

PUBLIC

Annex B

The International Criminal Court

Elements of Crimes
and Rules of
Procedure
and Evidence

Edited by
Roy S. Lee



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Elements of Crimes and Rules of Procedure and Evidence

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III. STATUS CONFERENCES AND MOTIONS

A. Status Conferences

Rule 132: Status conferences

1. Promptly after it is constituted, the Trial Chamber shall hold a status conference in order to set the date of the trial. The Trial Chamber, on its own motion, or at the request of the Prosecutor or the defence, may postpone the date of the trial. The Trial Chamber shall notify the trial date to all those participating in the proceedings. The Trial Chamber shall ensure that this date and any postponements are made public.

2. In order to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber may confer with the parties by holding status conferences as necessary.

This rule provides a regime for the Trial Chamber to hold hearings so it can comply with article 64, paragraph 3(a), which requires it to confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings. To ensure there is no unnecessary delay between the close of the pre-trial phase and the start of the trial, the very first status conference will fix the trial date. Some consideration was given to setting a time limit within which this first conference would be held. However, as has been referred to earlier, the subject of time limits proved controversial throughout the Preparatory Commission, and for this reason the Court is merely required to act “promptly” in holding an initial status conference. To ensure a degree of flexibility and take account of the inevitable delays that can occur, the Court may, on application or on its own motion, postpone the trial date. It may appear odd that the draftsmen of this rule felt it necessary to explicitly state that the trial date should be notified to the parties and the public, but some delegates were concerned that there should be no doubt about the matter.

B. Motions Challenging Admissibility or Jurisdiction

Rule 133: Motions challenging admissibility or jurisdiction

Challenges to the jurisdiction of the Court or the admissibility of the case at the commencement of the trial, or subsequently with the leave of the Court, shall be dealt with by the Presiding Judge and the Trial Chamber in accordance with rule 58.

Although it is anticipated that most challenges to the admissibility of a case or jurisdiction of the Court (not to be confused with challenges to the admissibility of evidence) will be dealt with at an early stage in the proceedings, it is clear from article 19, paragraph 4, that in exceptional circumstances (and with leave of the Court), such challenges can be made during the trial itself.

The Australian proposal regarding motions at the trial stage had different rules on preliminary motions and on motions during the trial, but did not specifically address the issue of motions concerning jurisdiction or admissibility.⁹ However, challenges to admissibility or jurisdiction are of a fundamentally different character from those usually encountered in a criminal trial, and a special regime for dealing with them is

9. Rules 77 and 78, *supra* note 2, which were partially inspired by Rules 72 and 73 of the ICTY Rules.

contained in the Statute and the Rules. The question of a separate rule regarding the latter kind of motions at trial was raised in the debate and the present division into two rules for motions challenging admissibility or jurisdiction (Rule 133) and for other motions (Rule 134) was developed.¹⁰ Later, the Mont Tremblant document suggested that Rule 133 could be simplified in light of the procedural provisions that had been elaborated in relation to article 19.¹¹ As a consequence, a cross-reference to Rule 58 was inserted.

C. Motions Relating to the Trial Proceedings

Rule 134: Motions relating to the trial proceedings

1. Prior to the commencement of the trial, the Trial Chamber on its own motion, or at the request of the Prosecutor or the defence, may rule on any issue concerning the conduct of the proceedings. Any request from the Prosecutor or the defence shall be in writing and, unless the request is for an *ex parte* procedure, served on the other party. For all requests other than those submitted for an *ex parte* procedure, the other party shall have the opportunity to file a response.

2. At the commencement of the trial, the Trial Chamber shall ask the Prosecutor and the defence whether they have any objections or observations concerning the conduct of the proceedings which have arisen since the confirmation hearings. Such objections or observations may not be raised or made again on a subsequent occasion in the trial proceedings, without leave of the Trial Chamber in this proceeding.

3. After the commencement of the trial, the Trial Chamber, on its own motion, or at the request of the Prosecutor or the defence, may rule on issues that arise during the course of the trial.

This rule is a direct response to the concerns felt by many delegations that proceedings at the ICTR and ICTY were being delayed by endless procedural challenges. In the initial debate, the idea of prescribing explicit time limits for motions before the trial—either in the Rules or in the Regulations of the Court—was discussed. However, due to opposing views as to the feasibility of such time limits, this idea was abandoned.

Sub-rule 1 provides a regime for rulings on procedure to be made prior to the commencement of the trial. The Court may make such a ruling on its own motion or at the request of either party. If made by a party, the request shall be in writing, and unless the request is for an *ex parte* procedure it will be served on the other party and the other party will allow an opportunity to respond.

Some delegates argued that it would be impossible to settle all procedural issues at the start of a lengthy trial. For this reason sub-rule 3 was added which allows the Court to make later rulings, although these are confined to issues that “arise during the course of the trial.”

Challenges may not however be confined to the trial procedure itself. Parties may wish to challenge procedures that occurred between the confirmation hearing

10. Rules 6.11 and 6.12 in PCNICC/1999/WGRPE/RT.5, *supra* note 3.

11. Note to Rule 6.11, *supra* note 4.

and the commencement of the trial; sub-rule 2 ensures that any such issues are settled before the trial commences. The Trial Chamber is obliged to ask the Prosecutor and the defence whether they have any objections or observations on these preliminary proceedings and such objections or challenges cannot be raised again on a subsequent occasion. The sub-rule would have remained in this raw and uncompromising state but for the concerns of some delegations that it was unrealistic and potentially unfair to insist that challenges could not be made at a later stage. For this reason sub-rule 2 allows later challenges but only with leave of the Court.

IV. MEDICAL EXAMINATION OF THE ACCUSED

Rule 135: Medical examination of the accused

1. The Trial Chamber may, for the purpose of discharging its obligations under article 64, paragraph 8 (a), or for any other reasons, or at the request of a party, order a medical, psychiatric or psychological examination of the accused, under the conditions set forth in rule 113.
2. The Trial Chamber shall place its reasons for any such order on the record.
3. The Trial Chamber shall appoint one or more experts from the list of experts approved by the Registrar, or an expert approved by the Trial Chamber at the request of a party.
4. Where the Trial Chamber is satisfied that the accused is unfit to stand trial, it shall order that the trial be adjourned. The Trial Chamber may, on its own motion or at the request of the Prosecution or the defence, review the case of the accused. In any event, the case shall be reviewed every 120 days unless there are reasons to do otherwise. If necessary, the Trial Chamber may order further examinations of the accused. When the Trial Chamber is satisfied that the accused has become fit to stand trial it shall proceed in accordance with rule 132.

There are three principal reasons why the Court may wish the accused to be medically examined. The first and most obvious is so the Court can fulfil its obligations under article 64, paragraph 8(a): "The Trial Chamber shall satisfy itself that the accused understands the nature of the charges and that the defendant is mentally fit to stand trial." The second is that the defence may argue that the accused was suffering from a mental disease or defect such as to exclude criminal responsibility (*see* art. 31, para. 1[a]).¹² Finally, an accused may be suffering from some physical complaint and the Court may wish to determine if he is too ill to attend court.

An Australian proposal served as the point of departure for the elaboration of Rule 135.¹³ Sub-rules 1 to 3 appeared in the discussion paper following the Siracusa meeting¹⁴ and were thereafter transferred to the final text without amendments. At the second session of the Preparatory Commission, sub-rule 4 was added, based upon an Italian proposal.¹⁵

12. The Prosecution may also wish to request an examination of the accused to satisfy its duties under art. 54, para. 1(a), of investigating incriminating and exonerating circumstances equally.

13. Rule 79, *supra* note 2.

14. Rule 6.13, *supra* note 3.

15. Rule 6.13 in PCNICC/1999/WGRPE/DP.18 (26 July 1999).

Sub-rule 1 allows the Court to order a medical, psychiatric or psychological examination of the accused. There is a cross-reference to Rule 113 which provides a similar procedure for the Pre-Trial Chamber.¹⁶

Some delegations were concerned about the use of this procedure, particularly if it led to a stay of proceedings against someone accused of notorious war crimes. For this reason sub-rule 2 was drafted to ensure that the reasons for any such order are placed on the court record.

Sub-rule 3 was added to ensure that only approved experts will be used (which will presumably help prevent the accused from duping inexperienced experts in order to avoid trial or criminal responsibility). It was pointed out, however, that the prosecution or the defence may themselves be able to identify particular specialist advice, and for this reason the sub-rule was amended to allow the Trial Chamber to approve an expert at the request of a party.

Sub-rule 4 begins and ends with obvious points: if the accused is unfit to stand trial, the case will be adjourned, but if the accused recovers the Trial Chamber shall proceed to set a trial date in accordance with Rule 132. In between these two simple statements is quite a complicated formula regarding the review of the defendant's status. Some delegates wanted the Court to have a duty to keep the situation constantly under review, others felt that some certainty was required and that there ought to be regular reviews. Yet others wanted to include the possibility that the parties themselves might seek a review. Finally, there were those who argued that some medical conditions would be so serious and the prognosis so clear (e.g., for a terminally ill accused) that a requirement to review the case would be unnecessary. Eventually, after much negotiation, all these views were accommodated in a single formula: the Court can review the defendant's status at any time and the parties may request a review; in any event there will be a review every 120 days unless there are reasons to do otherwise (i.e., there is a clear prognosis). To facilitate an effective review of the situation, the sub-rule also allows the Court to order a further examination of the accused.

V. JOINT AND SEPARATE TRIALS

Rule 136: Joint and separate trials

1. Persons accused jointly shall be tried together unless the Trial Chamber, on its own motion or at the request of the Prosecutor or the defence, orders that separate trials are necessary, in order to avoid serious prejudice to the accused, to protect the interests of justice or because a person jointly accused has made an admission of guilt and can be proceeded against in accordance with article 65, paragraph 2.
2. In joint trials, each accused shall be accorded the same rights as if such accused were being tried separately.

This rule provides guidance to the Trial Chamber on the exercise of its discretion under article 64, paragraph 5: "Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges

16. *See supra* Part Two, Chapter 7 on Investigation and Prosecution.