1 March 2000
English
Original: Spanish

Preparatory Commission for the International Criminal Court
Working Group on Rules of Procedure and Evidence concerning Part 6 of the Statute
New York
13-31 March 2000
12-30 June 2000
27 November-8 December 2000

Proposal by Colombia concerning the Rules of Procedure and Evidence relating to Part 6 of the Statute (The Trial)

Comments by the delegation of Colombia on the discussion paper proposed by the Coordinator on Rules of Procedure and Evidence relating to Part 6 of the Statute (The Trial), as contained in document PCNICC/1999/L.5/Rev.1/Add.1

Rule 6.4. Privileged communications and information

With regard to paragraph (c) concerning privileged information and officials or employees of the International Committee of the Red Cross (ICRC) and of the Red Crescent Societies, we note that providing the possibility for the Court to make exceptions to the general rule established in that same paragraph is inappropriate and contrary to the nature and functions of both the International Committee of the Red Cross (ICRC) and the Red Crescent Societies.

For that reason we reiterate the comment we made in document PCNICC/1999/WGRPE/DP.39 of 12 November 1999 and, in that connection, we consider it relevant to draw attention to the ruling of one of the Trial Chambers of the International Tribunal for the Former Yugoslavia which, according to an ICRC press release of 8 October 1999 supports our views:

> **"Trial Chamber III rules that ICRC need not testify before the Tribunal**
>
> "On 1 October 1999, Trial Chamber III issued an order lifting the confidentiality on their *ex parte* decision of 27 July 1999 that found that the evidence of a former employee of the International Committee of the Red

Cross (ICRC) that the Prosecutor wanted to present in the "*Simic and Others*" case should not be given.

"This follows a motion filed by the prosecution on 10 February 1999, which sought a ruling from the Trial Chamber as to whether the former ICRC employee could be called to give evidence of facts that came to his knowledge by virtue of his employment.

"In coming to their decision, the Trial Chamber noted the principles derived from the mandate entrusted to ICRC by international law under the Geneva Conventions and Additional Protocols thereto. In particular, the Trial Chamber focused on three fundamental principles that guide the movement, that is, impartiality, neutrality and independence, and considered that the right to non-disclosure of information relating to ICRC's activities in the possession of its employees in judicial proceedings is necessary for the effective discharge by ICRC of its mandate. In addition, the Trial Chamber took note of the ratification of the Geneva Conventions by 188 States.

"As a result, the Trial Chamber came to the conclusion that customary international law provides ICRC with an absolute right to non-disclosure of information relating to the work of ICRC in the possession of an ICRC employee. Consequently, no issue arises as to balancing ICRC's confidentiality interest against the interest of justice.

"The Trial Chamber thus decided that 'the evidence of the former employee of ICRC sought to be presented by the Prosecutor should not be given'. Judge Hunt issued a separate concurring opinion."

In conclusion, for the foregoing reasons, **we propose that** paragraph (c), subparagraphs (i) and (ii), and paragraphs (d) and (e) **should be deleted**.

Rule 6.5. Evidence in cases of sexual violence

We believe that the proposal contained in footnote 81 is, on the whole, acceptable, but that the following clarifications should be made:

Paragraph (a) could be reworded as follows:

"(a) **Where the accused** intends to introduce or elicit evidence **regarding** the victim's **consent in a trial concerning** a crime of sexual violence, the accused **shall inform** the Court and shall describe the substance of **such** evidence and the relevance of the evidence to the issues in the case;"

We propose that paragraph (b) (i) should read as follows:

"(i) **There is any indication** that force, threat of force, coercion or taking advantage of a coercive environment may have adversely affected the victim's ability to consent;"

This formula avoids prejudgement by the Court, since it is one thing to determine whether there was violence, with full proof, and it is quite another thing to note or determine whether there is any indication, which situation is again evaluated later on in the trial.

We propose that paragraph (b) (ii) should read as follows:

> "(ii) All or part of the evidence **is relevant and pertinent** so as to justify its admissibility, taking into account, *inter alia*, any **detrimental impact that such evidence may have on the right to** a fair trial or to a fair evaluation of the testimony of a witness, in particular the victim, in accordance with article 69, paragraph 4;"

The above formulation would avoid giving value to the evidence before it is evaluated, that is to say, before the judgement. Accordingly, given its impartiality, the Court, at this time, can only determine whether the evidence is relevant and pertinent.

Rule 6.7. Solemn undertaking

With regard to this rule we must reiterate the proposal we made in document PCNICC/1999/WGRPE/DP.39 to the effect that in paragraph (b), the following words should be added: "... **a circumstance that should be taken into account when evaluating the evidence**".

This addition is relevant inasmuch as the paragraph we are commenting on permits the Court to excuse some persons, because of their age or diminished mental capacity, from making the undertaking and therefore such circumstances must be taken into account when evaluating the evidence.

We also believe that there is need to add a paragraph (d) on the solemn undertaking of interpreters and translators, as we suggested in document PCNICC/1999/WGRPE/DP.39. The text would reads as follows:

> **"(d) Interpreters and translators shall solemnly promise to perform their functions with the utmost fidelity and shall be subject to appropriate disciplinary and penal sanctions for failure to fulfil that duty**."

Rule 6.8. Findings and evidence from other proceedings

As we proposed in document PCNICC/1999/WGRPE/DP.39, the title should be "**Transferred evidence**" which is the technical term applied to situations governed by that rule.

Rule 6.9. Self-incrimination by a witness

With regard to this rule we must reiterate what we stated in document PCNICC/1999/WGRPE/DP.41 of 12 November 1999, which reads as follows:

> "As we maintained in document PCNICC/1999/WGRPE/DP.24 of 29 July 1999, a person's testimony must be integral. Nonetheless, in cases where the witness is incriminating himself or there is a risk of self-incrimination, the right of defence, that is, the defence of the accused, immediately arises.
>
> "In this regard, article 14, paragraph (g), of the International Covenant on Civil and Political Rights and article 67, paragraph (g), of the Statute of the Court clearly establish the guarantee that the accused will not be compelled to testify against himself or to confess guilt and may remain silent. This is a guarantee which must be respected by any judge or court; and especially, a court with the high moral authority of the International Criminal Court, but

since the latter's purpose is to prevent impunity, it should not foster it. We therefore cannot agree that the Court should be able to offer confidentiality or immunity in exchange for the witness answering questions he believes to be incriminating.

"For the same reasons, we do not agree with subparagraph (e), which not only establishes an impossible circumstance with regard to the internal jurisdiction of each country that is required to investigate the punishable acts but also allows for a type of secret evidence prohibited by the general evidentiary framework developed by the Statute.

"With regard to footnote 1, we must affirm and reaffirm the need to expressly regulate the exoneration of the accused's family members from the duty to testify."

Rule 6.13. Medical examination of the accused

The Colombian delegation concurs with the content and general thrust of the rule; however, as we proposed in document PCNICC/1999/WGRPE/DP.30 of 2 August 1999, it should include the concept of expert consultant who assists the Chamber in interpreting the medical, scientific and technical examinations and collaborates in the preparation of scientific questionnaires. Accordingly there is need to add a paragraph (e) which would read as follows:

"(e) The Court may appoint expert consultants for the purpose of requesting or interpreting medical or scientific examinations."

What is being proposed, therefore, is not an expert examination, but rather the possibility of the Chamber receiving advice with regard to the conduct and comprehension of the expert or technical examination.

Rule 6.15. Joint and separate trials

As we proposed in document PCNICC/1999/WGRPE/DP.30, the title of the rule should be "**Joint and separate charges**" because it is the charges not the decisions which are being joined or separated.

Rule 6.23. Postponement of the deliberations

The title of this rule should be "**Deliberation and decision**" rather than "postponement of the deliberations" since the rule deals with the actual deliberations and decision and how they should be carried out.

Rule 6.24. Delivery of the decisions of the Trial Chamber

We propose that paragraph (b), subparagraph (ii), should be amended to bring it into line with the rule concerning languages in Part 4. Accordingly, subparagraph (ii) should read as follows:

"(ii) To the person's counsel, the Prosecutor, and if applicable, to the legal representatives of the victims and the representatives of the States which have participated in the proceedings, in the official languages of the Court, as appropriate."

Rule 6.28. Protective Measures

The Colombian delegation reiterates the point it made in document PCNICC/WGRPE/DP.39 and Corr.1 of 12 November 1999, namely, that this rule establishes an inappropriate procedure; the procedure should be discretionary and urgent. In that document we stated:

> "As our delegation maintained in paragraph 1.4 of document PCNICC/1999/WGRPE/DP.37 of 10 August 1999, protective measures should not require a special proceeding. The procedure proposed by the Coordinator entails an indefinite, possibly long lapse of time. From the time a motion or request for protective measures is filed until the time the measures are actually ordered the witness or victim is left unprotected. Protective measures are and should be discretionary and urgent."

Rule 6.30. Participation of victims in the proceedings

We must emphasize that, in our view, the rules being considered in this section constitute a general framework and are therefore to be applied systematically together with others containing specific reference to victims, such as, for example, rules 6.6, 6.8, 6.10, 6.11, 6.18, 6.19, 6.21, 6.24, 6.27, 6.28, and 6.29.

Likewise, we would emphasize participation of the victim or the victim's representative in the hearing of testimony, as we did in documents PCNICC/1999/WGRPE/DP.37 and PCNICC/1999/WGRPE/DP.42 of 12 November 1999.

Rule [B]

We believe, as we said in document PCNICC/WGRPE/DP.39, that in this rule concerning the designation of victim's representatives the choice of representatives cannot be left to the discretion of the Registry, but that objective mechanisms must be established so as to ensure greater independence and impartiality on the part of the Court.

One such criterion, for example, could be the order in which they have been recognized by the Court or the order in which they have participated in the trial, or the like.

For the same reasons of impartiality, it does not seem appropriate for the Registry to provide a list of lawyers from which the victims may choose their representative or representatives, as provided in paragraph 3 of rule B.

We believe that the list of lawyers could be provided by independent organizations in consultative status with the United Nations or by professional associations recognized by States, or that a rule could be drafted which would establish that the Court will keep a roster open to lawyers from any part of the world and establish the minimum qualifications needed for inclusion in the roster; the latter would be available to anyone who wished to consult it.

Rule [C]

We propose that the following should be added paragraph 2: "**The defence shall have the right, in any event, to be the last to question**", thereby ensuring the right to defence.

Rule 6.31. Reparations to victims

Rule B. Procedure on the motion of the Court

We propose that paragraph (b) should read as follows:

"If, **after being notified under paragraph (a)** a victim makes a request for reparations, **that request will be determined in accordance with rule A**."

Rule C. Publication of proceedings

The text of paragraph (b) should be amended slightly to read as follows:

"In taking the measures prescribed in paragraph (a), the Court may request in accordance with Part 9 the cooperation of relevant States Parties, and seek the assistance of organs of the United Nations, intergovernmental or non-governmental organizations in order to give publicity to the proceedings **brought** before the Court as widely as possible and by all possible means".

Rule 6.34. Statute of limitations

We should like to reiterate the comments made in document PCNICC/WGRPE/DP.36 of 6 August 1999, which reflects two concerns regarding, first, the mandate of the Preparatory Commission and, second, revision.

We stated, at the time, that:

"With regard to offences against the administration of justice, there is apparently a possibility of a 'statute of limitations'; this is sufficient reason to consider the importance of specifying a length of time for this purpose during the debates on the adoption of the Rules of Procedure and Evidence. The delegation of Colombia cannot affirm with certainty that there is a mandate for such a normative implementation, either in terms of a statute of limitations or in terms of the decision to regulate such a possibility.

"However, we must make clear our concern with respect to the establishment of a 'statute of limitations' on offences against the administration of justice, in view of the existence of crimes within the jurisdiction of the International Criminal Court, which are imprescriptible. For example:

— Using fraudulent means, presenting false documents, corruptly influencing a witness or expert, and so on, are reproachable behaviours, considered as such. The use of such mechanisms within the International Criminal Court is the most highly reproachable conduct, not only because of the behaviours — the crimes — being judged by the Court, but also because of the quality and quantity of the penalties;

— This is especially true in view of the possibility of revision (art. 84 of the Rome Statute), although it is a mechanism to re-establish the presumption of innocence. It should be recalled that one of the conditions is present (art. 84 (b)) when '*It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified*'. The statute of limitation, then, would prevent the possibility of revision, for obvious reasons;

— The above argument is applicable to the case of a statute of limitations with regard to a criminal action. However, we see no difficulty whatsoever in the case of a statute of limitations on the penalty, where the perpetrator's responsibility has been proved.

"In brief, in accordance with the above, the statute of limitations is a matter of concern where there is a possibility of revision."

Rule 6.36. Penalties

It is important to draw attention to and to reiterate the comments made in document PCNICC/WGRPE/DP.36, since the rule in question develops only penalties in the form of fines, but not those involving deprivation of liberty provided for in the Statute:

"However, this could be ambivalent and contradictory with respect to the Statute, since article 70, paragraph 3, provides that "*the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both*, which indicates that the penalties that may be imposed are of two kinds and two qualitative categories, namely, imprisonment or fine, or both, at the discretion of the Court."

Concerning the penalty of deprivation of liberty, we propose the inclusion of a rule that would read as follows:

For the purposes of article 70, paragraph 3, the Court, when imposing the penalty shall bear in mind the following criteria:

(a) The seriousness, the method used and the other circumstances of the crime;

(b) In determining the seriousness, account shall be taken of whether the conduct had or might have an impact on any decision of the Court or on its proceedings;

(c) In any event, rule 7.1 regarding criteria for determining the sentence shall apply *mutatis mutandis*;

(d) Where all the circumstances are aggravating circumstances, the Court may, in addition to imprisonment, impose a fine;

(e) Where all the circumstances are mitigating circumstances, the Court may, if it sees fit, impose only a fine;

(f) In all other cases the Court shall establish either a term of imprisonment not exceeding five years or a fine but not both.