

The Registrar shall retain and preserve as necessary, all physical evidence and exhibits offered during the hearing, subject to any order that the Trial Chamber shall make.

Rule 6.18 Directions for the conduct of the proceedings

(a) Having regard to article 64, paragraph 2, and article 67, the Presiding Judge of the Trial Chamber may give directions for the conduct of the proceedings under article 64, paragraph 8 (b).

(b) If no directions are given, the Prosecutor and the Defence shall agree on the order and manner in which the evidence shall be submitted to the Trial Chamber. If no agreement can be reached, the Presiding Judge of the Trial Chamber shall issue directions.

(c) Unless otherwise ordered by the Trial Chamber, a witness other than an expert or an investigator, if he or she has not yet testified, shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not, for that reason alone, be disqualified from testifying.

Rule 6.19 Record of the proceedings

(a) The Registrar shall maintain the record of the proceedings transmitted by the Pre-Trial Chamber, pursuant to rule 5.9 (f).

(b) Subject to any restrictions concerning confidentiality, the record may be consulted by the Prosecutor, the Defence, the representatives of States when they participate in the proceedings, and the victims or their legal representatives when they participate in the proceedings pursuant to rules (x) to (xx).

Rule 6.20 Disclosure and additional evidence

In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64, paragraphs 3 (c) and 6 (d), and article 67, paragraph (2), make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence. To avoid delay and ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber.

Rule 6.21 Additional hearings on matters related to sentence or reparations

Pursuant to article 76, paragraphs 2 and 3, for the purpose of holding further hearings on matters related to sentence and, if applicable, reparations, the Presiding Judge of the Trial Chamber shall set the date of the further hearing. This hearing can be postponed, in exceptional circumstances, by the Trial Chamber, on its own motion or at the request of the Prosecutor or the Defence and, if applicable, at the request of the victims or their legal representatives when they participate in the proceedings pursuant to rules (x) to (xx).

Rule 6.22 Closure of the submission of evidence

(a) The Presiding Judge of the Trial Chamber shall declare when the submission of evidence is closed.

(b) The Presiding Judge of the Trial Chamber shall invite the Prosecutor, the Defence and the legal representatives of the victims to make their closing statements. The Presiding Judge may also invite the participants to make statements in reply to the other closing speeches. The Defence shall always have the opportunity to speak last.

Rule 6.23 Postponement of the deliberations

After the closing speeches, the Trial Chamber shall retire to deliberate, in camera. The Trial Chamber shall inform the Prosecutor, the Defence and, if applicable, the legal

representatives of the victims and the representatives of States who have participated in the proceedings of the date on which the Trial Chamber will pronounce its decision.¹⁰

Rule 6.24 Delivery of the decisions of the Trial Chamber

(a) Decisions of the Trial Chamber concerning admissibility of a case, the jurisdiction of the Court, criminal responsibility of the accused, or sentence and reparations shall be pronounced in public and, wherever 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.

(b) Copies of all the above-mentioned decisions shall be provided as soon as possible:

(i) To the person convicted or acquitted, in a language he or she understands and speaks fully;

(ii) To the person's counsel, the Prosecutor and, if applicable, to the legal representatives of the victims and the representatives of the States who have participated in the proceedings, in the working languages of the Court.

Rule 6.25 Decision on the admission of guilt

(a) After having proceeded in accordance with article 65, paragraph 1, the Trial Chamber, in order to fulfil its functions under article 65, paragraph 4, may invite the views of the legal representatives of the victims in accordance with rules (x) to (xx).

(b) The Trial Chamber shall then make its decision on the admission of guilt and shall give reasons for this decision, which shall be placed on the record.

III. Rules 6.26 to 6.36 Offences against the administration of justice

Rule 6.26 Jurisdiction

N.B. Consideration needs to be given to the scope of the exercise of jurisdiction by the Court under article 70.

Rule 6.27 Applications of the Statute and Rules

Unless otherwise provided in rules 6.26 to 6.36, the Statute and Rules shall apply *mutatis mutandis* to the Court's investigation, prosecution and punishment of the offences defined in article 70.

¹⁰ Consideration needs to be given to a rule requiring the Trial Chamber to review the measures restricting or depriving the accused of liberty if the decision in the case shall be delayed for a significant period.

Rule 6.28 Non-application

The provisions of Part 2, and any rules thereunder, shall not apply, with the exception of article 21.

Rule 6.29 Statute of limitations

Offences defined in article 70 shall be subject to a statute of limitations.¹¹

Rule 6.30 The Pre-Trial, Trial and Appeals judges

For purposes of any proceedings under article 70:

(a) The functions of the Pre-Trial Chamber shall be carried out by a single judge of the Pre-Trial Division (hereafter the Pre-Trial Judge);

(b) The functions of the Trial Chamber shall be carried out by a single judge of the Trial Division (hereafter the Trial Judge); and

(c) The functions of the Appeals Chamber shall be carried out by three judges of the Appeals Division,
to be appointed by the Presidency.

Rule 6.31 Investigation, prosecution and trial

(a) The Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70, on his or her own initiative, on the basis of information communicated by a Chamber of the Court or any reliable sources.

(b) Articles 53 and 59 shall not apply.¹²

(c) For purposes of article 61, the Pre-Trial Judge may make any of the determinations set forth in that article on the basis of written submissions, without a hearing, unless the interests of justice otherwise require.

(d) With the consent of all parties, a Trial Chamber may, as appropriate, direct that there be joinder of charges under article 70 with charges under articles 5 to 8.

¹¹ It was agreed that a statute of limitations should apply. Two possible ways of establishing such a limitations period were discussed. The first would set out a statute of limitations of (x) years in the Rules themselves, with or without a period of suspension, until such time as the offence is discovered. The second would look to the law of the State of the territory on which the offences were committed, or the law of the State of which the concerned person is a national, with a sub-rule by which the Court would decide between these laws.

In addition, for consideration, the question was raised as to whether a rule should be added that would provide that, where the offence is referred to a State, that State shall apply its own statute of limitations.

¹² The question was raised as to whether article 54, paragraph 2 (b), should also be excluded.

Rule 6.32 Penalties

(a) The fine imposed under paragraph 3 of article 70 may not exceed (x) Euros, or the equivalent amount in any other currency, or, with respect to an offence defined in paragraph 1 (f) of article 70, a maximum amount equal to (x) times the amount of the bribe solicited or accepted, whichever is greater.

(b) Each offence may be separately fined, and those fines may be cumulative.

(c) Article 77 shall not apply.

Rule 6.33 International cooperation and Judicial assistance

(a) With regard to offences under article 70, the Court may request a State to provide any form of cooperation or judicial assistance corresponding to those forms set forth in Part 9. In any such request, the Court shall indicate that the basis for the request is an investigation or prosecution of offences under article 70.

(b) The conditions for providing cooperation or judicial assistance with regard to offences under article 70 shall be those set forth in paragraph 2 of that article.

Rule 6.34 Referral

Upon request of the Prosecutor, the Presidency may make a request to a State Party in accordance with article 70, paragraph 4 (b).

Rule 6.35 Ne bis in idem

No 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.

Rule 6.36 Immediate arrest

In the case of an offence under article 70 committed in the presence of a Chamber of the Court, the Prosecutor may request that Chamber to order the immediate arrest of the person concerned.

IV. Rules 6.37 to 6.40 Misconduct before the Court¹³

Rule 6.37 Hearing

When a Chamber of the Court has good reason to believe that a person has committed misconduct in violation of article 71, it may so inform that person. After affording such person an opportunity to appear and answer, the Chamber may impose one or more of the sanctions set forth in rule 6.38, provided that such sanction is imposed within 30 days of the misconduct.

¹³ Consideration should be given to the need to elaborate a code of conduct for counsel.

In the case of misconduct committed in the presence of a Chamber of the Court, the Chamber may afford the opportunity to answer immediately.

Rule 6.38 Sanctions

A person who is found guilty of a violation of article 71 may be subject to one or more of the following sanctions:

- (a) Removal, by force if necessary, from the courtroom, until further decision;
- (b) A fine, the amount of which shall not exceed (x) Euros, or the equivalent amount in any currency, provided that in cases of continuing misconduct, a new fine may be imposed on each day that the misconduct continues, and such fines shall be cumulative;
- (c) Permanent or temporary interdiction from attending a hearing before the Court;
or
- (d) If the person is an officer of the Court, or a defence counsel, or a legal representative of a victim, permanent or temporary interdiction from the exercise of his or her functions before the Court.

Rule 6.39 Appeal

Any decision rendered under article 71 shall be subject to appeal to a single judge of the Appeals Division appointed by the Presidency.

Rule 6.40 Concurrence

If a Chamber of the Court determines that conduct covered by article 71 also constitutes one of the offences defined in article 70, the Chamber shall proceed in accordance with article 70 and rules 6.26 to 6.36.
