

23 November 1999
English
Original: French

Preparatory Commission for the International Criminal Court

Working Group on Rules of Procedure and Evidence

New York

16-26 February 1999

26 July-13 August 1999

29 November-17 December 1999

Proposal submitted by France concerning part 2 of the Rome Statute of the International Criminal Court, concerning jurisdiction, admissibility and applicable law

Section 2. Referral, jurisdiction and admissibility

The proposals of France are based on the following documents:

- *The conclusions of workshop 1 of the Paris seminar on victims' access to the International Criminal Court (PCNICC/1999/WGRPE/INF.2 and Add.1) for questions relating to the application of articles 15 and 19 concerning victims' participation; and*
- *The draft general outline proposed by France (PCNICC/1999/DP.2).*

The main issue is that of the application of the principle of complementarity: article 19 does not specify any particular time for its application, unlike articles 15 and 18, which apply at a specified stage of the proceedings. The Court must make sure that it has jurisdiction over any case referred to it from the very beginning of the proceedings. States can challenge the jurisdiction of the Court or the admissibility of the case from the beginning of the proceedings provided for in article 15 or article 18. This is not only a possibility but even an obligation for States, since article 19, paragraph 5, provides that States shall make a challenge at the earliest opportunity.

It would thus be difficult to have three separate proceedings, under articles 15, 18 and 19. The Rules of Procedure and Evidence should, on the contrary, establish ways in which the Court can "provoke" challenges by States on this point so that the question can be settled as soon as possible. Instead of having three successive proceedings, under article 15, article 18 and article 19, the Rules of Procedure and Evidence should enable States to make challenges in accordance with article 19 in connection with the

proceedings provided for in article 15 and then those provided for in article 18. The Court can ask States to make their challenges in the course of these proceedings. It is then provided that the Court may make a ruling under article 19 on its own initiative and invite any State concerned to make a challenge.

Rules concerning articles 11 and 12

A rule may be necessary for article 11, paragraph 2, which refers to article 12, paragraph 3. The rule would specify the way in which a State may be invited to accept the jurisdiction of the Court.

Rule 2.1. Declaration provided for in article 12, paragraph 3

(a) The Registrar, at the request of the Prosecutor, shall ask a State which is not a party whether it intends to make the declaration provided for in article 12, paragraph 3.

(b) The provisions of the present rule shall be applicable when a State which becomes a Party to the Statute after its entry into force, in accordance with article 11, paragraph 2, makes the declaration provided for in article 12, paragraph 3.

There is another issue to be resolved, concerning the last sentence of article 12, paragraph 3, which provides that a State which accepts the jurisdiction of the Court shall cooperate with it in accordance with part 9. It seems logical to apply to that State the provisions applicable to States Parties, together with the corresponding rules, especially with regard to languages to be used and channels of communication.

Rule 2.2. Obligation to cooperate of a State that is not a party which makes the declaration provided for in article 12, paragraph 3

The provisions of part 9 of the Statute, together with rules X to XX¹ concerning States Parties, shall be applicable to a State not a party which makes a declaration in accordance with article 12, paragraph 3.

Rules concerning article 15

It is appropriate first of all to recall the rules proposed by workshop 1 of the Paris seminar on victims' access to the International Criminal Court (PCNICC/1999/WGRPE/INF.2).

Rule X. Definition of victim²

(a) "Victim" means any person or group of persons who directly or indirectly, individually or collectively, suffered harm as a result of crimes within the jurisdiction of the Court.

(b) "Harm" includes physical or mental injury, emotional suffering, economic loss or substantial impairment of fundamental rights.

¹ Rules concerning the implementation of part 9.

² This rule should be included in the part of the Rules of Procedure and Evidence entitled "Definition of terms".

(c) “Victims”, where appropriate, may also be organizations or institutions which have been directly harmed.

This definition could, if appropriate, be included in the part entitled “General provisions”.

Rule 2.3 (Rule E of workshop 1 of the Paris seminar)³

If a person, organization or institution claims to be a victim and intends to make submissions to the Court pursuant to article 15, paragraph 3, and article 19, paragraph 3, the Chamber concerned shall determine the right to do so under the applicable provisions of the Statute and the Rules of Procedure and Evidence.

Rule 2.4 (Rule F of workshop 1 of the Paris Seminar)⁴

Prior to any contact with the Court that requires his or her physical presence, a victim shall be informed of the existence, functions and availability of the Victims and Witnesses Unit.

Rule 2.5 (Rule A of workshop 1 of the Paris seminar)

In the event of information submitted under article 15, paragraph 1, or of oral and written testimony at the seat of the Court pursuant to article 15, paragraph 2, the Prosecutor shall preserve the confidentiality of such information or take any other necessary measures pursuant to his or her duty under article 68, paragraph 1, and article 54, paragraph 3 (f), of the Statute. Where appropriate, the Prosecutor shall seek the intervention of the Victims and Witnesses Unit.

Rule 2.6

(Based on rule B of workshop 1 of the Paris seminar, concerning article 15, paragraph 3)

(a) Where the Prosecutor intends to seek authorization of the Pre-Trial Chamber to initiate an investigation pursuant to article 15, paragraph 3, he or she shall inform victims or their representatives of such intention for the purpose of enabling them to make representations to the Pre-Trial Chamber.

Notice may also be given by way of public announcement.

The Prosecutor may decide not to transmit the information or make the public announcement provided for in the two preceding paragraphs if doing so would endanger the integrity of the investigation or the life and well-being of victims and witnesses. If the Prosecutor decides not to inform victims he or she shall ensure that the initial submissions made by the victims, if any, are presented before the Pre-Trial Chamber.

(b) (i) The representations of victims or their representatives under article 15, paragraph 3, to the Pre-Trial Chamber may be made in written form or, with the authorization of the Court, in any other form. The Prosecutor may provide victims or their representatives with a summary of his or her request for authorization to initiate an investigation, if this can be done without endangering the efficiency of the investigation or the safety of any person.

³ Application of this rule should be extended to all phases of the proceedings.

⁴ Application of this rule concerns all phases of the proceedings.

(ii) In deciding, pursuant to article 15, paragraph 4, whether there is a reasonable basis to proceed with an investigation, the Pre-trial Chamber shall consider any representations made by the victims or their representatives.

(c) The procedure described in paragraphs (a) and (b) above shall also apply where the Prosecutor decides to submit a new request pursuant to article 15, paragraph 5.

Rule 2.7

(Rule C of workshop 1 of the Paris seminar, concerning article 15, paragraph 6)

(a) In the event of a decision taken pursuant to article 15, paragraph 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, paragraphs 1 and 2, or to the integrity of investigations or proceedings.

(b) The notice shall also advise of the possibility of submitting further information regarding the same situation in the light of new facts and evidence.

(c) When the original information has been provided by victims, notice shall be made without unnecessary delay and with compassion and respect for their dignity.

Additional rules concerning the application of article 15 should be proposed in two areas:

- *The taking of testimony pursuant to article 15, paragraph 2, and its subsequent use as evidence;*
- *The organization of the proceedings before the Pre-Trial Chamber and action following the decision (application of article 15, paragraphs 3 and 4).*

Rule 2.8

(a) The provisions of rules 5.9 and 5.10 shall be applicable, *mutatis mutandis*, to testimony received by the Prosecutor pursuant to article 15, paragraph 2.

(b) Where the Prosecutor considers there is a serious risk that it might not be possible for the testimony to be taken subsequently, he or she may request the Pre-Trial Chamber to take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence, pursuant to article 56, paragraph 2, and rule 5.12 (a).

(c) Evidence taken pursuant to article 15, paragraph 2, shall be considered by the Court in accordance with the relevant provisions of the Statute and rules 6.1 to 6.9.

(d) The provisions of the present rule shall be applicable in the case provided for in article 53, paragraph 1, and rule 5.2.

Rule 2.9. Proceedings concerning article 15

(a) Where a case is referred to it pursuant to article 15, paragraph 3, the Pre-Trial Chamber shall decide on the procedure to be followed. It may, acting on its own motion or at the request of the Prosecutor or the victims, hold a hearing. After consulting the Prosecutor, it may request the Registrar to take measures to publicize the proceedings in accordance with rule 6.31 C, unless that would endanger the integrity of the proceedings or the life and well-being of victims and witnesses.

(b) Subject to the provisions of rule 5.32 (k), submissions to the Pre-Trial Chamber shall be communicated to all the parties to the proceedings; the parties may respond to them within the time limit established by the Chamber. The Pre-Trial Chamber may request further information from the parties to the proceedings.

Rule 2.10. Challenges to the jurisdiction of the Court or the admissibility of a case within the framework of article 15

(a) Any State concerned may, at the time of the proceedings provided for in article 15, challenge the jurisdiction of the Court or the admissibility of the case pursuant to article 19, paragraph 2.

(b) The Pre-Trial Chamber may, at the request of the Prosecutor or on its own motion, invite any State concerned to bring a challenge, as appropriate, pursuant to article 19, paragraph 2.

(c) When the Prosecutor presents a case to the Pre-Trial Chamber pursuant to article 15, paragraph 3, he or she may seek a ruling from it regarding a question of jurisdiction or admissibility pursuant to article 19, paragraph 3.

(d) When the Pre-Trial Chamber is seized by a State, in accordance with article 19, paragraph 2 (b) and (c), or by the Prosecutor, in accordance with article 19, paragraph 3, rules 2.18 to 2.20 shall apply, *mutatis mutandis*.

Rule 2.11. Decision by the Pre-Trial Chamber pursuant to article 15

(a) The Pre-Trial Chamber shall rule in the same decision on all applications submitted to it pursuant to rules 2.9 and 2.10.

(b) The reasoned decision of the Pre-Trial Chamber shall be communicated as soon as possible to all parties to the proceedings. The Pre-Trial Chamber may authorize the partial or total initiation of the investigation.

(c) If the negative decision of the Pre-Trial Chamber is based wholly or partly on the lack of competence of the Court or the inadmissibility of the case, the parties to the proceedings may appeal to the Appeals Chamber in accordance with article 82 and rules X to XX.⁵

(d) The Prosecutor may notify the Pre-Trial Chamber of the need to take the decision concerning authorization of the initiation of the investigation as a matter of urgency, in view, in particular, of the danger that the evidence may disappear.

Rules concerning article 18

Article 18, paragraph 1, raises the issue of the channels of communication and the language to be used between the Court and States. The same problems arise in both articles 18 and 19, because article 19 likewise refers to communications between the Court and States, whether parties or not, and these communications have nothing to do with requests for cooperation. It is thus necessary to provide for the application of rule 2.12 in the case of articles 18 and 19.

⁵ These rules concern the implementation of article 82.

Rule 2.12. Notification provided for in article 18, paragraph 1

(a) The notification provided for in article 18, paragraph 1, shall be addressed to States Parties in accordance with article 87 and rules X to XX.⁶

(b) With regard to States that are not parties, the notification shall be made through the diplomatic channel, unless there is a special agreement between the Court and the State concerned.

(c) This notification shall in all cases be made in one of the working languages of the Court.

(d) The provisions of the present rule shall be applicable to all communications between the Court and States pursuant to article 18⁷ or 19. Subject to the application of article 50, paragraph 3, applications by States formulated pursuant to article 18⁷ or 19 shall be written in a working language of the Court.

Article 18, paragraph 2, raises the question of the calculation of the one-month time limit which begins upon receipt of the notification.

Rule 2.13

The Prosecutor shall ascertain the date on which States receive the notification provided for in article 18, paragraph 1. If he or she considers it necessary, he or she may for that purpose request any State to inform him or her that the notification has been received.

For the application of article 18, paragraph 2, five criteria are established:

- *The State must respond within one month;*
- *It must initiate or have initiated an investigation;*
- *This investigation must concern its nationals or others within its jurisdiction; in order for the Prosecutor to defer to a State's investigation, the persons concerned must be identified, since the last sentence of paragraph 2 states that the Prosecutor shall defer to a State's investigation "of those persons", which supposes that they are known and identified;*
- *The investigation must concern criminal acts which may constitute crimes referred to in article 5;*
- *These criminal acts must relate to the information provided in the notification to States.*

Rule 2.14. Deferral under article 18, paragraph 2

(a) When he or she receives a request for deferral of the investigation pursuant to article 18, paragraph 2, the Prosecutor shall make sure that the information provided by the State fulfils the criteria established in that article. To that end, he or she may request additional information from the State concerned.

⁶ These rules concern channels of communication with States Parties.

⁷ This should cover exchanges between the Prosecutor and States, pursuant in particular to paragraph 2, but also to paragraph 5, when the Prosecutor requests information about the progress of the proceedings.

In the event of a dispute concerning interpretation of the criteria established in article 18, paragraph 2, the State may request the Pre-Trial Chamber to settle the dispute as soon as possible, after requesting the observations of the Prosecutor.

(b) When the criteria established in article 18, paragraph 2, are fulfilled, the Prosecutor shall, if the State so requests, defer the investigation to it.

(c) If the Prosecutor considers, however, that the case is admissible under article 17, he or she shall submit to the Pre-Trial Chamber a written and reasoned request for authorization of an investigation and shall communicate to it all the information provided by the State. The Prosecutor shall inform that State in writing of the submission of the request to the Pre-Trial Chamber.

(d) Rules 2.19 and 2.20 shall be applicable to proceedings initiated in accordance with paragraph (c) of the present rule and conducted in accordance with rules 2.15 and 2.16.

Rule 2.15. Proceedings applicable to article 18, paragraph 2

(a) When the Pre-Trial Chamber receives an application from the Prosecutor pursuant to article 18, paragraph 2, it shall rule on the procedure to be followed and the eventual holding of a hearing.

After consulting the Prosecutor, the Pre-Trial Chamber may request the Registrar to take measures to publicize the proceedings in accordance with rule 6.31 (C), unless doing so would endanger the integrity of the proceedings or the life and well-being of victims and witnesses.

(b) The provisions of rules 2.9 (b) to 2.11 shall be applicable, *mutatis mutandis*.

(c) The reasoned decision of the Pre-Trial Chamber shall be communicated as soon as possible to all the parties to the proceedings and to the State which requested deferral of the investigation, even if it did not take part in the proceedings. The proceedings provided for in rules 8.6 and 8.8 to 8.10 shall be applicable to appeals against rulings of the Pre-Trial Chamber.

It will doubtless often be the case that several States make such appeals under article 18, for example when a State informs the Court that it is investigating one of its nationals and another State informs the Court that that person is within its jurisdiction and that it too has begun investigating him or her. It would seem that the only equitable solution is to provide that the Court is under an obligation to rule on these appeals in the light of their "date of arrival" at the Court.

Rule 2.16. Procedure applicable in the case of multiple requests for deferral

Where the Prosecutor receives several requests for deferral pursuant to article 18, paragraph 2, they shall be ruled upon, in accordance with rules 2.14 and 2.15, according to their respective dates.

The rules necessary for the application of article 18, paragraph 6 must be formulated. The main consideration is the need for such proceedings to be conducted discreetly and expeditiously. Provision must therefore be made for proceedings different from those established for the application of paragraph 2; for paragraph 6, the Court would rule solely on the basis of the submissions of the Prosecutor, as a matter of urgency and in camera.

Rule 2.17. Provisional measures

On the basis of a motion by the Prosecutor in accordance with article 18, paragraph 6, the Pre-Trial Chamber shall rule in closed meetings solely on the basis of the submissions of the Prosecutor. If the Prosecutor requests a ruling on his or her motion as a matter of urgency, the Pre-Trial Chamber shall notify him or her by all available means of its reasoned decision within a maximum period of three days from the time when it was seized. Before making a ruling, the Pre-Trial Chamber may request additional information from the Prosecutor.

Rules concerning article 19

For the application of article 19, three groups of issues must be considered:

- *Participation of victims pursuant to article 19, paragraph 3;*
- *Procedural rules for the application of article 19;*
- *Consequences of the application of article 19.*

Rule 2.18. Proceedings applicable to article 19

(a) When a Chamber of the Court receives a challenge or question concerning its jurisdiction or the admissibility of a case from a person or a State, in accordance with article 19, paragraph 2, or from the Prosecutor, pursuant to article 19, paragraph 3, it shall rule on the procedure to be followed and the eventual holding of a hearing.

(b) When the Court is seized exclusively by the Prosecutor, it may, at the request of the Prosecutor or on its own motion after consulting the Prosecutor, invite any State concerned to make a challenge, if appropriate, in accordance with article 19, paragraph 2.

(c) After consulting the Prosecutor, the Chamber seized of the case may request the Registrar to take measures to publicize the proceeding in accordance with rule 6.31 (C), unless doing so would endanger the integrity of the proceedings or the life and well-being of victims and witnesses.

(d) Subject to the provisions of rule 5.32 (k), the application shall be communicated to all the parties to the proceedings; those parties may make submissions within the time limit established by the Court.

(e) When the question is raised or the challenge made in the cases referred to in article 90, the Court shall rule as a matter of urgency. The proceedings shall be in written form, unless the Chamber decides otherwise. The parties to the proceedings shall have a maximum time limit of 15 days to make their submissions. The Chamber shall rule within a maximum of three months from the time at which it is seized.

The Court may decide that these urgent proceedings shall be applied in other situations, when the circumstances so require.

(f) When the Court is seized of several applications pursuant to paragraph (a) of the present rule, it may rule on them in the same decision, if it deems it necessary, according to their respective dates. It shall rule first on questions of jurisdiction, then on questions of admissibility.

(g) The provisions of the present rule shall be applicable, *mutatis mutandis*, to cases in which the Chamber concerned decides to rule on its own initiative pursuant to article 19, paragraph 1.

Rule 2.19. Participation of victims in proceedings relating to the application of Article 19

(Based on rule D of workshop 1 of the Paris seminar)

(a) For the purposes of article 19, paragraph 3, victims or their representatives may present written submissions, including requests for the holding of a hearing, or, if the circumstances of the case so require and with the authorization of the Court, in any other form.

(b) Following consultations with the Prosecutor, the Chamber of the Court concerned shall direct the Registrar to act in accordance with rule 6.31 (C), in order to inform the victims of the initiation of proceedings with respect to jurisdiction and admissibility, for the purposes set forth in paragraph (a), unless that would endanger the integrity of the proceedings or the life and physical well-being of victims and witnesses.

(c) The Registrar shall provide the victims who have expressed their intention of making submissions, or their representatives, with a summary of the grounds on which the admissibility of a case or the jurisdiction of the Court has been challenged, in a manner consistent with the duties of the Prosecutor and the Court regarding the confidentiality of information, the protection of any person and the preservation of evidence.

Rule 2.20. Participation of those who have deferred a situation, pursuant to article 13, in proceedings relating to the application of article 19

(a) For the purposes of article 19, paragraph 3, the Registrar shall inform those who have deferred a situation pursuant to article 13 of the initiation of proceedings with respect to challenges concerning jurisdiction and admissibility, in circumstances which do not endanger the integrity of the proceedings or the life and well-being of victims and witnesses. They may make written submissions, including requests for the holding of a hearing, and, in the case of a State, submissions in any other form, with the authorization of the Court.

(b) To that end, the Registrar shall provide a summary of the grounds on which the admissibility of a case or the jurisdiction of the Court has been challenged, in a manner consistent with the duties of the Prosecutor and the Court regarding the confidentiality of information, the protection of any person and the preservation of evidence.

For the application of article 19, paragraph 4, a procedural rule must be provided, especially with regard to the “exceptional circumstances”.

Rule 2.21

In order to determine whether exceptional circumstances exist, within the meaning of the third sentence of article 19, paragraph 4, the Court shall apply rules 2.18 to 2.20.

A number of issues arise in regard to the application of article 19, paragraph 6:

- *The maximum time limit within which the challenge may be made before the Pre-Trial Chamber (see the time limit of 30 days prior to the confirmation hearing before the Pre-Trial Chamber in rule 5.18);*
- *What is to become of challenges received after that time limit has expired? What is to be done with challenges which arrive after confirmation of the charges but before the Pre-Trial Chamber is constituted or designated by the Presidency?*

Rule 2.22

(a) Any challenge or appeal submitted pursuant to article 19 to the Pre-Trial Chamber less than 30 days prior to the confirmation hearing shall, unless the person or State making the challenge or appeal obtains a postponement of the hearing from the Pre-Trial Chamber, be referred by that Chamber to the Presidency, which shall refer it to the Trial Chamber that it designates or constitutes pursuant to rule 5.27.

(b) If a challenge to the jurisdiction of the Court or to the admissibility of a case is made after confirmation of the charges but before the constitution or designation of the Trial Chamber, it shall be addressed to the Presidency, which shall refer it to the Trial Chamber as soon as the latter is constituted or designated in accordance with rule 5.27.

Rule 2.23

The provisions of rule 2.17 shall be applicable in the case referred to in article 19, paragraph 8.

Rule 2.24

The provisions of rules 2.18 to 2.20 shall be applicable in the case referred to in article 19, paragraph 10.

*After the provisions for the procedural application of part 2, including participation by victims, have been considered, there remains the question of the **procedural consequences of decisions concerning the jurisdiction of the Court or the admissibility of a case.***

Rule 2.25. Consequences of decisions concerning lack of jurisdiction or inadmissibility

(a) When the Court rules that it does not have jurisdiction, or that the case is not admissible, after the prosecuted person is surrendered to the Court, that person shall be transferred to the State which surrendered him or her to the Court.

(b) In the case referred to in paragraph (a), the Court shall, as appropriate, inform the State which challenged its jurisdiction or the admissibility of the case as to which State the person is transferred.

(c) As appropriate, the State which challenged the admissibility of the case shall deduct from the penalty subsequently imposed the period during which the person concerned was detained at the order of the Court both at its seat and on the territory of the State initially requested to surrender him or her.
