

**Eleventh session**

The Hague, 14-22 November 2012

**Report of the Study Group on Governance on
rule 132 *bis* of the Rules of Procedure and Evidence****Rule 132 *bis* – Designation of a judge for the preparation of the trial****I. Introduction**

1. On 17 October 2012, the Study Group on Governance (“the Study Group”) held an extraordinary meeting in response to the letter from the President of the International Criminal Court (“the Court”),¹ dated 12 October 2012, concerning the Court’s proposals to amend rule 132² of the Court’s Rules of Procedure and Evidence (“the Rules”). In the interests of promoting a constructive dialogue on potential amendments and in light of the limited time available before the start of the Assembly of States Parties (“the Assembly”), the Study Group considered that the Working Group on Amendments and the Court would benefit from advice and recommendations on the proposal to amend rule 132.

2. During the course of discussions within the Study Group, it was clear that there were three potential recommendations on how to respond to the Court’s proposal to amend rule 132:

(a) The majority of delegates were inclined to support adoption of the proposed amendment as currently drafted by the Court;

(b) An alternative view was to support the Court’s proposal but subject it to further changes; and

(c) The view was also expressed that the proposed amendment could not be supported due to concerns on its legal basis.

II. Proposed rule 132 *bis* explained

3. During discussions within the Study Group, the Court explained that work on amending rule 132 had commenced over a year ago and had preceded discussion within the Study Group on the Roadmap to consider amendments aimed at expediting the criminal procedures.³ The Court stressed that notwithstanding its ability under article 51, paragraph (3), of the Rome Statute to adopt in plenary provisional rules, it wanted to engage in a transparent dialogue with States. It was noted that all stakeholders within the Court, including the judges, Office of the Prosecutor, Registry and representatives of counsel, had been involved in the drafting of this rule.

¹ Annex III.

² Annex I.

³ Report of the Bureau on the Study Group on Governance (ICC-ASP/11/31), annex I.

4. The Court went on to explain the meaning and impact of the proposed rule 132 *bis*:
- (a) *Practical effect*: The rule would allow for a single judge, as opposed to the full bench of three judges, to exercise the functions of the Trial Chamber, in consultation with the full bench, in respect of trial preparation only (the phase ending with the commencement of the hearing on the merits of the case, i.e. the opening statements);
 - (b) *Benefits*: The rule would allow the Court to operate more efficiently and effectively by enabling judicial resources, with respect to all trials and also pre-trials, to be deployed in a more flexible manner to meet the needs of the Court;
 - (c) *Legal basis for adoption of rule*: The Court was proposing the rule be adopted by States at the Assembly under article 51, paragraph (2) (b);
 - (d) *Legal basis for proposal of rule*: As set out in its explanatory note, the Court explained that article 64, paragraph (3) (a) allowed the Trial Chamber to, after conferring with the parties, adopt such procedures as are necessary to facilitate the fair and expeditious conduct of proceedings. In the Court's view, this provision could reconcile the potential tensions between this rule and article 39, paragraph (2) (b) (iii); and
 - (e) *Risks*: In response to questions from the Study Group, the Court noted that, as with any legal provision, the fact that a single judge was dealing with certain parts of the trial preparation could always be challenged. However, the Court noted that all organs of the Court, including counsel, had been involved in consultations and inbuilt within the rule were safeguards to preserve the rights of parties within proceedings, including the possibility for any matter dealt with by the single judge to be referred to the full bench.

III. Recommendation 1 – Assembly to adopt rule 132 *bis* (unchanged)

5. The majority of delegations were supportive of the Assembly adopting rule 132 *bis* as currently drafted by the Court. It was noted that the proposed rule would have a significantly positive impact on the efficiency of proceedings and should enable matters before the Trial Chamber to be dealt with more expeditiously. With respect to the legal basis of the rule, the majority of delegates considered that article 64, paragraph (3) (a) provided a respectable legal basis for the rule to be enabled. The majority also noted that the risks within the rule had been mitigated in so far as ensuring that the rights of parties before the proceedings were safeguarded. It was emphasised by delegations that the current text was now a result of extensive consultations between all stakeholders within the Court and, as a result, was now finely balanced. Given that the next Assembly is imminent, a majority of delegations recognised the risks in disrupting that fine balance reached amongst the Court's stakeholders with amendment proposals aimed at simplifying or streamlining the text.

IV. Recommendation 2 – Assembly to adopt rule 132 *bis* (subject to changes)

6. According to another view, whilst agreeing with the majority that rule 132 *bis* can be adopted, a structural review aimed at simplifying the text was essential (see annex II), so as to make it more succinct while deferring certain parts of the provision to the Regulations of the Court. These changes would be aimed at ensuring that the single judge proposal entered into force upon adoption of the amendment to the Rules. It was also felt that the Court could build upon its own case-law and practice to adapt the details on the single judge proposal without the need to further revert to rule 132 *bis* in the future.

V. Recommendation 3 – That rule 132 *bis* not be adopted by the Assembly

7. A view was expressed that it was premature to adopt the new rule 132 *bis* at this stage. The wide scope of the proposed role of the single trial judge may have a negative impact on the stability and predictability of the trial procedure, especially since practice of the Court concerning procedural matters had not been firmly established. It was also considered that the proposed rule 132 *bis* was not consistent with article 39, paragraph (2) (b) (ii), of the Rome Statute because the preparatory work of the trial process is as critical as other substantive issues of the trial process.

Annex I

Proposal to amend the Rules of Procedure and Evidence - rule 132 *bis* designation of a judge for the preparation of the trial¹

Explanatory note

1. The judges hereby propose to amend the Rules of Procedure and Evidence (hereinafter all references to “rules” are to those of the Rules of Procedure and Evidence (“Rules”», so as to specify that the functions of the Trial Chamber, in respect of trial preparation (in the period between the confirmation of charges hearing and the commencement of the hearing on the merits of the case, i.e. the opening statements), may be exercised by a single judge or single judges in order to expedite proceedings and to ensure cost efficiency.

A. History of the proposed new rule 132 *bis*

2. On 12 July 2011, in accordance with regulation 5(1) of the Regulations of the Court (hereinafter all references to “regulations” are to those of the Regulations of the Court) two judges submitted to the Advisory Committee on Legal Texts (hereinafter “ACL T”), pursuant to article 51(3) of the Rome Statute, an urgent proposal for the adoption of a provisional rule to allow one judge in a Trial Chamber to act on behalf of the whole Trial Chamber in relation to trial preparation issues.

3. On 21 February 2012, following consideration of the proposal, the ACLT (composed, in accordance with regulation 4 of the Regulations of the Court, of three judges -one from each Division of the Judiciary, a representative from the Office of the Prosecutor, a representative from the Registry and a representative of counsel included in the list of counsel) submitted its report to the plenary session of judges pursuant to regulation 4(4). That report recommended to the plenary session a draft text amending the Rules (hereinafter the “ACLT Recommended Text”).

4. In its report, the ACLT also recommended, in light of the importance of the provision and the positive effect it may have on the length of the proceedings, that the ACLT Recommended Text be considered by the plenary of judges, pursuant to article 51(3) as soon as possible, and that thereafter it be applied as soon as possible. It further recommended that the ACLT Recommended Text be considered prior to the expiration of the mandate of six judges on 10 March 2012 in order to seek the views of those judges with experience in the relevant issues.

5. The Presidency circulated the report to the judges that same day -21 February 2012 - and appointed a judge to coordinate the consideration of the report in light of the recommendation to amend the Rules before the expiration of the terms of office of the six judges on 10 March 2012 (all of whom had sat as trial judges).

6. Having sought the views of the judges, the appointed judge reported to the Presidency that although the written comments returned were largely supportive of the idea in the proposed new rule, concerns had been raised, including its consistency with the Statute. The prevailing view among the judges was that they wished to have more time to consider the report and ACLT Recommended Text, that the newlyelected judges (in addition to the outgoing judges) should be included in the debate, and that discussion on the subject should take place amongst the judges. In view of those considerations, the matter could not progress before 10 March 2012 as initially recommended by the ACLT; and, as such, was postponed until the inauguration of the newly-elected judges.

¹ Submitted by the judges on 25 September 2012.

7. On 16 August 2012, that report was resubmitted to the judges by the focal point for the Lessons Learnt exercise. An absolute majority of judges supported the idea of the proposal in principle, although that support was tempered by a sense that the ACLT recommended text was complex and potentially litigious. As such, a slightly simplified draft text was prepared under the guidance of the focal point for the Lessons Learnt exercise and submitted to the judges on 19 September 2012. That text was accepted by an absolute majority of the judges and is hereby submitted to the Assembly of States Parties for consideration as an appendix to this note.

B. Justification for the proposed new rule 132 bis

8. The objective of the amendment is to administer justice more expeditiously and efficiently, whilst ensuring the accused's right to a fair trial.

9. Once the charges have been confirmed by the Pre-Trial Chamber and the case remitted to the Trial Chamber, the latter will undertake a period of trial preparation, usually lasting between 8 -12 months. Allowing trial preparation to be addressed by a single judge provides for greater efficiency and flexibility at the judicial divisional level as it will enable the remaining two members of a Trial Chamber to be more readily available to address other matters before the Trial Division and other divisions.

10. Consideration was given to whether article 39, paragraph (2) (b), of the Statute presented an obstacle to the proposed new rule, given that, in contrast to the express wording in article 39, paragraph (2) (b) (iii) that allows for the functions of the Pre-Trial Chamber to be carried out by a single judge, the wording in article 39, paragraph 2 (b) (ii) provides for the functions the Trial Chamber to be carried out by three judges of the Trial Division.

11. Ultimately, the enabling provision cited for this amendment is article 64, paragraph (3) (a). It provides that the Trial Chamber shall “[c]onfer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings”. The proposed amendment merely sets out the precise details of one of the procedures that the Trial Chamber may adopt in the exercise of its powers under article 64, paragraph (3) (a).

12. Guided by article 64, paragraph (3) (a) and bearing in mind the above-mentioned constraints of article 39, paragraph (2) (b), a conservative approach to the amendment was taken. As such, the role of the trial judge acting alone was limited to the preparatory work while the more substantive issues remain solely within the remit of the full Trial Chamber.

13. Finally, it was considered that the proposal could apply to the Appeals Chamber without necessitating any further amendment to the rules, by virtue of rule 149, which provides that “Parts 5 and 6 and rules governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber”.

C. The proposal

Rule 132 bis

Designation of a judge for the preparation of the trial

- 1. In exercising its authority under article 64, paragraph 3 (a), a Trial Chamber may designate one or more of its members for the purposes of ensuring the preparation of the trial.**

14. It is the Trial Chamber as a whole which designates the single judge. This is consistent with rule 7(1) which deals, inter alia, with the modalities of the designation of the single judge at the pre-trial level. This sub-provision allows for maximum flexibility in the number of judges that may be designated and the nature of such designation. It allows the Trial Chamber to designate more than one judge for the preparation of the case, further dividing the workload to maximise efficiency.

- 2. The judge shall take all necessary preparatory measures in order to facilitate the fair and expeditious conduct of the trial proceedings, in consultation with the Trial Chamber.**

15. The single judge is empowered to take all of the decisions with respect to the preparation of the trial. The sub-rule uses the wording in article 64, paragraph (3) (a) (“to facilitate the fair and expeditious conduct of the proceedings”), with the specification of the word “trial”. The designated judge acts alone in fulfilling his or her mandate but consults the bench as to which preparatory measures are entailed and the approach to be taken. This is consistent with the terms of sub-rule 6 below.

- 3. The judge may at any time, *proprio motu* or, if appropriate, at the request of a party, refer specific issues to the Trial Chamber for its decision. A majority of the Trial Chamber may also decide *proprio motu* or, if appropriate, at the request of a party, to deal with issues that could otherwise be dealt with by the judge.**

16. The Trial Chamber may re-assume responsibility of a matter: i) when the designated judge refers a matter to the Trial Chamber, either *proprio motu* or at the request of a party and ii) where the Trial Chamber considers that a matter should be heard by the full bench, either *proprio motu* or at the request of a party. This echoes rule 7(3), which provides that in pre-trial proceedings the Chamber may on its own motion or, if appropriate, at the request of a party decide that the functions of the single judge be exercised by the full Chamber (provision is also made in article 57, paragraph (2) (b), of the Statute for the majority of the Pre-Trial Chamber to require matters to be decided by the full bench). Further, the reference to a party” seizing the Chamber is deliberately consistent with rule 7(3); and it will be left to the judges to interpret the scope of those words in practice.

- 4. In order to fulfil his or her responsibilities for the preparation of the trial, the judge may hold status conferences and render orders and decisions. The judge may also establish a work plan indicating the obligations the parties are required to meet pursuant to this rule and the dates by which these obligations must be fulfilled.**

17. This rule sets out the tools at the disposal of the designated judge to fulfil his or her mandate.

- 5. The functions of the judge may be performed in relation to preparatory issues, whether or not they arise before or after the commencement of the trial. These issues may include:**

- (a) Ensuring proper disclosure between the parties;
- (b) Ordering protective measures where necessary;
- (c) Dealing with applications by victims for participation in the trial, as referred to in article 68, paragraph 3;
- (d) Conferring with the parties regarding issues referred to in regulation 54 of the Regulations of the Court, decisions thereon being taken by the Trial Chamber;
- (e) Scheduling matters, with the exception of setting the date of the trial, as referred to in rule 132, sub-rule 1;
- (f) Dealing with the conditions of detention and related matters; and
- (g) Dealing with any other preparatory matters that must be resolved which do not otherwise fall within the exclusive competence of the Trial Chamber.

18. This sub-provision lists those issues under the mandate of the judge, although not in an exclusive manner.

- 6. The judge shall not render decisions which significantly affect the rights of the accused or which touch upon the central legal and factual issues in the case, nor shall he or she, subject to sub-rule 5, make decisions that affect the substantive rights of victims.**

19. Given the terms of article 39, paragraph (2) (b), of the Statute, this sub-rule prevents a judge taking decisions that may affect the outcome of the trial. It does not list which issues fall outside of the competence of the single judge, leaving them to be determined in practice.

Appendix

Proposal to amend the Rule of Procedure and Evidence*

Rule 132 bis

Designation of a judge for the preparation of the trial

1. In exercising its authority under article 64, paragraph 3 (a), a Trial Chamber may designate one or more of its members for the purposes of ensuring the preparation of the trial.
2. The judge shall take all necessary preparatory measures in order to facilitate the fair and expeditious conduct of the trial proceedings, in consultation with the Trial Chamber.
3. The judge may at any time, *proprio motu* or, if appropriate, at the request of a party, refer specific issues to the Trial Chamber for its decision. A majority of the Trial Chamber may also decide *proprio motu* or, if appropriate, at the request of a party, to deal with issues that could otherwise be dealt with by the judge.
4. In order to fulfil his or her responsibilities for the preparation of the trial, the judge may hold status conferences and render orders and decisions. The judge may also establish a work plan indicating the obligations the parties are required to meet pursuant to this rule and the dates by which these obligations must be fulfilled.
5. The functions of the judge may be performed in relation to preparatory issues, whether or not they arise before or after the commencement of the trial. These issues may include:
 - (a) Ensuring proper disclosure between the parties;
 - (b) Ordering protective measures where necessary;
 - (c) Dealing with applications by victims for participation in the trial, as referred to in article 68, paragraph 3;
 - (d) Conferring with the parties regarding issues referred to in regulation 54 of the Regulations of the Court, decisions thereon being taken by the Trial Chamber;
 - (e) Scheduling matters, with the exception of setting the date of the trial, as referred to in rule 132, sub-rule 1;
 - (f) Dealing with the conditions of detention and related matters; and
 - (g) Dealing with any other preparatory matters that must be resolved which do not otherwise fall within the exclusive competence of the Trial Chamber.
6. The judge shall not render decisions which significantly affect the rights of the accused or which touch upon the central legal and factual issues in the case, nor shall he or she, subject to sub-rule 5, make decisions that affect the substantive rights of victims.

* Dated 25 September 2012.

Annex II

Recommendation 2 - the proposal to amend the rule of procedure and evidence

Rule 132 *bis*

Designation of a judge for the preparation of the trial

1. In exercising its authority under article 64, paragraph 3 (a), a Trial Chamber may designate one or more of its members for the purposes of ensuring the preparation of the trial.

~~2. The functions of the judge may be performed in relation to preparatory issues, in consultation with the Trial Chamber, whether or not they arise before or after the commencement of the trial. [formerly chapeau of paragraph 5]~~

~~2. The judge shall take all necessary preparatory measures in order to facilitate the fair and expeditious conduct of the trial proceedings, in consultation with the Trial Chamber.~~

3. The judge may at any time, proprio motu or, if appropriate, at the request of a party, refer specific issues to the Trial Chamber for its decision. A majority of the Trial Chamber may also decide proprio motu or, if appropriate, at the request of a party, to deal with issues that could otherwise be dealt with by the judge.

Move to Regulations of the Court:

~~2. The judge shall take all necessary preparatory measures in order to facilitate the fair and expeditious conduct of the trial proceedings [, in consultation with the Trial Chamber – moved to former paragraph 5, chapeau, now paragraph 2],~~

4. In order to fulfil his or her responsibilities for the preparation of the trial, the judge may hold status conferences and render orders and decisions. The judge may also establish a work plan indicating the obligations the parties are required to meet pursuant to this rule and the dates by which these obligations must be fulfilled.

~~5. The functions of the judge may be performed in relation to preparatory issues, whether or not they arise before or after the commencement of the trial.~~

From paragraph 5.

These issues may include:

- (a) Ensuring proper disclosure between the parties;
- (b) Ordering protective measures where necessary;
- (c) Dealing with applications by victims for participation in the trial, as referred to in article 68, paragraph 3;
- (d) Conferring with the parties regarding issues referred to in regulation 54 of the Regulations of the Court, decisions thereon being taken by the Trial Chamber;
- (e) Scheduling matters, with the exception of setting the date of the trial, as referred to in rule 132, sub-rule 1;
- (f) Dealing with the conditions of detention and related matters; and
- (g) Dealing with any other preparatory matters that must be resolved which do not otherwise fall within the exclusive competence of the Trial Chamber.

6. The judge shall not render decisions which significantly affect the rights of the accused or which touch upon the central legal and factual issues in the case, nor shall he or she, subject to sub-rule 5, make decisions that affect the substantive rights of victims.

Annex III

Letter from the President of the Court to the President of the Assembly, dated 12 October 2012*

Excellency,

I have the honour to inform you that on 21 September 2012, pursuant to article 51(2) (b) of the Statute of the International Criminal Court, the judges of the Court agreed, by absolute majority, upon a proposal to amend the Rules of Procedure and Evidence so as to specify that the functions of the Trial Chamber, in respect of trial preparation, may be exercised by a single judge or single judges in order to expedite proceedings and to ensure cost efficiency.

The draft proposal was submitted on 25 September 2012 to the Secretariat of the Assembly of States Parties for circulation among States Parties.

I would be grateful if the proposal on this matter could be considered at the coming session of the Assembly.

Please find attached the proposal and explanatory note.

I will be available to discuss the proposal during my visit to New York for the international law week (29 October-2 November), if this would be helpful.

Excellency, please accept the assurances of my highest consideration.

[Signature]

Sang-Hyun Song

* Reference: 2012/PRES/502.