Observations on the discussion papers for the ICC Rules of Procedure and Evidence[1]

1. Part 5 of the Rome Statute: Investigation and Prosecution

1.1. Discussion papers proposed by the coordinator (PCNICC/1999/L.3/Rev.1)

Rules 5.1 (determination of a reasonable basis to proceed with an investigation) and 5.2 (Evaluation by the Prosecutor of information provided to him or her) : Both draft rules seem to be redundant with the Statute. Delegates should consider whether it is necessary to have a rule for each article of the Statute, or whether it would be more adequate to allow the Statute to speak for itself where there is no ambiguity in its language, thereby avoiding unnecessary duplication.

Rules 5.3 (Notification of a decision not to investigate) and 5.4 (Notification of a decision not to prosecute) : Notification to victims under sub-rules 5.3 (d) and 5.4 (c) should contain a caveat that accounts for confidential investigations and the need to ensure the safety and well-being of concerned persons. Draft Rule C of the Report of Workshop 1 of the International Seminar on victim's access to the International Criminal Court[2] provides that "[i]n the event of a decision taken pursuant to Article 15 (6), the Prosecutor shall ensure that notice is provided, along with the reasons for his or her decision, in a manner that prevents any danger to the safety, well-being and privacy of those who provided information to him or her under Article 15 (1) and (2), or the integrity of investigations or proceedings".

Rule 5.5 (Procedure in the event of an application for review of a decision not to investigate or not to prosecute) : The Prosecutor should retain authority to comply with his or her duties *vis-à-vis* the confidentiality of the information received, the safety and well-being of victims and witnesses and the integrity of on-going investigations and proceedings. Accordingly, he or she should be empowered to request *ex camera* and *ex parte* hearings for the presentation of sensitive information or other appropriate protective measures where circumstances so require. The same reasons recommend that, prior to any determination under Article 68 (3) of the Statute regarding participation of victims or their legal representatives at the hearing, the Pre-Trial Chamber should always initiate consultations with the Prosecutor.

Rule 5.7 (Ibid.): Paragraph (a) does not reflect adequately the chronological steps envisaged by Article 53 (1) (c) of the Statute. A possible re-drafting of the first part of the provision would be following: *"Upon notice by the Prosecutor under Article 53 (1) (c), the Pre-Trial Chamber shall, if it decides to review the decision, inform the Prosecutor of its intention and establish a time-frame during which he or she may submit observations* ***and additional material****"*. The addition reflects the need to authorize the Prosecutor to present supplementary material in support of his or her decision in order to enable the Pre-Trial Chamber to make a proper determination of the matter. Victims' participation should be qualified by the same proviso described in

[1] This document consists mainly of observations on existing proposals. Bold letters are used where additions or amendments are suggested.
[2] Paris, 29 April 1999.

the commentary to Rules 5.3 and 5.4, and 5.5 above, and should also require previous consultations between the Pre-Trial Chamber and the Prosecutor.

Rule 5.8 (Ibid.): For the purposes of clarification it is recommended that the first sentence of the Rule be re-drafted in the following way: *"A decision of the Pre-Trial Chamber* ***reviewing a decision taken by the Prosecutor under Article 53, paragraph 1 (c) or 2 (c), shall be*** *concurred in by a majority of the judges comprising the Chamber,* ***and shall*** *contain reasons, as well as a full explanation of those reasons".*

Rule 5.9 (Confirmation of the charges): According to para. (g), victims and their legal representatives seem to have an unqualified right to consult the record of the proceedings. This right should be qualified following the language contained in draft Rule 6.19 of the Discussion paper presented by the coordinator in the Siracusa Informal Intersessional Meeting on Rules of Procedure and Evidence ("Siracusa document")[3], which grants victims or their legal representatives a similar right "subject to any restrictions concerning confidentiality" (para. (b)).

Rule 5.10 (Ibid.): Paragraph (a) of the draft rule establishes that the President of the Pre-Trial Chamber may establish the order and conditions in which "he or she intends the parties to explain the documentary evidence contained in the record of the proceedings". This language seems to imply that the confirmation of the charges is mainly a written process, and that accordingly the hearing is reduced to oral allegations on the basis of the existing record. Even if in many cases reasons of expediency and simplicity may well support the adoption of such a procedure, both parties should have the right to present other forms of evidence and the Pre-Trial Chamber should be given authority to accept or dismiss these presentations.

Rule 5.11 (Disclosure for the purposes of the confirmation hearing): The first part of this rule seems to be redundant since Article 61 (3) of the Statute is already dealt with in Rule 5.9. However, if the decision is to retain the language for the purposes of emphasizing the importance of disclosure prior to the confirmation hearing, the text should be moved to that Rule. The second paragraph of the provision dealing with the duty of the Pre-Trial Chamber to hold status conferences can be moved to Rule 5.9 or retained as a separate rule.

Rule 5.12 (Communication of disclosed evidence to the Pre-Trial Chamber): The obligation of the parties under this rule seems to have already been established by Rule 5.9.

Rule 5.15 (Pre-trial disclosure - Prosecution's witnesses): A footnote in the document suggests that the same provision dealing with pre-trial disclosure could be applicable *mutatis mutandi* before the Pre-Trial Chamber for the purposes of the confirmation hearing. The footnote apparently confuses disclosure for the purposes of confirmation of charges and pre-trial disclosure for the purposes of preparation of the defense at trial. The former requires evidence sufficient "to establish substantial *grounds to believe* that the person committed the crime charged." The latter requires evidence sufficient to convince the Court of the "guilt of the accused *beyond reasonable*

[3] Siracusa, 21-27 June 1999.

doubt"[4]. In other words, the scope of disclosure is different at these two stages and, accordingly, the requirements for disclosure should not be identical.

Rule 5.17 (Disclosure by the Defence - defence of alibi and certain grounds for excluding criminal responsibility): Paragraph (b) should be amended to include a provision stating that if prior notice has not been given by the accused of the nature of his or her testimony, the Prosecution shall be given an adjournment, if necessary, to prepare a rebuttal case. Such a provision would be consistent with the principle enshrined in Rule 5.18.

1.2 Proposal by France concerning the Rules of Procedure and Evidence (PCNICC/1999/DP.8/Add.2/Rev.1)

Rule 64. Modification of the charges: In accordance with draft Rule 64, if the Prosecutor seeks to amend charges *before the trial has begun* he shall make a written request to that effect to the *Pre-Trial Chamber*. At the same time, the draft provides for both the commitment of the person and a referral of the case to the Trial Chamber immediately upon confirmation of charges.

It is unclear which body (the Pre-Trial Chamber or the Trial Chamber) is to confirm the amended charges within the period between the referral of the case to the Trial Chamber and before the beginning of the trial. One may argue that since pursuant to Article 61 a Trial Chamber "may exercise any function of the Pre-Trial Chamber", it is the Trial Chamber that would hold confirmation hearings on amended charges in this period. However, in both major systems there is a tendency to ensure separation of judicial functions in order to avoid, whenever possible, an involvement of the trial judges into out-of-trial assessment of evidence. This approach can also be found in the structure of Rule 50 of the ICTY Rules. On the basis of the ICTY experience, it might also be considered to define more precisely the beginning of a trial as a "commencement of the presentation of evidence". Here is an evolution of the wording used in Rule 50 of the ICTY Rules: 1994 "if at trial"; 1996 "after the presentation of evidence has commenced"; 1997 "the initial appearance of the accused"; 1998 "commencement of the presentation of evidence".

1.3. International Seminar on victim's access to the International Criminal Court (Paris, 27-29 April 1999), Report of Workshops.

Report of Workshop 2

Rule C: Paragraph (2) of Rule C gives the legal representatives of the victims the power to question the accused, the witnesses and experts with the sole proviso that this shall be made with the permission of the President of the Chamber concerned while taking into account the rights of the accused and the need for a fair and impartial trial. This implies granting a non-party procedural rights in relation to the examination of witnesses and the accused that are tantamount to those rights that only parties before the Court enjoy. Furthermore, the exercise of these rights by the legal representatives of victims may well interfere with an efficient prosecution of the case. Accordingly, this particular provision should be reconsidered. At the very least, the Prosecutor should always be consulted before the Chamber concerned allows

[4] Emphasis added.

questioning by the legal representative as expressed in footnote 9 attached to the draft rule.

Report of Workshop 3

Rule D: Pursuant to the draft Rule D (4) (Protection of victims and witnesses) "all communications between individuals and medical doctors, psychiatrists, psychologists or counsellors ... shall be regarded as privileged and consequently not subject to disclosure at trial unless the individual consents to such disclosure.
This provision may be inconsistent with the Prosecutor's obligation to disclose exculpatory evidence in accordance with Article 67 (2) of the Statute (similar to ICTY Rule 68), since emotional or mental condition of a witness may affect his or her credibility. In terms of Art. 51 (4), the Rules of Procedure and Evidence, amendments thereto and any provisional Rule have to be consistent with the Statute. In the event of a conflict the Statute prevails. The inconsistency arising can be overcome by a proviso or an exception appended to the Rule. As a drafting measure Rule D (4) can be made to read subject to Art. 67(2). On the other hand, if delegates decide to adopt a general rule on privileges such as the one contained in the Siracusa document (draft Rule 6.4), this draft rule would be redundant.

2. Part 6 of the Rome Statute: the Trial

Discussion paper proposed by the coordinator - Siracusa Informal Intersessional Meeting (21-27 June)

Rule 6.4. Privileges: The draft Rule establishes an unqualified privilege for communications between a person and his or her legal counsel (para. (a)) and a general clause empowering the Court to assert other privileged communications if three criteria are met (para. (b)). These criteria are based on the test set forth in *Wigmore on Evidence*[5], however, a substantial criterion included therein has been omitted in the standard enshrined in the draft rule, namely: that "the *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation"[6]. This is a crucial power with which the Court should be vested for a correct establishment of a privilege against the disclosure of communications other than person-legal counsel and should accordingly be incorporated as a subparagraph (iv) in para. (b) of the draft Rule. At the same time, it is recommended that a subpara. (v) be added, with the following language: "**(v) other protective measures would not be equally adequate to avoid or minimize the injury to the relation that could be caused by disclosure of the communication**". The rationale underpinning this draft provision is that if other less restrictive measures are appropriate to adequately protect the relation at stake, the Court should give them preference *vis-à-vis* the assertion of a privilege.

Rule 6.5. Evidence in cases of sexual violence: The draft Rule follows the approach of ICTY RPE Rule 96 and therefore presents the same problems of interpretation raised by the latter. Para. (a) of the rule deals with consent and the circumstances under which consent shall be considered not to have been obtained. As footnote 6 attached to the provision indicates, this is a substantive issue that should not be addressed in

[5] John H. Wigmore, *A treatise on the Anglo-American System of Evidence in Trials at Common Law*, Little, Brown and Company, 1940, § 2285 at p. 531.
[6] *Ibid.* Emphasis in the original.

the Rules of Procedure and Evidence of the ICC but rather in the Elements of Crimes. Moreover, the definition adopted in the Elements of Crimes should have a direct effect in the procedural provision since it should clarify, for instance, whether "consent" is a defence, or simply refers to a failure of the Prosecutor to prove an element of the crime.

The language in Para. (b) requires the Trial Chamber to satisfy itself that the conditions excluding consent are not found to exist before admitting evidence of the victim's consent. This particular test implies that the judges must reach an advanced albeit partial decision on the merits of the case without having considered the totality of the evidence. Such a decision could seriously impair the impartiality of the judges and give raise to allegations of pre-judgement by the Chamber. Furthermore, fairness to the accused requires that no decision on the merits of the case be made without a prior full presentation of the evidence and arguments by the defence. It is accordingly suggested to amend the language of this provision or to simply delete it and rely on the general provisions dealing with relevance and admissibility of evidence (s. draft Rule 6.2). An alternative drafting possibility is suggested:

> **"(b) (i) No evidence of the victim's consent shall be admitted unless the Trial Chamber has satisfied itself *in camera* that the evidence is highly relevant and credible.**
> **(ii) Issues dealing with consent of the victim shall be raised by the defence as early as possible in the proceedings. The defence shall give written and confidential notice in advance of its intention to present evidence of the victim's consent"**

Para. (c) remains open. The cross-reference in the Nota Bene attached thereto is to the corresponding provision in the Australian Draft RPE (PCNICC/1999/DP.1/Rule 101 (iv)), which contains an absolute prohibition *vis-à-vis* the admissibility of evidence of prior sexual conduct of the victim. However, the interests of justice including the right of the accused to make a full and adequate defence against the charges brought by the Prosecutor may require that such evidence be admitted under limited circumstances. Furthermore, exceptions to the prohibition have also been recognized in national systems which endorse as a principle the inadmissibility of evidence of prior sexual conduct[7]. An alternative drafting is suggested[8]:

> **"(c) Evidence of prior sexual conduct of the victim shall generally not be admissible. The Trial Chamber may admit such evidence if it determines *in camera*:**
> **(i) that the evidence is highly relevant and has a substantial probative value which is not outweighed by its inflammatory or prejudicial nature, and**
> **(ii) that the evidence relates to the victim's previous sexual conduct with the accused or other specific instances of sexual activity directly related to an issue at trial;**
> **(d) In determining the admissibility of evidence of prior sexual conduct, the Trial Chamber shall consider, *inter alia*, the interests**

[7] S. Criminal Code of Minnesota, Chapter 609, Section 609.347, Subdivision 3; Criminal Code of Canada, R.S.C., 1985, C-46, as amended, Section 276.
[8] The proposed wording is based on the provisions referred to in footnote 6 above.

of justice including the rights of the accused under Article 67 of the Statute, the potential prejudice to the victim's dignity and privacy and the need to avoid any adverse distinction or bias in the process of asserting the truth.

(e) Evidence of prior sexual conduct tendered to support the inference that, solely because of that conduct
(i) the victim is more likely to have consented to the sexual activity underlying the charges brought by the Prosecutor, or
(ii) the victim is less worthy of belief,
shall under no circumstances be admissible".

Rule 6.18. Conduct of the Proceedings: The draft rule falls short of providing the order in which evidence must be presented at trial. The formula adopted relies on discretionary powers given to the Presiding Judge of the Trial Chamber and on agreements reached by the parties. Taking into account the dimension and complexity of the trials that will be heard before the Court and the fact that agreements between the parties may be extremely difficult to obtain, the Rules should provide some guidance as to the order and manner of presentation of the evidence for the purposes of ensuring expediency and efficiency of the trial proceedings.

3. Part 8 of the Rome Statute: Appeal and Revision

The following comments will confine themselves to the draft Rules proposed by Australia[9].

Draft Rules 114, 115, 117, 118, and 119 all require a party to serve a document upon the other party or parties, as well as to file the document with the Registrar. It is suggested that in each of these provisions, reference to service on the other party be deleted, and a sentence be added at the end of the provision to provide that the document "shall be served on the other party or parties in accordance with the Regulations." Questions relating to the method of service of documents appear to be a matter of "routine functioning", which is appropriately regulated by Regulations of the Court under Article 52 of the Statute. For instance, in the practice of the Court, it may prove more convenient for documents to be served on the other parties by the Registry, rather than for the party filing the document to serve the other parties directly. (See, e.g., draft Rule 109(b).)

Draft Rule 110(b) contains an express provision for extension of the time limit for the lodging of a notice of appeal. Other provisions relating to appeals set time limits without making any provision for these to be extended. In practice, there may frequently be need for extensions of time to be granted, for instance, for the filing of briefs (draft Rules 114 and 115). Rule 127 of the Rules of Procedure and Evidence of the ICTY contains a general provision for the extension of time limits. Unless a similar general provision is included in the ICC Rules (see draft Rule 7), express provision should be made in each of the Rules imposing a relevant deadline.

Many of the Rules relating to appeals refer to the "parties", without defining this expression. In the Rules of Procedure and Evidence of the ICTY and ICTR, the

[9] Document PCNICC/1999/DP.1, Part 9, Rules 108-126.

expression "party" is expressly defined as "the Prosecutor or the accused" (Rule 2). It is submitted that the expression should be similarly defined in the Rules of Procedure and Evidence of the ICC (cf. draft Rule 4). In any case where a person or State other than a party is entitled to participate in appellate proceedings, this should be stated expressly in the Rules. An example is draft Rule 124, which proposes that:

> A party permitted by article 82, paragraph 4, to appeal against an order for reparations made under article 75 shall, not more than (X) days from the date upon which the order was made, file with the Registrar a written notice of appeal. The Registrar shall send copies of the notice to other parties with an interest in the proceedings.

As Article 82(4) of the Statute also permits an appeal against the relevant decision to be brought by "victims ... or a bona fide owner of property", it is suggested that draft Rule 124 should refer to a "***person*** *permitted by article 82, paragraph 4, to appeal*". The second sentence of the Rule should also be amended, and might for instance read as follows: **"The Registrar shall send copies of the notice to the other party or parties, as well as to any person or State who made representations to the Court under Article 75(3) in the proceedings resulting in the decision appealed against."**

Draft Rules 122(c) and 125(c) envisage the possibility that expedited appeals may be heard without written briefs being filed. Consideration should also be given to the possibility of expedited appeals being decided on the basis of written briefs only, without oral argument being heard.