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Report of the Working Group on the Draft Statute  
for an International Criminal Court

Addendum

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## Article 46

### Powers of the Court

1. The Court shall, subject to the provisions of the Statute and in accordance with the rules of procedure and evidence of the Court have, inter alia, the power to:

- (a) require the attendance and testimony of witnesses;
- (b) require the production of documentary and other evidentiary materials;
- (c) rule on the admissibility or relevance of issues, evidence and statements;
- (d) maintain order in the course of a trial.

2. The Court shall ensure that a complete record of a trial, which shall accurately reflect the proceedings, shall be maintained and preserved under the authority of the Court.

### Commentary

(1) This article sets forth in paragraph 1 the general powers of the Court in conducting the proceedings, including ordering the attendance and testimony of witnesses, the production of documentary or other evidence, determining the relevance or admissibility of evidence, and maintaining order in the courtroom.

(2) There must be a complete and accurate record of the trial proceedings which is to be maintained and preserved by the Registrar under the authority of the Court. This record of the trial would be of particular importance to the defendant, as well as the Prosecutor, in the event of a conviction which is subject to appeal or revision under Articles 54 or 56, respectively.

## Article 47

### Evidence

1. The Court shall, on the application of the prosecution or of the defence, require any person to give evidence at the trial unless it concludes that the evidence of such person would not contribute to clarifying any matter of relevance to the trial. The Court may also on its own initiative require any person to give evidence at the trial.

2. Before testifying, each witness shall make such oath or declaration as is customary in judicial proceedings in his country.

3. The Court may require to be informed of the nature of any evidence before it is offered so that it may rule on its admissibility or relevance. Any such ruling shall be made in open court.

4. The court shall not require proof of facts of common knowledge but shall take judicial notice thereof.

5. Evidence obtained directly or indirectly by illegal means which constitute a serious violation of internationally protected human rights shall not be admissible.

6. A witness who has not yet testified shall not be present when the evidence of another witness is taken. However, a witness who has heard the evidence of another witness shall not for that reason alone be disqualified from giving evidence.

7. The Court may accept evidence in such forms as it deems appropriate in accordance with its rules of procedure and evidence.

#### Commentary

(1) While some members felt that the rules of evidence were too complex to be addressed in the Statute, other members felt that it should include some basic provisions on this important subject. The Nuremberg Tribunal, which was not bound by technical rules of evidence, was required to admit any evidence which had probative value, according to Article 19 of its Charter.

(2) The Court, acting on the recommendation of the Bureau, would establish its own rules of evidence and procedure pursuant to Article 19 of the present Statute. It may accept evidence in such forms as it deems appropriate in accordance with those rules, under paragraph 7 of this article. The Court may also take judicial notice of facts which are common knowledge rather than requiring proof of such facts, according to paragraph 4 which is similar to Article 21 of the Nuremberg Charter.

(3) The Court shall require a person to give evidence or testify at the trial, at the request of the prosecution or the defence or on its own initiative, unless the Court concludes that such evidence or testimony would be of no probative value in determining any question which is at issue in a particular case, according to paragraph 1 of this article. To ensure the veracity of testimony, witnesses would be required to make the oath or declaration normally required in their national courts pursuant to paragraph 2. For the same reason, a witness who had not yet testified should not be present when other witnesses were testifying during the trial, according to paragraph 6. However, a witness who heard the testimony of other

witnesses before testifying would not be disqualified unless the Court determined that this was necessary because of the possibility that the testimony would be tainted.

(4) The prosecution or defence may be required to inform the Court of the nature and purpose of evidence proposed for introduction in the trial to enable it to make a prior determination of relevance or admissibility, according to paragraph 3 which is similar to Article 20 of the Nuremberg Charter. This requirement is particularly important in criminal trials before a jury to avoid the introduction of inadmissible evidence which may be prejudicial to the defendant and subsequently difficult for lay persons to ignore notwithstanding judicial instructions to the contrary. However, it is also an important requirement in other criminal trials to enable the Court to fulfil its responsibility for ensuring an expeditious trial limited in scope to a determination of the validity of the charges against the accused and issues relating thereto. Some members also stressed the desirability of this provision to prevent the collection or production of evidence being used as a delaying tactic during the trial, as well as the substantial costs which may be involved in translating inadmissible evidence. Other members felt strongly that this provision should not be interpreted as allowing the Court to exclude evidence in ex parte or closed proceedings, rather than following the normal procedure in which motions for the introduction of evidence were made by counsel, in the presence of opposing counsel, and decided by the Court in public proceedings. It was suggested the Court's rulings as to the admissibility of evidence should be subject to appeal. The Working Group decided to return to the question of providing for interlocutory appeals at a later stage. This would also require consideration of the appropriate body to decide such matters, for example the Bureau or an Appeals Chamber, bearing in mind the nature of the Tribunal.

(5) The Court must exclude any evidence obtained either directly or indirectly by illegal means which constitute a serious violation of internationally protected human rights, according to paragraph 5. With regard to the standard for applying the exclusionary rule, one member suggested that only evidence obtained in violation of a peremptory norm of human rights should be inadmissible.

## Article 48

### Hearings

1. The indictment shall be read to the accused and the Court shall ask the accused whether he pleads "guilty" or "not guilty" to each of the charges in the indictment.
2. If an objection is raised as to the jurisdiction of the Court, the Court shall rule on the objection prior to proceeding any further with the trial.
3. The Prosecutor shall make an opening statement and call witnesses and present evidence on behalf of the prosecution and, thereafter, the defence may make an opening statement and may call witnesses and present evidence on behalf of the accused.
4. When hearings of evidence have been completed, the prosecution shall make a closing statement and, thereafter, the defence may make a closing statement.
5. The Court shall inquire of the accused whether he wishes to make a statement before the judgement of the Court is delivered, and shall, if the accused so wishes, permit the accused to do so.
6. The Court shall, thereafter, retire for closed and private deliberations upon the judgement it is to make.

### Commentary

(1) The trials conducted by the Chamber of the Court would follow the general procedure set forth in this article, which is similar to a somewhat more detailed provision contained in the Nuremberg Charter. The Court would first read the indictment and request the defendant to enter a plea of guilty or not guilty with respect to each of the crimes alleged in the indictment. Any jurisdictional challenges raised in accordance with Article 37 must be decided before continuing with the trial. The Prosecutor would first present the case for the prosecution which would be followed by the case for the defence. At the conclusion of the hearing, the prosecution would be required to make a closing statement demonstrating that the burden of proof had been met. The defence would be entitled to make a closing statement and thus have the "last word", but would not be required to do so since the accused is entitled to a presumption of innocence. One member suggested that the Court may decide that the prosecution has not met its burden thus obviating the need for the defence to make any statement. At the conclusion of the hearing, the Court shall engage in private deliberations and reach a decision in the case.

(2) The rules to be adopted by the Court would contain more detailed provisions concerning the procedures to be followed throughout the trial to ensure that the proceedings are conducted in accordance with uniform rules and procedures.

#### Article 49

##### Quorum

At least four judges must be present at each stage of the trial. The decisions of the [court] [chambers] shall be taken by a majority of the judges present.

##### Commentary

This article provides the general rules concerning the necessary quorum to conduct the trial proceedings and the extent of agreement required for taking decisions. The rules to be adopted by the Court would address such matters in greater detail. However, the Working Group felt that it would be useful to include these provisions in the Statute to establish the general guidelines for the functioning of the Court.

#### Article 50

##### Judgement

1. The Court shall pronounce judgements and impose sentences and penalties on persons convicted of crimes under this Statute.
2. The Judgement of the Court shall be in written form and contain a full and reasoned statement of its findings and conclusions. It shall be the sole judgement or opinion issued.
3. The Judgement shall be delivered in open Court.

##### Commentary

(1) This article confers on the Court the power to pronounce judgements and impose sentences on a person convicted of a crime under this Statute following the trial of a particular case. It is at this point in time that the person who was initially suspected of committing a crime and therefore the subject of an investigation (the suspect) and later accused of committing the crime when the indictment was affirmed (the accused), now becomes the convicted person

when the Court decides that the prosecution has met its burden of proving the charges contained in the indictment and pronounces its judgement that the person is guilty as charged.

(2) The term "sentence" was used to refer to the punishment imposed by the Court against a convicted person in a particular case. It was considered broad enough to encompass the full range of penalties at the disposal of the Court, including imprisonment, fines and the confiscation of unlawfully acquired property.

(3) The judgement must be in writing and be accompanied by a full reasoned statement of the findings of fact and conclusions of law on which it is based. The Court would issue a single judgement reflecting the opinion of the majority of judges. There would be no dissenting or separate opinions. The judgement would be delivered in a public proceeding.

(4) In connection with paragraph 2, different views were expressed on the desirability of allowing separate or dissenting opinions. The well known dissenting opinion to the Judgement of the Nuremberg Tribunal was issued notwithstanding the silence of the Charter on this question. Those who were opposed to allowing such opinions felt that they would undermine the authority of the Court and its judgements. One member suggested that judges may hesitate to issue such opinions as a result of concerns for their personal safety given the serious nature of the crimes referred to in the Statute. However, other members believed that judges should have the right to issue separate or dissenting opinions as a matter of conscience, if they chose to do so. It was also suggested that these opinions would be extremely important to the defendant who chose to appeal a conviction and may also be of interest to the Appeals Chamber in deciding whether to overturn the conviction.

#### Article 51

#### Sentencing

1. The Court shall hold a further and separate hearing to consider the question of the appropriate sentences to be imposed on the accused, and hear the submissions of the prosecution and of the defence and such evidence as the Court may deem of relevance.
2. The Court may retire for deliberations in private.
3. The decisions of the Court on the sentences shall be delivered in open Court.

Commentary

The Court must hold a separate sentencing hearing to determine an appropriate penalty commensurate with the crime committed by the convicted person. The Court may engage in private deliberations on the matter. The Court must announce its decision as to the appropriate sentence to be imposed on the convicted person in a public proceeding.

Article 52

Applicable penalties

1. The Chamber may impose on a person convicted of a crime under this Statute one or more of the following penalties:

(a) a term of imprisonment, up to and including life imprisonment;

(b) a fine of any amount.

2. In determining the length of a term of imprisonment for a crime or the amount of a fine, the Chamber may have regard to the penalties provided for by the law of:

(a) the State of which the perpetrator of the crime is a national;

(b) the State on whose territory the crime was committed; or

(c) the State which had custody of and jurisdiction over the accused.

3. The Chamber may also order:

(a) the return to their rightful owners of any property or proceeds which were acquired by the person convicted in the course of committing the crime;

(b) the forfeiture of such property or proceeds, if the rightful owners cannot be traced.

4. Fines paid or proceeds or property confiscated pursuant to this Article may be paid or transferred, by order of the Chamber, to one or more of the following:

(a) the Registrar, to defray the costs of the trial;

(b) a State whose nationals were the victims of the crime;

(c) a trust fund established by the Secretary-General of the United Nations for the benefit of victims of crime.



Commentary

(1) This article sets forth the applicable penalties which would be available to the Court in determining the appropriate punishment in a particular case, including a term of imprisonment up to and including life imprisonment and a fine of any amount. The Court would not be authorized to impose the death penalty.

(2) In determining the term of imprisonment or the amount of fine to be imposed, the Court may consider relevant provisions of the national law of the States which have a particular connection to the person or the crime committed, namely the State of which the convicted person is a national, the State on whose territory the crime was committed or the State which had custody of and jurisdiction over the accused. Although any State may prosecute a person for a crime under international law in accordance with the principle of universal jurisdiction, providing that the Court may consider the relevant national law of these three States is based on the particular connection between them and either the individual or the crime. The consideration of the laws of these States is even more appropriate with respect to the crimes under national law referred to in paragraph 2 (b) of Article 26 of this Statute. While the Court is free to consider the relevant national law of the States indicated in this article, it is not obliged to follow the law of any one of them.

(3) In addition to imprisonment or fines, the Court may also order the confiscation of property unlawfully obtained or the proceeds of unlawful conduct. The Court may further order the return of such property to its rightful owner and the payment of fines or illicit proceeds to the Registrar to defray the costs of the trial, to the State whose nationals were the victims of the crime for purposes of compensation, or to a fund to be established by the Secretary-General of the United Nations to benefit victims of crime. In this connection, attention may be drawn to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which contains detailed provisions concerning the confiscation of illicit proceeds, and the Optional Protocol to the Model Treaty on Mutual Assistance in Criminal Matters concerning the proceeds of crime.

(4) Some members questioned the ability of the Court to determine the ownership of stolen property in the absence of a claim filed by the alleged

owner, which may need to be considered in a separate proceeding. Others felt that it was not appropriate to authorize the Court to order the return of stolen property, a remedy which they considered to be more appropriate in a civil rather than a criminal case. One member suggested that allowing the Court to consider such matters would be inconsistent with its primary function and contrary to its fundamental purpose, namely to prosecute and punish without delay perpetrators of the crimes referred to in the Statute.

Article 53

Aggravating or mitigating factors

In imposing sentence, the Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

Commentary

- (1) In determining the sentence to be imposed on the convicted person, the Court must take into account all of the elements relating to the gravity of the crime committed, on the one hand, and the individual circumstances of the convicted person which may constitute mitigating factors, on the other. For example, the Court may decide to impose a lesser sentence for a war crime committed by a very young inexperienced member of the armed forces in comparison to the sentence imposed for the same crime committed by a senior military officer with years of training and experience.
- (2) The Court must also take into account the extent to which any sentence imposed by another court on the same person for the same acts has already been served, in accordance with paragraph 3 of Article 44.

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