13 August 1999

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Preparatory Commission for the International Criminal Court
Working Group on Rules of Procedure and Evidence
New York
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Request from the Governments of Bosnia and Herzegovina, Canada, Colombia, Egypt, Portugal, Senegal and Spain regarding the report prepared by Judge Florence Ndepele Mwachande Mumba, Judge Gabrielle Kirk McDonald, Judge Antonio Cassese, Judge Richard George May, Judge Almiro Simoes Rodrigues, Judge Mohamed Bennouna on the Rules of Procedure and Evidence of the Statute

Note verbale dated 13 August 1999 from the Permanent Missions of Bosnia and Herzegovina, Canada, Colombia, Egypt, Portugal, Senegal and Spain addressed to the Secretary-General

The Permanent Missions of Bosnia and Herzegovina, Canada, Colombia, Egypt, Portugal, Senegal and Spain have the honour to attach the text prepared by Judge Florence Ndepele Mwachande Mumba, Judge Gabrielle Kirk McDonald, Judge Antonio Cassese, Judge Richard George May, Judge Almiro Simoes Rodrigues and Judge Mohamed Bennouna in order to provide information to the Preparatory Commission on the Proposed Rules of Procedure and Evidence for the International Criminal Court (see annex).

The Permanent Missions of Bosnia and Herzegovina, Canada, Colombia, Egypt, Portugal, Senegal and Spain request the circulation of the present letter as a document for the information of the Preparatory Commission.

99-23883 (E)

Annex

CONTRIBUTIONS OF THE CHAMBERS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

SUBMITTED TO THE 26 JULY – 13 AUGUST 1999 PREPARATORY COMMISSION ON THE PROPOSED RULES OF PROCEDURE AND EVIDENCE FOR THE INTERNATIONAL CRIMINAL COURT

PREPARED BY THE ICC LIAISON COMMITTEE OF THE CHAMBERS OF THE ICTY

Judge Florence Ndepele Mwachande Mumba, Chair
Judge Gabrielle Kirk McDonald, President
Judge Antonio Cassese
Judge Richard George May
Judge Almiro Simoes Rodrigues
Judge Mohamed Bennouna

ICTY Experience

1. On 25 May 1993, the U.N. Security Council, by Resolution 827, acting under Chapter VII of the U.N. Charter, established the International Criminal Tribunal for the former Yugoslavia (ICTY or Tribunal) to prosecute serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. In September of 1993, the General Assembly elected 11 judges, who took office on 17 November 1993. Immediately thereafter, the judges began drafting the Rules of Procedure and Evidence (Rules) of the Tribunal. The first draft of these Rules was adopted some four months later, on 11 February 1994. In five and one half years of practical experience, these Rules have been amended several times, and the judges of the ICTY have had the opportunity to test the viability and practicality of the Rules in applying them to a wide range of situations raised before the Chambers.

2. Since its inception, the Tribunal has publicly indicted 90 individuals in 27 indictments, with 28 accused presently in custody. One accused pleaded guilty and one died just before a judgement was rendered.[1] Four trials have been completed against 7 other accused.[2] Of these, one was found not guilty and the remaining six were convicted. Trials continue against another 10 accused.[3] The Appeals Chamber has issued four final decisions,[4] and in 1999 alone, it has handled some 23 interlocutory appeals. Since 1993, the Tribunal has issued several hundred orders or decisions on a wide variety of procedural and substantive issues.

The Role of Judges in the Rule-Making Process

3. The creators of the ICC have acknowledged the importance of taking advantage of the experience of judges of the Tribunal, through such means as importing ICTY Rules or jurisprudence into the ICC Statute, through reference to ICTY caselaw or Rules in ICC Preparatory Committee and Commission documents, through inviting Tribunal staff to participate as observers to each of the PrepCom sessions, and through sending experts to the Tribunal to seek advice from the judges and other organs of the Tribunal. In the Final Act, it was noted that the General Assembly, in resolution 52/160, requested the Secretary-General to invite representatives of the Tribunals[5] to participate as observers to the Rome Conference. The judges are encouraged by this relationship with the ICC, and hope that it continues and culminates in a relationship that is mutually beneficial to the institutions and to the progressive development of international criminal law.

4. Due to the experience gained by the judges in handling trials and appeals of international crimes similar to those that will come before the International Criminal Court, and in the spirit of continuity and cooperation, the judges of the International Tribunal respectfully submit comments for consideration by the Preparatory Commission, particularly concerning the drafting of the Rules of Procedure and Evidence. Due to the extensive knowledge gained in adjudicating serious violations of international humanitarian law over the past 6 years, it is the desire of the judges to

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[1] Prosecutor v. Dražen Erdemović, IT-96-22; Prosecutor v. Mile Mrkšić et al. (Slavko Dokmanović case), IT-95-13a-T.

[2] Prosecutor v. Duško Tadić, Opinion and Judgment, IT-94-1-T, 7 May 1997; Prosecutor v. Anto Furundžija, Judgement, IT-95-17/1-T; Prosecutor v. Zlatko Aleksovski, Judgement, IT-95-14-T, 7 May 1999; Prosecutor v. Zejnil Delalić et al., "Čelebići", Judgement, IT-96-21-T.

[3] Prosecutor v. Tihomil Blaškić, IT-95-14-T; Prosecutor v. Zoran Kupreškić et al., IT-95-16-T; Prosecutor v. Goran Jelisić, IT-95-10-T; Prosecutor v. Dario Kordić and Mario Čerkez, IT-95-14/2-T.

[4] Prosecutor v. Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 Oct. 1995; Prosector v. Duško Tadić, Judgement, IT-94-1-A, App. Ch., 15 July 1999; Prosecutor v. Dražen Erdemović, Judgement, IT-96-22-A, App. Ch., 7 Oct. 1997; Prosecutor v. Tihomir Blaškić, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, IT-95-14-AR108 *bis*, App. Ch., 29 Oct. 1997.

[5] The International Criminal Tribunal for Rwanda (ICTR) was similarly invited to send representatives to participate informally with the conference.

give the ICC the maximum benefit of the Tribunal's experience in performing functions similar to those assigned to the ICC.

5. The judges note that Article 51 of the ICC Statute provides that the Rules and any amendments thereto must be adopted by a two-thirds majority of the members of the Assembly of States Parties. The judges also note that Annex I(F) of the Final Act established a Preparatory Commission to "prepare proposals for practical arrangements for the establishment and coming into operation of the Court," including preparing, by the end of June 2000, a draft text of the Rules of Procedure and Evidence. The Preparatory Commission will remain in existence until the conclusion of the first meeting of the Assembly of States Parties. Article 112 of the ICC Statute established the Assembly of States Parties to the Statute, and provides that each State Party shall have one representative in the Assembly, and this Assembly shall consider and adopt, as appropriate, recommendations of the Preparatory Commission. The judges are particularly encouraged to note that paragraph 5 of Article 112 provides that the "President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau."

6. The Statute does not enter into force until it has been ratified, accepted, approved, or acceded to by 60 states, pursuant to Article 126 of the Statute, and there is general consensus that the Assembly of States Parties are precluded from performing official functions prior to the time the Statute enters into force. Article 36, paragraph 6(a) of the Statute stipulates that the judges are to be elected at "a meeting of the Assembly of States Parties convened for that purpose". Article 51, paragraph 1 of the Statute states that the Rules shall enter into force upon adoption by the Assembly of States Parties. The Statute does not appear to dictate a chronological order such that nothing seems to prevent the Assembly of States Parties from electing judges prior to adopting the Rules. With this in mind, the judges wish to stress that participation of judges in the rule-making process has played an indispensable role in the success of the ICTY, and this role has facilitated immensely both expediting the trials and developing the jurisprudence.

7. The judges wish to encourage the Preparatory Commission to include a provision that would allow judicial participation with the Assembly of States Parties in the adoption of the Rules.[6] Even though the ICC judges will not have drafted the Rules themselves, as did the ICTY and ICTR judges, their input before adoption is critical and cannot be overemphasized.

8. Although the ICC judges will be able to provisionally amend the Rules, they will be subject to subsequent approval by the Assembly of States Parties.[7] What would happen if the Rules were provisionally amended and applied, but were subsequently not approved? It is our understanding that the language of Article 51, paragraph 3 must be interpreted such that any decision or application made under a provisional Rule cannot have its "legality" affected by a subsequent failure to adopt the Rule.[8] The judges should have an opportunity to participate in some meaningful way with the Assembly in considering any amendment to the Rules, and most especially when considering the adoption, amendment, or rejection of provisional Rules. A provision in the ICC Rules allowing this participation would not contradict the Statute, which vests the ultimate authority with the Assembly.

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[6] If, however, by the time the Rules are to be adopted by the Assembly of States Parties the ICC judges have not been elected, perhaps an advisory board consisting of a number of ICTY and ICTR judges (past and current) could be established to ensure judicial input from judges experienced in international criminal procedure.

[7] ICC Statute, Article 51, Rules of Procedure and Evidence, at paragraph 2, stipulates that amendments to the Rules will enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties. Paragraph 3 provides that "in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties."

[8] Support for this contention is also found in paragraph 4 of Article 51, which provides that neither amendments to the Rules nor provisional Rules may be applied retroactively to the detriment of the accused.

9. The ICC Statute already has far more extensive requirements than those imposed by the ICTY Statute, so the ICC Rules may need less elaboration than the ICTY Rules, which were necessarily more detailed in order to fill a lacunae in the Statute. Indeed, many of the ICTY Rules are reproduced in the ICC Statute, and this provides additional support for the proposition that the ICC Rules need less detail than the ICTY Rules. Most importantly, the judges should be allowed room within the Rules to develop procedures that were not envisaged by the drafters.

10. Explicit provisions in the Rules providing for judicial discretion and judicial authority are of the utmost importance. Judges of the ICTY have been granted discretion in dealing with matters of procedure as well as evidence. In general this flexibility has proved to be a strength of the ICTY in dealing with the wide variety of situations coming before a criminal court operating in an international legal environment. The Statute of the ICC at times reflects a view of the Court as a large administrative organ and in general does not leave as much room for judicial involvement.[9]

11. Since the first three years of the Tribunal's "start-up efforts," the last three years have seen extensive courtroom action, and more suspects are in detention than the ICTY has capacity and ability to try simultaneously. In anticipation of a similar situation in the ICC, procedures which satisfy the twin criteria of expeditiousness and fairness must be developed in accordance with the standards set in the ICC Statute and in compliance with international human rights norms. It is primarily against this background that the Tribunal seeks to contribute to the Commission's work on the ICC's Rules of Procedure and Evidence.

12. The codification and progressive development of international criminal law since 1993 has been remarkable, particularly in the establishment of the ad hoc Tribunals to prosecute serious violations of international humanitarian law committed in the territory of the former Yugoslavia and in Rwanda, and in the adoption of the ICC Statute. As noted by the Trial Chamber in the *Furundžija* case, regarding the Rome Statute of the International Criminal Court:

> In many areas, the Statute may be regarded as indicative of the legal views, i.e. *opinio juris* of a great number of States. . . . [R]esort may be had *cum grano salis* to these provisions to help elucidate customary international law. Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.[10]

13. Indeed, some Judgements rendered in the ICTY have referred to, and at points even relied upon, to greater or lesser extents, provisions of the ICC Statute. This reflects the ICTY's awareness that the Statute was signed by 120 countries, signifying its collective stature, and the judges' acknowledgement of its international support and character. Providing consistency and continuity in international criminal law is vital to maintaining, reinforcing, and expanding its credibility and influence. It is in this consciousness that the judges of the ICTY have reflected upon certain provisions or omissions in the ICTY Rules, along with consideration of drafts submitted to or derived in previous Preparatory Commissions or intersessionals, in order to impart general advice on proposed Rules or omissions that appear most pressing.

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[9] E.g. Article 51 of the ICC Statute provides that judges may adopt provisional amendments to the rules of procedure but not permanent ones, whereas at the ICTY judges have the power to make amendments, and have used this power frequently.

[10] Prosecutor v. Anto Furundžija, Judgement, IT-95-17/1-T, 10 Dec. 1998, para. 227.

14. This Report, which generally tracks the organization of the Australian Draft (PCNICC/1999/DP.1), constitutes the consensus of the Chambers and does not necessarily reflect unanimity on every recommendation. The themes that are embodied throughout each section below, and which are eagerly supported by all the judges, are fairness, expediency, and flexibility.

PART 1 – GENERAL PROVISIONS

15. ICTY Rule 2 sets forth several definitions that can provide a useful starting point in including definitions within the ICC Rules. Additionally, in the past several years, there has been extensive litigation in the Tribunals during the course of which definitions have been refined and settled. Because both certainty and malleability are needed, the main terms used in the Statute and Rules should be defined. Making use of ICTY jurisprudence in enunciating more extensive definitions than those provided in ICTY Rule 2 will avoid the litigation the ICTY has experienced in interpreting definitions of terms.

PART 2 – COMPOSITION AND ADMINISTRATION OF THE COURT

16. Article 46 of the ICC Statute provides for removal from office certain persons, including judges, found to have committed serious misconduct or a serious breach of his or her duties. In considering misconduct of judges, the standard of "serious misconduct" should simply be conduct which causes serious harm to the proper administration of justice or to the standing of the Court.[11]

17. The concept of negligence by a judge in the performance of his or her duties is complex and unnecessary. It should be sufficient to define "a serious breach of duty" as a breach of a duty that causes serious harm to the administration of justice or the standing of the Court.[12]

18. Any disciplinary proceedings should be reviewed and considered in a timely manner. Judges should not be subjected to lengthy disciplinary procedures, as it may seriously disrupt ongoing judicial functions, and their work product may suffer whenever their professional integrity or impartiality is subjected to such proceedings.

19. There are advantages to making election, rather than seniority, the basis for determining the Presiding Judge of a Pre-Trial or Trial Chamber. Election is preferable to seniority because there may be instances in which the senior judge does not wish to preside, or cases where the senior judge would not be the most appropriate judge to preside over the case. Thus, whereas the Australian Draft, at Rule 23, proposes that the Presiding Judge "shall" be the senior judge, the ICTY judges respectfully suggest that having a mandatory requirement is not appropriate. In the experience of the ICTY, sometimes the senior judge is the Presiding Judge, but not always.

20. The ICC Statute, at Article 36, concerning the qualifications, nomination and election of judges, requires that judicial candidates have established competence and experience either in criminal law and procedure or in international law. The judges note that paragraph 4(c) of this article states that the "Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties." This is another area in which the ICC may wish to draw on the expertise of judges of the ICTY and ICTR by including Tribunal judges within its Advisory Committee on nominations, if such a committee is established.

[11] See Australian Draft, at Rule 9, which differentiates between conduct during or outside the course of official duties.

[12] See Australian Draft, at Rule 10, which sets the standard at "gross negligence" or "knowingly" acting in contravention of his or her duties.

21. In staffing the Victims and Witnesses Unit, established pursuant to Article 43, paragraph 6 of the ICC Statute, Rules should emphasize, as does ICTY Rule 34(B), that due consideration be given to the employment of qualified women.

22. The Victims and Witnesses Unit should play an active role throughout all stages of the proceedings and both the Office of the Prosecutor and Defence counsel should coordinate with this Unit on all matters concerning victims or witnesses which falls within the Unit's mandate.

23. Consideration should be given to the possibility of, when appropriate, appointing counsel for victims or witnesses who testify, as their best interests are not always represented by either party.

24. ICTY Rule 44, regarding the appointment, qualifications and duties of counsel, stipulates that counsel be "admitted to the practice of law in a State" or be a professor of law. Rule 53 of the Australian Draft reproduces these requirements, and in the notes to this Rule queries whether more specific qualifications of defence counsel should be listed. In the International Criminal Tribunal for Rwanda, ICTR Rule 45 has been amended to require that defence counsel have at least 10 years of "relevant experience."[13] Thus, in order to ensure an adequate defence for indigent indictees, there should be a minimum number of years of relevant experience before counsel should be added to the list of counsel available to indigent accused.

25. The assignment of counsel is a significant issue to be determined by the Preparatory Commission. It is quite important for the Rules to provide for an indigent person to be assigned counsel by the Registrar, rather than allowed to select a counsel from a list of counsel provided by the Registrar.[14] Indigent persons do not have an unfettered right to counsel by any person of their choice; rather, they have the right to be provided with competent counsel.

26. In the ICTY, a Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal (IT/125) has been devised. Rule 55 of the Australian Draft, concerning a code of professional conduct, provides: "The Registrar shall in consultation with the judges and the Prosecutor prepare a code of professional conduct for defence counsel appearing before the Court, which shall be approved by the judges." The judges suggest that such a code should apply to both prosecution and defence counsel, and that defence counsel be given the same authority as the Prosecutor in preparing or amending such a code. In the ICTY, Rule 46, governing misconduct of counsel, applies to both defence and prosecution counsel. ICTR Rule 46 is even more explicit, stating that the provision "is applicable *mutatis mutandis* to Counsel for the prosecution." The ICTR Rule further states that "[a]mendments to the Code [of Professional Conduct] shall be made in consultation with representatives of the Prosecutor and defence counsel".

PART 4 – INVESTIGATION AND PROSECUTION (PRE-TRIAL PROCEEDINGS)

27. The ICC could benefit from the Tribunal's experience during the pre-trial and trial stages, which are of crucial importance to ensuring expeditious trials.[15] The relevant provisions of Article 64 of

[13] See ICTR Rule 45, amended 1 July 1999.

[14] This is consistent with ICTY Rule 45(D)(iii), and Article 55 (2) (c) and 67 (1)(d) of the ICC Statute, as well as Article 14(3)(d) of the International Covenant on Civil and Political Rights.

[15] The phrase "pre-trial" does not refer to the same stages within the ICC's and the ICTY's provisions. Within the framework of the ICC Statute, "pre-trial" is used to refer to the stage of the proceedings up to the confirmation of the charges against an accused person, thus mostly covering the investigation phase, whereas in the Tribunals' Rules, "pre-trial" refers to the stage of the proceedings which runs from the initial appearance of an accused (after the confirmation of an indictment) up to the commencement of trial. This distinction is made here to avoid confusion. Many functions are not specific to the investigation stage and may subsequently be exercised by the Trial Chamber. Further, some of the most important functions of the Pre-Trial Chamber are determining, upon a request by the Prosecution, that there is a reasonable basis to proceed with an investigation (Article 15), adjudicating admissibility and jurisdiction challenges before the confirmation of charges (Article 19), and confirming charges (Article 61). These functions obviously differ from the functions entrusted to Trial Chambers or the pre-trial judge of the ICTY at the pre-trial stage.

the ICC Statute, enumerating functions and powers of the Trial Chamber, are very broad and not detailed, even though they contain more specificity than that contained in the ICTY Statute (Article 15). The Tribunal's Rules were drafted and subsequently amended, primarily as a result of the practice, to include detailed provisions as to the preparation for trial.

28. The Preparatory Commission might consider including Rules to reduce the length of trials through more efficient pre-trial proceedings. The ICC Rules should include reference to Pre-Trial Conferences, which have proven useful in ICTY practice, and could prove even more effective if used more systematically or boldly. There should be a specific reference as to how a Chamber will discharge its duty to ensure that exchanges between the parties result in timely trial preparation. In the ICTY, Rule 73 *bis* (Pre-Trial Conference) and *ter* (Pre-Defence Conference), which were adopted as a result of the need to establish more efficient procedures to prepare for expeditious trials, set out a number of steps that a Chamber may take in order to prepare the case for trial. Of particular use is the holding of a Pre-Trial Conference or a Pre-Defence Conference, where the parties may be requested to file pre-trial briefs, statements of disputed issues, or a list of witnesses and exhibits, before the start of the presentation of their respective case. The Pre-Trial Conference(s) should take place "as and where necessary" and not necessarily "on a regular basis."

29. Pursuant to ICTY Rule 65 *ter*, a Trial Chamber may designate a pre-trial judge to be responsible for pre-trial proceedings. Dividing authority and responsibilities among the judges to hear parties, coordinate communication, set deadlines, or handle other judicial functions reduces the burden on the Chamber as a whole. The ICC Rules should consider adopting a similar provision.

PART 5 – DISCLOSURE

30. Rule 67(a) of the Australian Draft requires the Prosecutor to provide the defence with the name and address of witnesses whom the Prosecutor intends to call to testify at trial. The ICTY strongly urges the Preparatory Commission to not make this a mandatory requirement, as this could intimidate witnesses who may be in need of protection.

PART 6 – THE TRIAL [TRIAL MANAGEMENT]

31. Article 64 of the ICC Statute, concerning functions and powers of the Trial Chamber, assigns broad and extensive powers to the judges. Article 51, paragraph 5 of the Statute states that if a conflict develops between the Rules and the Statute, "the Statute shall prevail." With this in mind, the judges caution against drafting any Rules which could be interpreted as restricting the powers of the Trial Chambers afforded in Article 64. For example, Article 64, paragraph 2 unequivocally states: "The Trial Chamber shall 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 victims and witnesses." The use of "shall" indicates this provision is mandatory and thus any Rule impinging upon this authority would be in direct conflict with the powers afforded under the Statute. Other powers are granted to a Pre-Trial Chamber under Article 57 of the ICC Statute (Functions and powers of the Pre-Trial Chamber).

32. As to preliminary motions in general, the attention of the delegates to the Preparatory Commission may be usefully drawn to the need to set out specific deadlines within which to present motions in order to avoid disorderly and last minute presentation of motions that could result in a delay of the commencement of the trial. Regardless of whether the Preparatory Commission prefers the exhaustive approach of defining preliminary matters, similar to those provided by ICTY Rule 72, or the non-definitional approach, the most important point is that preliminary motions should be

those that raise issues which can be cured before the trial begins and which may affect the propriety of proceeding with the trial.

33. Rules should not only not restrict the discretion of judges, particularly in regards to the conduct of trial, but indeed, should insist upon judicial authority and discretion, where appropriate. For example, ICTY Rule 73 *bis* (D) empowers the Trial Chamber to call upon the Prosecution "to reduce the number of witnesses if it considers that an excessive number of witnesses are being called to prove the same fact". This is a useful power, though one which should be exercised sparingly and cautiously. Additionally, Rule 98 grants power to a Chamber to order either party to produce additional evidence. These are examples of Rules that unambiguously confer power to a Chamber to manage the trial proceedings.

34. ICC Article 68(3) provides that the Court shall allow victims to have "their views and concerns . . . presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." While careful consideration should be given to allowing such presentation during the trial on account of possible prejudice to the accused, some judges find support for this provision, and acknowledge that victims are often forgotten during the judicial process. Provided the rights of the accused are not infringed, the rights of the victims to have their views heard during pre-trial or trial proceedings should be considered.

35. However, other judges feel strongly that the most appropriate stage at which the presentation of the views and concerns of victims by themselves or through their legal representatives should be given is after the judgement. Such views and concerns expressed prior to judgement may be prejudicial to the accused. If the views and concerns of victims are admitted during the trial phase it can impact the "perception," at the very least, as to whether the accused is being given a fair trial. Certainly their views and concerns, unless they were witnesses before the Chamber, have no relevance to the issue of guilt. This may be particularly so under the ICC Statute, which, unlike current ICTY Rules (see Rules 85 and 87(C)), could be interpreted as providing for a separate sentencing procedure. Indeed Article 76 of the ICC Statute, regarding sentencing, allows the Trial Chamber to, *inter alia*, hold additional hearings, including ones to hear representations relating to reparations that are made pursuant to Article 75 of the Statute.[16]

36. The ICC will more likely than not be faced with difficulties arising from long and complex cases. There is now a case before the ICTY in which the Prosecution alone proposes to call well over 300 witnesses. Article 64(2) of the ICC Statute mandates 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 victims and witnesses". ICTY Rule 90(H) allows the Trial Chamber to, when necessary, inquire into matters not affecting the credibility of the witness, during cross-examination. Article 64(3)(a) also obliges the Trial Chamber, once a case has been assigned to it, to "confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings". The flexibility afforded by this latter article in particular – which repeats the concern of expediency – should not be constrained by inflexible Rules that are contrary to the intents and purposes of the article, and indeed, the Statute. Accordingly, it is imperative judges not be restricted in their authority to exercise control over the proceedings and manage complicated and lengthy cases. Expeditious trials are in the interests of justice for all parties, particularly the accused, who is usually in detention during the trial.

[16] In particular, Article 75 (Reparations to victims), provides at paragraph 3: "[T]he Court may invite and shall take account of representations from or on behalf of the convicted person, victims, or other interested persons or interested States."

PART 7 – RULES OF EVIDENCE

37. There should be a provision in the ICC Rules similar to ICTY Rule 89(C), allowing the Chamber to admit any relevant evidence that has probative value. Article 69(4) of the ICC Statute does not necessarily have the same import as that Rule. ICTY Rule 89 (C) empowers the Court to rule on the relevance or admissibility of evidence, taking into account, *inter alia*, its probative and prejudicial effect. There is a need for the ICC Rules to reflect an affirmative statement of the discretionary power of the Court as it is elaborated in ICTY Rule 89(C). ICTY Rule 89(D) could also be reflected.

38. Based on experience in conducting trials in the ICTY, the judges have developed and amended the Rules several times to allow trials to proceed in a timely and impartial manner. In addition to other Rules discussed above, further examples of Rules developed to expedite the presentation of evidence include:

a. the use of deposition evidence in lieu of live testimony (Rule 71);
b. the calling of "expert" witnesses who are able to give a representative overview of a larger number of individual testimonies (Rule 94 *bis*);
c. judicial notice (Rule 94);
d. the use of affidavit evidence to corroborate live testimony (Rule 94 *ter*);[17]
e. presentation of oral rather than written motions during trial (Rule 73).

39. The Preparatory Commission might consider including a Rule that provides for anticipated evidence, in case of grave illness, incapacity/impossibility to travel, death, or other similar reasons. Because the amount of time that elapses between the occurrence of facts and the date of trial is generally quite long, it might be useful to have a rule that allows for affidavits as envisaged in ICTY Rule 94 *ter* and depositions as contemplated in ICTY Rule 71. Thus, there is a need for some mechanism to make a statement official if it would be lost otherwise, due, for instance, to death of the witness after a statement is made. In other words, there is a need to provide a means of preserving oral testimony before trial. Rigorous standards, however, would have to be imposed to ensure a fair trial.

PART 8 – PENALTIES

40. The action that should be taken on non-payment of a fine depends on whether the fine imposed is alternative to imprisonment or is a single punishment; in respect of non-payment, the Court should be empowered to impose such terms of imprisonment as it considers appropriate in the interests of justice. Care should be taken not to imprison persons because of their pauper status.

PART 10 – OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE AND SANCTIONS FOR MISCONDUCT BEFORE THE COURT

41. Consideration should be given to enumerating consequences for failing to disclose exculpatory evidence. Depending on when this matter is raised, such a failure could nullify the trial. Of course, what evidence is exculpatory is often debatable, but failure to disclose evidence that is clearly exculpatory should be subject to sanction.

[17] If the party objects and the Trial Chamber so rules, or if the Trial Chamber so orders, the witnesses who give affidavits will be called for cross-examination.

PART 11 – INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

42. Article 72 of the ICC Statute, entitled Protection of national security information, outlines a procedure to acknowledge a States' claim to non-disclosure of documents because of national security interests. This lengthy provision basically provides for procedural steps to be followed by a Chamber in the consideration of such a claim of prejudice. In particular, "all reasonable steps . . . to resolve the matter though cooperative means" should first be explored by the State and the Court. Failing that, the State is to notify the Court of the reasons why it still considers that it cannot disclose the documents or evidence sought. The third step is, if the Court has determined that the evidence is relevant and necessary for the conduct of trial, for the Court to hold further consultations that may include *in camera* and *ex parte* hearings. According to Article 87 of the Statute, concerning requests for cooperation, at paragraph 7, if a State Party fails to comply with a request by the Court to cooperate, and this failure prevents the Court from performing its obligations under the Statute, the Court may then, *inter alia*, refer the matter it to the Assembly of States Parties or to the Security Council.

This provision draws in part from the Blaškić Subpoena Decision of the Appeals Chamber, in particular as to the possibility of holding *in camera* and *ex parte* hearings. The Decision of the Appeals Chamber however set out some more detailed procedural elements.[18] The Appeals Chamber also held that a Trial Chamber could make a determination as to whether the State raising national security concerns acts bona fide, in particular by looking at its record of assistance and cooperation with the Tribunal, and its general attitude towards the Tribunal. The attention of delegates to the Preparatory Commission could be drawn to this jurisprudence as well as to the utility of setting out detailed procedures to make a determination as to legitimate State concerns.

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[18] See Prosecutor v. Tihomir Blaškić, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, IT-95-14-AR108 *bis*, App. Ch., 29 Oct. 1997, in paras. 67 and 68 of the Decision.