

Confidential Annex A

article 55

Part 6. Investigation and prosecution

not expressly state that assigned counsel must be competent, but it is increasingly accepted that this is an inherent requirement of the right to assigned counsel.

(d) "to be questioned in the presence of counsel"

- 15 In a significant advance in the protection of suspects over previous international instruments, the *ICTY* and *ICTR Rules* both prohibit questioning of a suspect in the absence of counsel unless the suspect has voluntarily waived that right¹⁹. Article 55 para. 2 (d) of the *Rome Statute* includes the same prohibition as in these rules, but although it does not contain the express prohibition in these rules on continuing questioning of a suspect who, after a previous waiver, subsequently expresses the desire for counsel. Although this would seem to be implicit in the original guarantee, an express provision to this effect in the Rules of Procedure and Evidence would clarify this point. In addition to the prohibition of questioning of suspects in the absence of counsel, the *ICTY* and *ICTR Rules* provide detailed requirements to make audio or video recordings of the questioning and to transcribe them "as soon as practicable after the conclusion of questioning" and to provide the transcript and the tape to the suspect. These recording requirements are a useful safeguard for ensuring the integrity of the questioning and are likely to be included in the Rules of Procedure and Evidence.

C. Special Remarks

- 16 There are a number of important rights which suspects or detainees who have not been accused of a crime – such as a witness transferred from a state to the custody of the Court – have under international law which are not expressly included in article 55 or some other provision of the *Rome Statute*. The expressly recognized rights of suspects under the *Rome Statute* do not include all the rights of suspects in detention recognized in international instruments such as the *ICCPR*, the *UN Standard Minimum Rules for the Treatment of Prisoners*, the *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* and the *Rules of Detention* of the two International Criminal Tribunals. These guarantees should be included in the Court's rules of procedure and evidence and its rules of detention for persons detained before trial under order of the Court. The right to have adequate time and facilities for a defence, guaranteed under article 67 of the *Rome Statute* to an accused is an important aspect of the right to counsel, and should apply to counsel representing a suspect, since effective representation of suspects may require time to provide advice and access to certain documents or other evidence, although this right may not be as extensive as the right of an accused. Perhaps the most important right which has not been expressly recognized in the *Rome Statute* is the right guaranteed in article 9 para. 4 of the *ICCPR* to have the Court review the lawfulness of detention and, if that detention is unlawful, to be released.

¹⁹ Rule 42 (B) *ICTY Rules* states:

"Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel."

Rule 42 (B) *ICTR Rules* is identical.

Article 56

Role of the Pre-Trial Chamber in relation to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.
- (b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, 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.
- (c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.
2. The measures referred to in paragraph 1 (b) may include:
 - (a) Making recommendations or orders regarding procedures to be followed;
 - (b) Directing that a record be made of the proceedings;
 - (c) Appointing an expert to assist;
 - (d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;
 - (e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;
 - (f) Taking such other action as may be necessary to collect or preserve evidence.
3. (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.
- (b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.
4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

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A. Introduction

1 In the ILC Draft Statute, the investigation of crimes within the jurisdiction of the Court was entirely under the control of the Prosecutor; judicial intervention at the investigative stage was limited to the issuance of warrants and orders, or examination of the indictment filed by the Prosecutor¹. The Draft did not include any provision directed at assisting an accused person to collect evidence or intervene in investigative acts performed by the Prosecutor. The fact that a suspect or an accused was left on his or her own in relation to the investigative measures required for the preparation of his or her defence, following the "adversarial" tradition, was criticised in the Ad Hoc Committee: "Some concern was voiced ... that the Statute drew extensively on the common-law system, even though the civil-law system might afford greater protection to the suspect or the accused at the early stage of investigation or prosecution."² The reaction to this view can be read on the very same page: "Some delegations observed, however, that undue judicial control over the investigation would interfere with the separation of the judicial and prosecutorial functions."

The concern that without some form of judicial intervention at the investigation stage, an accused would be incapable of effectively collecting evidence and preparing his or her defence lead to the presentation of the first proposals to involve a judicial organ of the Court in an investigation, which were submitted during the August 1996 Preparatory Committee Session. Their aim was to ensure that there was at least partial "equality of arms" between an accused or a suspect and the Prosecutor at the stage of investigation and prosecution. Thus, the prejudice to the accused resulting from the particular nature of the ICC proceedings – conducted away from the country of the defendants and away from where the evidence and witnesses were readily available³ –, would be minimized. The initial proposals empowered a judicial organ of the ICC to intervene in the process of gathering evidence in different ways: one proposal granted any person suspected of committing crimes within the jurisdiction of the Court to obtain an order from a Pre-Trial Chamber, addressed to the Prosecutor, instructing him or her to "accomplish certain acts, seeking, where necessary, cooperation from any State party"⁴; other proposals established a duty on the Prosecutor to notify to the Presidency

¹ Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Statute for an International Criminal Court, 2 May-22 July 1994, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994), articles 26 para. 4, 27 para. 2 and 28.

² Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, U.N. GAOR, 50th Sess., Supp. No. 22, U.N. Doc. A/50/22 (1995), p. 50.

³ Statement contained in the 1995 Ad Hoc Committee Report, *supra* note 2, p. 29.

⁴ Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. GAOR, 51st Sess., Supp. No. 22, U.N. Doc. A/51/22 (1996), Vol. II, p. 115: rights of suspect to gather evidence. This approach had also been suggested by the Siracusa Draft, proposed article 26 para. 6 (e): "A person suspected of a crime under this Statute shall: ... [have the right] (e) to obtain an

his or her intention to perform special investigative acts which, because of their nature, could not be subsequently reproduced at trial⁵ and to ask for a judge to be appointed in order to carry out or supervise the act⁶ in question. Both proposals raised concerns among those delegations who feared that excessive judicial interference at the stage of investigation and prosecution would undermine the independence of the Prosecutor.

Despite divergent views at the outset of negotiation, by the August 1997 Preparatory Committee Session delegations were willing to explore different alternatives regarding judicial intervention and supervision during an investigation. A number of delegations engaged in the re-drafting of the existing proposals; the result of this exercise was a new draft provision, then referred to as article 26^{ter}, which, as it can be read in the footnote attached thereto, established that "in exceptional circumstances in which a unique opportunity appears to exist for the taking or collection of evidence, the Pre-Trial Chamber may be involved in order to assure a fair trial/protect the rights of the defence"⁷. However, the proposal contained different bracketed options, reflecting "differing views as to the balance to be struck between the need to ensure the Prosecutor's independence and the desirability of conferring a limited role on the Pre-Trial Chamber"⁸. That draft provision constitutes the core of what, after subsequent re-draftings in Rome⁹, became current article 56 of the Statute.

B. Analysis and interpretation of elements

I. Paragraph 1

1. Subparagraph (a)

This subparagraph sets forth the boundaries of the Pre-Trial Chamber's role during the investigative stage, limiting its role to where acts of investigation that the Prosecutor intends to perform present a "unique investigative opportunity" related to evidence that may not be subsequently available for the purposes of a trial. The concept reflects the civil law category of "*definitive and unrepeatable acts*" or the so-called "*anticipated taking of evidence*"¹⁰, but also the common law tradition of ensuring cross-examination in the case of a witness that will not be available at trial (*depositions*). The rationale underlying the provision is that, in the case of the taking of evidence that, because of its nature, cannot be fully reproduced at trial (*e.g.*, a mass-grave exhumation), but rather a

order from the Court for measures to ensure 'equality of arms' "; its commentary notes that "The right to request application of the Prosecutor's powers is an important feature of the 'equality of arms' during pre-trial proceedings. Without this facility, it may be impossible to obtain information that is relevant to the defence, notably documents." A similar conclusion drove the drafters of the Statute to include subparagraph (b) of article 57 para. 3. See F. Guariglia and K. Harris, article 57.

⁵ Such as an inspection, a scientific test or the taking of testimony of a witness that would not subsequently be available for trial.

⁶ *Ibid.*, p. 216.

⁷ Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997, U.N. Doc. A/AC.249/1997/L.8/Rev.1 (1997), p. 20, fn. 18.

⁸ *Ibid.*

⁹ See U.N. Doc. A/CONF.183/C.1/WGPM/L.38, A/CONF.183/C.1/WGPM/L.38/Rev.1 and A/CONF.183/C.1/WGPM/L.38/Rev.1/Corr.1.

¹⁰ See J. Maier, DERECHO PROCESAL PENAL 589 (1996).

record of the way in which was obtained will be relied upon¹¹, there is a need to take extraordinary measures to preserve that evidence and give due weight to the rights of the parties to contest it. The adoption of these measures should not be in the sole hands of the Prosecutor, even despite the clear mandate to investigate incriminating and exonerating circumstances equally (article 54 para. 1 (a)), but rather be decided by a neutral organ of the Court, meaning by this an organ with no commitment to the task of investigating and prosecuting crimes within the jurisdiction of the Court. Accordingly, subparagraph (a) establishes a *duty* of the Prosecutor to inform the Pre-Trial Chamber of his or her intention to carry out an act that may fall under the category envisaged in article 56, with a view to a decision as to the adequate protective measures set forth in paragraph 2. An unjustified breach of this duty should lead to the inadmissibility of the evidence at trial; this should be clearly reflected in the Rules of Procedure and Evidence, as should the exceptional circumstances (such as extreme urgency) that could relieve the Prosecutor from his or her unfettered obligation to notify the Pre-Trial Chamber¹².

2. Subparagraph (b)

- 4 The measures that may be taken under paragraph 2 need to be requested, in principle, by the Prosecutor, if he or she considers that they are required for the purposes of ensuring the efficiency and integrity of the proceedings and the protection of the rights of the defence. This means that, whereas the Prosecutor has an obligation to notify the Pre-Trial Chamber of the performance of unique acts of investigation under subparagraph (a), he or she has the *authority* to seek these measures, and therefore retains sufficient discretion not to do so. However, where the Pre-Trial Chamber disagrees with the Prosecutor's decision not to request any of these measures, the Pre-Trial Chamber is given authority to take them on its own initiative pursuant to paragraph 3 (a). In addition, measures under article 56 para. 2 can also be triggered by request of a person who has been arrested or has appeared pursuant to a summons under article 58, by virtue of the power contained in article 57 para. 3 (b). Finally, it must be noted that it is for the chamber to determine which measures are appropriate for the purposes of paragraph 1 (b).

- 5 It must be stressed that article 56 should not be read as creating a *juge d' instruction* in the traditional sense of the term, *i.e.*, an investigative judge¹³. The role of the Pre-Trial Chamber under this provision is not to make decisions on, for example, which investigative acts ought to be carried out pursuant to the need for an adequate and efficient investigation, which is a matter that falls within the exclusive remit of the Prosecutor. Rather, its role is to ensure that specific investigative acts that he or she has decided to undertake are carried out in a way that guarantees the efficiency and integrity

¹¹ See Preparatory Committee document U.N. Doc. A/AC.249/L.6, Note to Rule 89bis.

¹² See commentary to article 57 in: M.Ch. Bassiouni (ed.), *Model Draft Statute for the International Criminal Court based on the Preparatory Committee's text to the Diplomatic Conference*, 13ter NOUVELLES ETUDES PÉNALES 89 (1998).

¹³ That is how Ch.L. Blakesley considers the role of the Pre-Trial Chamber under article 56; see L. Sadat Wexler (special ed.), *Observations on the consolidated ICC text before the final session of the Preparatory Committee*, 13bis NOUVELLES ETUDES PÉNALES 77 (1998).

of the proceedings and protects the rights of the defence¹⁴. Furthermore, the article establishes that, as a principle, the intervention of the Pre-Trial Chamber must be triggered by the Prosecutor (subparagraph (a)), another substantial difference with the *juge d' instruction*, who usually enjoys full investigative powers¹⁵.

3. Subparagraph (c)

The subparagraph establishes the duty of the Prosecutor to provide relevant information regarding the investigative acts to the person arrested or who appeared before the Court in response to a summons. This is a natural consequence of the essential objective of article 56, which is the due protection of the rights of the defence; perhaps the most important measure that can be taken under paragraph 2 *vis-à-vis* the rights of the defence is the authorization of counsel to participate¹⁶. Moreover, only on the basis of a timely notification to the defence can a person that has been arrested or has appeared before the Court exercise his or her right to make a request under article 57 para. 3 (b) to obtain measures enumerated in article 56 from the Pre-Trial Chamber. Accordingly, even if the language in this subparagraph allows the Pre-Trial Chamber to authorize the Prosecutor not to notify the defence, this should only take place in extremely exceptional circumstances, which should be specified in the Rules of Procedure and Evidence, and should be balanced by other measures, that might equally protect the rights of the defence. The unjustified failure to notify the defence under this subparagraph – including the situation of an erroneous or excessive authorization by the Pre-Trial Chamber – should further lead to inadmissibility of the evidence obtained.

II. Paragraph 2

Paragraph 2 contains a non-exhaustive list¹⁷ of possible measures to be taken by the Pre-Trial Chamber in the event of a unique investigative opportunity. As reflected in the bracketed options contained in previous drafts¹⁸, some delegations were reluctant to give the Pre-Trial Chamber, or a judge appointed by it, the power to make "orders" regarding the procedures to be followed, the collection and preservation of evidence and the questioning of persons. However, later in the negotiation process it was recognized that the chamber might be faced with situations in which the power to make orders would, indeed, be required, such as the undue refusal of the Prosecutor to make available a certain witness to the defence, or to allow the defence into the site being

¹⁴ For some similar examples in comparative law, see Italian Code of Criminal Procedure, articles 392 et seq., Model Code of Criminal Procedure for Latin America, article 258, and German Code of Criminal Procedure, § 160.

¹⁵ An *ex officio* intervention under paragraph 3 is only possible in the exceptional situation of an "unjustified" failure of the Prosecutor to request measures provided for in article 56, and is subject to appeal by the Prosecutor. On the scope of the investigative powers of a *juge d' instruction* in some national jurisdictions, see M. Delmas-Marty (ed.), *PROCÉDURES PÉNALES D'EUROPE* 437 (1995).

¹⁶ Subparagraph (d). It has even been stated that the "only way really to ensure fairness of such a process ... is to have defence counsel oversee the process to protect suspects or potential suspects". Ch.L. Blakesley, *supra* note 13. Notification to the defence is also a necessary requirement for a valid taking of evidence in the legal systems mentioned in *supra* note 14.

¹⁷ See subparagraph (f).

¹⁸ Decisions Taken by the Preparatory Committee, *supra* note 7, p. 20.

examined; hence, granting a certain amount of discretion and authority to the chamber seemed to be necessary.

- 8 The measures included vary in nature and in substance. The Pre-Trial Chamber needs to satisfy itself that the measure to be adopted is the most appropriate to accomplish the goal pursued by paragraph 1 (a) of this provision. This would rule out, for instance, directing that a record be made of the proceedings as an appropriate measure in the case of an unique opportunity to take testimony of a witness: such a measure would not be adequate to cure the harm that could be caused to the rights of confrontation of the defence at trial. At the same time, the Pre-Trial Chamber should interpret the measures set forth in this paragraph in a way that best favours the efficiency and integrity of the proceedings and the rights of the defence. For instance, the Pre-Trial Chamber could authorize under subparagraph (c) that an expert proposed by the defence be also appointed to assist, unless there are impelling reasons not to do so. It must be emphasized that this paragraph does not include a *numerus clausus* of available measures; on the contrary, it ends with an open-ended clause that empowers the Pre-Trial Chamber to create new measures or expand the existing ones "as may be necessary to collect or preserve evidence" (subparagraph (f)).
- 9 As noted above, probably the most important measure that can be taken in order to fulfill the objectives of article 56 is that mentioned in subparagraph (d): the provision empowering the chamber to authorize counsel to participate, and, following similar provisions in national systems¹⁹, to appoint counsel *ex officio* where there has not been yet an arrest or appearance, for example, because it is still unclear who might be implicated in the crime, or where counsel has not been designated yet by a person who has been arrested or has appeared before the Court. Moreover, in the situation of a witness that will not subsequently be available for the purposes of trial, allowing defence counsel to participate and cross-examine the witness is the only remedy that adequately compensates the diminution to the accused's rights of confrontation at trial. Hence, the Rules should establish a specific procedure for the taking of depositions, assuring that reasonable notice is given to the other party in order to allow attendance and cross-examination, such as the procedure envisaged in the ICTY Rules of Procedure and Evidence²⁰.
- 10 Finally, subparagraph (e) grants the chamber the power to appoint a judge to assist, to observe and make recommendations or orders regarding the collection or preservation of evidence. The exercise of this power will be essential in the case of depositions, where the appointed judge should act as presiding officer and assure that the act is properly carried out, and that both parties can adequately exercise their rights to cross-examination²¹.

¹⁹ See Code of Criminal Procedure of Costa Rica, article 294.

²⁰ See Human Rights Watch, COMMENTARY TO THE PREPARATORY COMMISSION 12-13 (1999).

²¹ See ICTY Rules of Procedure and Evidence, Rule 71 (c).

III. Paragraph 3

This paragraph was drafted anew at the Rome Conference²². It empowers the Pre-Trial Chamber to take any of the measures set forth in paragraph 2 on its own motion in the case of failure of the Prosecutor to make a request pursuant to paragraph 1 (b), upon consultation with the Prosecutor. The applicable standard for this determination by the chamber is more restrictive than the one set forth in paragraph 1: the Pre-Trial chamber has to satisfy itself that measures under paragraph 2 are required "to preserve evidence that it deems would be essential for the defence at trial"; moreover, the chamber needs also to determine that the Prosecutor's failure is unjustified.

Subparagraph (b) was included to address the concerns of some delegations that feared that an unjustified or excessive intrusion of the Pre-Trial Chamber could jeopardize the investigation of crimes within the jurisdiction of the Court. In order to avoid undue delay in the proceedings, it was decided that an appeal brought by the Prosecutor against the Chamber's Decision should be heard on an expedited basis.

IV. Paragraph 4

In an important decision, delegations decided not to specify the relative weight to be attached to evidence taken under article 56, but rather to leave the determination of its probative value, as well as its admissibility, to the Trial Chamber under the principles established in article 69. This is consistent with the rationale underpinning article 56, which is to ensure efficiency, integrity and fairness in the collection of specific evidence, but not to create "sacred" evidence that may not be subsequently challenged or tested at trial, as used to happen in many civil law systems with the evidence collected by the *juge d' instruction*²³. Accordingly, the Trial Chamber is free to rule on the admissibility and relevance of evidence obtained pursuant to article 56, subject to the criteria set forth in article 69 para. 4 and in the Rules of Procedure and Evidence, and even to decide its exclusion in the scenario envisaged by article 69 para. 7.

²² See U.N. Doc. A/CONF.183/C.1/WGPM/L.38/Rev.1/Corr.1.

²³ See J. Maier, *supra* note 10, 355.

Article 56

Role of the Pre-Trial Chamber in relation to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.
- (b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, 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.
- (c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.
2. The measures referred to in paragraph 1 (b) may include:
 - (a) Making recommendations or orders regarding procedures to be followed;
 - (b) Directing that a record be made of the proceedings;
 - (c) Appointing an expert to assist;
 - (d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance, or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;
 - (e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;
 - (f) Taking such other action as may be necessary to collect or preserve evidence.
3. (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.
- (b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.
4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber

Literature:

Olivier Fourmy, *Powers of the Pre-Trial Chambers*, in: Antonio Cassese (ed.), *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 1207 (2002); Håkan Friman, *The Rules of Procedure and Evidence in the Investigative Stage*, in: Horst Fischer/Claus Kreß/Sascha Rolf Lüder (eds.), *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW* 191 (2001); Fabricio Guariglia, *Investigation and Prosecution*, in: Roy S. Lee (ed.), *THE INTERNATIONAL CRIMINAL COURT. THE MAKING OF THE ROME STATUTE* 227 (1999); Claus Kreß, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, *JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE* 603 (2003).

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A. Introduction

- 1 In the ILC Draft Statute, the investigation of crimes within the jurisdiction of the Court was entirely under the control of the Prosecutor; judicial intervention at the investigative stage was limited to the issuance of warrants and orders, or examination of the indictment filed by the Prosecutor¹. The Draft did not include any provision directed at assisting an accused person to collect evidence or intervene in investigative acts performed by the Prosecutor. The fact that a suspect or an accused was left on his or her own in relation to the investigative measures required for the preparation of his or her defence, following the "adversarial" tradition, was criticised in the Ad Hoc Committee: "Some concern was voiced ... that the Statute drew extensively on the common-law system, even though the civil-law system might afford greater protection to the suspect or the accused at the early stage of investigation or prosecution."² The reaction to this view can be read on the very same page: "Some delegations observed, however, that undue judicial control over the investigation would interfere with the separation of the judicial and prosecutorial functions."
- 2 The concern that without some form of judicial intervention at the investigation stage, an accused would be incapable of effectively collecting evidence and preparing his or her defence led to the presentation of the first proposals to involve a judicial organ of the Court in an investigation, which were submitted during the August 1996 Preparatory Committee Session. Their aim was to ensure that there was at least partial "equality of arms" between an accused or a suspect and the Prosecutor at the stage of investigation and prosecution. Thus, the prejudice to the accused resulting from the particular nature of the ICC proceedings – conducted away from the country of the defendants and away from where the evidence and witnesses were readily available³ – would be minimized. The initial proposals empowered a judicial organ of the ICC to intervene in the process of gathering evidence in different ways: one proposal granted any person suspected of committing crimes within the jurisdiction of the Court to obtain an order from a Pre-Trial Chamber, addressed to the Prosecutor, instructing him or her to "accomplish certain acts, seeking, where necessary, cooperation from any State party"⁴; other proposals established a duty on the Prosecutor to notify to the Presidency his or her intention to perform special investigative acts which, because of their nature, could not be subsequently reproduced

¹ Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Statute for an International Criminal Court, 2 May-22 July 1994, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994), articles 26 para. 4, 27 para. 2 and 28.

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³ Statement contained in the 1995 Ad Hoc Committee Report, *supra* note 2, p. 29.

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at trial⁵ and to ask for a judge to be appointed in order to carry out or supervise the act⁶ in question. Both proposals raised concerns among those delegations who feared that excessive judicial interference at the stage of investigation and prosecution would undermine the independence of the Prosecutor.

Despite divergent views at the outset of negotiation, by the August 1997 Preparatory Committee Session delegations were willing to explore different alternatives regarding judicial intervention and supervision during an investigation. A number of delegations engaged in the re-drafting of the existing proposals; the result of this exercise was a new draft provision, then referred to as article 26ter, which, as it can be read in the footnote attached thereto, established that "in exceptional circumstances in which a unique opportunity appears to exist for the taking or collection of evidence, the Pre-Trial Chamber may be involved in order to assure a fair trial/protect the rights of the defence"⁷. However, the proposal contained different bracketed options, reflecting "differing views as to the balance to be struck between the need to ensure the Prosecutor's independence and the desirability of conferring a limited role on the Pre-Trial Chamber"⁸. That draft provision constitutes the core of what, after subsequent re-draftings in Rome⁹, became current article 56 of the Statute.

The explicit goal of article 56 is "to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence"¹⁰. Although paragraph 4 leaves the final determination of admissibility of evidence to the Trial Chamber, the principal purpose of article 56 is to ensure that the evidence obtained during the investigation will be admissible at trial¹¹.

B. Analysis and interpretation of elements

I. Paragraph 1

(a) Duty to inform the Pre-Trial Chamber

This subparagraph sets forth the boundaries of the Pre-Trial Chamber's role during the investigative stage, limiting its role to where acts of investigation that the Prosecutor intends to perform present a "unique investigative opportunity" related to evidence that may not be subsequently available for the purposes of a trial. The concept reflects the civil law category of "definitive and unrepeatable acts" or the so-called "anticipated taking of evidence"¹², but also the common law tradition of ensuring cross-examination in the case of a witness that will not be available at trial (*depositions*). The rationale underlying the provision is that, in the case of the taking of evidence that, because of its nature, cannot be fully reproduced at trial (e.g., a mass-grave exhumation), but rather a record of the way in which it was obtained will be relied upon¹³, there is a need to take extraordinary measures to preserve that evidence and give due weight to the rights of the parties to contest it. The adoption of these measures should not be in the sole

⁵ Such as an inspection, a scientific test or the taking of testimony of a witness that would not subsequently be available for trial.

⁶ *Ibid.*, p. 216.

⁷ Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997, U.N. Doc. A/AC.249/1997/L.8/Rev.1 (1997), p. 20, fn. 18.

⁸ *Ibid.*

⁹ See U.N. Doc. A/CONF.183/C.1/WGPM/L.38, A/CONF.183/C.1/WGPM/L.38/Rev.1 and A/CONF.183/C.1/WGPM/L.38/Rev.1/Corr.1.

¹⁰ See paragraph 1 (b).

¹¹ Cf. C. Kress, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 607 (2003): "Article 56(1)(a) ... offers a tool to take and to test evidence early in the process and to 'transport' the result to the trial stage."

¹² See J. Maier, DERECHO PROCESAL PENAL 589 (1996).

¹³ See Preparatory Committee document U.N. Doc. A/AC.249/L.6, Note to rule 89bis.

hands of the Prosecutor, even despite the clear mandate to investigate incriminating and exonerating circumstances equally (article 54 para. 1 (a)), but rather be decided by a neutral organ of the Court, meaning by this an organ with no commitment to the task of investigating and prosecuting crimes within the jurisdiction of the Court. Accordingly, subparagraph (a) establishes a *duty* of the Prosecutor to inform the Pre-Trial Chamber of his or her intention to carry out an act that may fall under the category envisaged in article 56, with a view to a decision as to the adequate protective measures set forth in paragraph 2. An unjustified breach of this duty can lead to the inadmissibility of the evidence at trial. However, article 69 vests the Trial Chamber with the authority to decide in favour of the admissibility of the evidence, on the basis of its consideration of the specific circumstances of the case (e.g. a case of extreme urgency relieving the Prosecutor from his or her obligation to notify the Pre-Trial Chamber)¹⁴.

- 6 Article 56 defines a unique investigative opportunity as: "a unique opportunity to take ... evidence, which may not be available subsequently for the purposes of a trial"¹⁵. Such a unique opportunity may arise from the factual impossibility to present the evidence at trial, e.g., the Prosecutor's only temporary access to items¹⁶, the transitory nature of the evidence (as traces of DNA) or a witness being mortally ill¹⁷. In the Preparatory Commission in charge of drafting the Rules of Procedure and Evidence a discussion took place as to whether article 56 was applicable to the testimony of vulnerable victims, a question that was ultimately left undetermined¹⁸. The Court could eventually resort to this option by combining this provision with article 68 para. 1¹⁹, if it concludes that there is an excessive risk of traumatisation of a child or a victim of sexual or gender violence, capable of leading to the effective unavailability of the testimony at trial²⁰.

(b) Decision on measures upon request of the Prosecutor

- 7 The measures that may be taken under paragraph 2 need to be requested, in principle, by the Prosecutor, if he or she considers that they are required for the purposes of ensuring the efficiency and integrity of the proceedings and the protection of the rights of the defence. This means that, whereas the Prosecutor has an obligation to notify the Pre-Trial Chamber of the performance of unique acts of investigation under subparagraph (a), he or she has the *authority* to seek these measures, and therefore retains sufficient discretion not to do so. However, where the Pre-Trial Chamber disagrees with the Prosecutor's decision not to request any of these measures, the Pre-Trial Chamber is given authority to take them on its own initiative pursuant to

¹⁴ See commentary to article 57 in: M.Ch. Bassiouni (ed.), *Model Draft Statute for the International Criminal Court based on the Preparatory Committee's text to the Diplomatic Conference*, 13ter NOUVELLES ETUDES PÉNALES 89 (1998).

¹⁵ As C. Kreß (*supra* note 11, 607 *et seq.*) has pointed out, a wide or a narrow interpretation of this term "will have considerable repercussions for the overall architecture of the proceedings. The broader the interpretation of Article 56, the less strong is the Prosecutor's position in dominating the investigation stage, and the more closely the Pre-Trial Chamber will resemble the French *juge d' instruction*. In addition, a broad interpretation of Article 56 may diminish the role of the trial as the climax of the proceedings."

¹⁶ Cf. Pre-Trial Chamber I's Decision following the Consultation held on 11 October 2005 and the Prosecution's Submission on Jurisdiction and Admissibility filed on 31 October 2005, 9 November 2005, ICC-01/04, Situation in the Democratic Republic of Congo.

¹⁷ O. Fourmy, *Powers of the Pre-Trial Chambers*, in: A. Cassese (ed.), *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 1218 (2002); W. Schabas, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 131 (2004).

¹⁸ See H. Friman, *The Rules of Procedure and Evidence in the Investigative Stage*, in: H. Fischer/C. Kreß/S.R. Lüder (eds.), *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW* 196 (2001).

¹⁹ Pursuant to this provision, the Court and the Prosecutor have to take appropriate measures for the well-being of victims and witnesses, in particular in case of sexual or gender violence or violence against children.

²⁰ For a detailed discussion of this question see C. Kreß, *Witnesses in Proceedings Before the International Criminal Court: An Analysis in the Light of Comparative Criminal Procedure*, in: H. Fischer/C. Kreß/S.R. Lüder (eds.), *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW* 309-362 *et seq.* (2001), who proposes rule 68 sub-rule 1 (a) as an alternative legal basis to spare vulnerable witnesses from a repetition of testimony.

paragraph 3 (a). In addition, measures under article 56 para. 2 can also be triggered by request of a person who has been arrested or has appeared pursuant to a summons under article 58, by virtue of the power contained in article 57 para. 3 (b). Finally, it must be noted that it is for the Chamber to determine which measures are appropriate for the purposes of paragraph 1 (b). However, before its decision, the Pre-Trial Chamber is obliged to consult the Prosecutor, who may advise the Chamber that intended measures could jeopardize the proper conduct of the investigation (rule 114). In principle, the Prosecutor must also inform the person arrested or who appeared in response to a summons (subparagraph (c)). If so, the person and his or her counsel have a right to participate in the consultations (rule 114 sub-rule 1). If there has not yet been an arrest or appearance or if the Chamber has authorized the Prosecutor to abstain from informing the defence (subparagraph (c)), the Chamber may hold an *ex parte* consultation with the Prosecutor on the measures to be taken and the modalities of their implementation²¹.

It must be stressed that article 56 should not be read as creating a *juge d' instruction* in the traditional sense of the term, *i.e.*, an investigative judge²². The role of the Pre-Trial Chamber under this provision is not to make decisions on, for example, which investigative acts ought to be carried out pursuant to the need for an adequate and efficient investigation, which is a matter that falls within the exclusive remit of the Prosecutor. Rather, its role is to ensure that specific investigative acts that he or she has decided to undertake are carried out in a way that guarantees the efficiency and integrity of the proceedings and protects the rights of the defence²³. Furthermore, the article establishes that, as a principle, the intervention of the Pre-Trial Chamber must be triggered by the Prosecutor (subparagraph (a)), another substantial difference with the *juge d' instruction*, who usually enjoys full investigative powers²⁴.

Since investigations rely heavily on the cooperation regime under Part 9, the measures taken by the Pre-Trial Chamber may collide with aspects of national law of the requested State. Pursuant to article 99 para. 1, the requested State must nonetheless execute the request for assistance, unless prohibited by its national law, "in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process". Article 88 ensures that States Parties have procedures available for all the forms of cooperation under Part 9²⁵.

(c) Duty to inform the "suspect"

Subparagraph (c) establishes the duty of the Prosecutor to provide relevant information regarding the investigative acts to the person arrested or who appeared before the Court in response to a summons. This is a natural consequence of the essential objective of article 56, which is the due protection of the rights of the defence; perhaps the most important measure that can be taken under paragraph 2 *vis-à-vis* the rights of the defence is the authorization of counsel to participate²⁶. Moreover, only on the basis of a timely notification to the defence can a person

²¹ See, e.g., Pre-Trial Chamber I's Decision to Hold Consultation under Rule 114, 21 April 2005, ICC-01/04, Situation in the Democratic Republic of Congo.

²² That is how Ch.L. Blakesley considers the role of the Pre-Trial Chamber under article 56; see L. Sadat Wexler (special ed.), *Observations on the consolidated ICC text before the final session of the Preparatory Committee*, 13bis NOUVELLES ETUDES PÉNALES 77 (1998).

²³ For some similar examples in comparative law, see Italian Code of Criminal Procedure, articles 392 *et seq.*, Model Code of Criminal Procedure for Latin America, article 258.

²⁴ An *ex officio* intervention under paragraph 3 is only possible in the exceptional situation of an "unjustified" failure of the Prosecutor to request measures provided for in article 56, and is subject to appeal by the Prosecutor. On the scope of the investigative powers of a *juge d' instruction* in some national jurisdictions, see M. Delmas-Marty (ed.), *PROCÉDURES PÉNALES D'EUROPE* 437 (1995).

²⁵ For a general authorization of audio- or video-recording or the presence of persons at the request of the Court see, e.g., Austrian "Bundesgesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof", § 14, BGBl. I 2002/135.

²⁶ Paragraph 2 (d). It has even been stated that the "only way really to ensure fairness of such a process ... is to have defence counsel oversee the process to protect suspects or potential suspects". Ch.L. Blakesley, *supra*

that has been arrested or has appeared before the Court exercise his or her right to make a request under article 57 para. 3 (b) to obtain measures enumerated in article 56 from the Pre-Trial Chamber. Accordingly, even if the language in this subparagraph allows the Pre-Trial Chamber to authorize the Prosecutor not to notify the defence, this should only take place in extremely exceptional circumstances and should be balanced by other measures that might equally protect the rights of the defence. The unjustified failure to notify the defence under this subparagraph – including the situation of an erroneous or excessive authorization by the Pre-Trial Chamber – should further lead to inadmissibility of the evidence obtained. Regrettably, the Rules of Procedure and Evidence fail to clarify these issues.

II. Paragraph 2: Exemplary list of measures

- 11 Paragraph 2 contains a non-exhaustive list of possible measures to be taken by the Pre-Trial Chamber in the event of a unique investigative opportunity. As reflected in the bracketed options contained in previous drafts²⁷, some delegations were reluctant to give the Pre-Trial Chamber, or a judge appointed by it, the power to make "orders" regarding the procedures to be followed, the collection and preservation of evidence and the questioning of persons. However, later in the negotiation process it was recognized that the Chamber might be faced with situations in which the power to make orders would, indeed, be required, such as the undue refusal of the Prosecutor to make available a certain witness to the defence, or to allow the defence into the site being examined; hence, granting a certain amount of discretion and authority to the Chamber seemed to be necessary.
- 12 The measures included vary in nature and in substance. The Pre-Trial Chamber needs to satisfy itself that the measure to be adopted is the most appropriate to accomplish the goal pursued by paragraph 1 (b) of this provision. This would rule out, for instance, directing that a record be made of the proceedings as an appropriate measure in the case of a unique opportunity to take testimony of a witness: such a measure would not be adequate to cure the harm that could be caused to the rights of confrontation of the defence at trial. At the same time, the Pre-Trial Chamber should interpret the measures set forth in this paragraph in a way that best favours the efficiency and integrity of the proceedings and the rights of the defence. For instance, the Pre-Trial Chamber could authorize under subparagraph (c) that an expert proposed by the defence be also appointed to assist, unless there are impelling reasons not to do so. It must be emphasized that this paragraph does not include a *numerus clausus* of available measures, as demonstrated by its preliminary wording²⁸ and its open-ended clause, which empowers the Pre-Trial Chamber to create new measures or expand the existing ones "as may be necessary to collect or preserve evidence" (subparagraph (f))²⁹. Rule 114 sub-rule 1 adds unspecified measures to ensure the free communication between the "suspect" and his or her counsel under article 67 para. 1 (b) to the exemplary list in paragraph 2³⁰.
- 13 With regard to paragraph 2 (b), rule 112 sub-rule 5 specifies that the Pre-Trial Chamber may order that the questioning of any person shall be audio- or video-recorded according to the procedure under rule 112.
- 14 As noted above, the measure mentioned in subparagraph (d) is probably the most important that can be taken in order to fulfil the objectives of article 56: to authorize counsel to participate,

note 22. Notification to the defence is also a necessary requirement for a valid taking of evidence in the legal systems mentioned in *supra* note 23.

27 Decisions Taken by the Preparatory Committee, *supra* note 7, p. 20.

28 "The measures ... may include" (emphasis added).

29 O. Fourmy, *supra* note 17, 1219, assumes that the measures listed "indicate that the PTC should envisage its role in this respect rather broadly".

30 Cf. H. Friman, *supra* note 18.

and, following similar provisions in national systems³¹, to appoint counsel *ex officio* where there has not been yet an arrest or appearance, for example, because it is still unclear who might be implicated in the crime, or where counsel has not been designated yet by a person who has been arrested or has appeared before the Court³². Moreover, in the situation of a witness that will not subsequently be available for the purposes of trial, allowing defence counsel to participate and cross-examine the witness is the only remedy that adequately compensates the diminution to the accused's rights of confrontation at trial.

Subparagraph (e) grants the Chamber the power to appoint a judge to assist, to observe and make recommendations or orders regarding the collection or preservation of evidence. The exercise of this power will be essential in the case of depositions, where the appointed judge should act as presiding officer and assure that the act is properly carried out, and that both parties can adequately exercise their rights to cross-examination³³.

Finally, the "catch-all" clause in subparagraph (f) authorizes the Chamber to order "such other action as may be necessary to collect or preserve evidence". The formulation "*such* other action" would appear to indicate that these measures must be similar to the measures listed in subparagraph (a) – (e). Therefore, subparagraph (f) would not empower the Pre-Trial Chamber to go beyond the scope of the authority provided by the other sub-provisions of article 56 and, for instance, collect or preserve evidence itself. Rather, the Chamber's authority appears to be limited to the regulation of the procedures for the collection or preservation of evidence.

Pre-Trial Chamber I's decision in the situation of the Democratic Republic of Congo may serve as an example for the type of applicable measures under article 56. The Chamber authorized the performance of forensic examinations and decided upon the following measures³⁴: the appointment of an *ad hoc* counsel to represent the general interests of the defence for the purpose of the forensic examination – a measure according to paragraph 2 (d); an independent laboratory should perform the forensic examinations and it should respond in writing to any additional questions and observations by the Prosecutor or the *ad hoc* counsel for the defence – measures necessary for the integrity and efficiency of the proceedings and for the protection of the rights of the defence; the laboratory should produce a comprehensive record of its forensic examinations and a report on the conclusions of the examinations – a measure according to paragraph 2 (b); the laboratory should retain in its possession items subject to forensic examination for a certain period³⁵ – a measure necessary to preserve evidence according to paragraph 2 (f). Later on, Pre-Trial Chamber I gave both parties the opportunity to make final observations on the additional report of the laboratory³⁶.

III. Paragraph 3: Decision on measures *proprio motu*

This paragraph was drafted anew at the Rome Conference³⁷. It empowers the Pre-Trial Chamber to take any of the measures set forth in paragraph 2 on its own motion or at the request of the defence³⁸ in the case of failure of the Prosecutor to make a request pursuant to paragraph 1 (b), upon consultation with the Prosecutor. The applicable standard for this determination by the Chamber is more restrictive than the one set forth in paragraph 1: the Pre-Trial Chamber has to

31 See Code of Criminal Procedure of Costa Rica, article 294.

32 Pursuant to regulation 77 of the Regulations of the Court, the Registrar shall establish an Office of Public Counsel for the defence. Its tasks include "representing and protecting the rights of the defence during the initial stages of the investigation, in particular for the application of article 56, paragraph 2 (d)".

33 See ICTY Rules of Procedure and Evidence, rule 71 (C).

34 Decision on the Prosecutor's Request for Measures under Article 56, 26 April 2005, ICC-01/04.

35 Namely until a copy of any additional report produced had been provided to the Registrar.

36 Decision Establishing a Deadline for Final Submissions on the NFI's Additional Report, 8 February 2006, ICC-01/04.

37 See U.N. Doc. A/CONF.183/C.1/WGPM/L.38/Rev.1/Corr.1.

38 See article 57 para. 3 (b).

satisfy itself that measures under paragraph 2 are required "to preserve evidence that it deems would be essential for the defence at trial"; moreover, the Chamber needs also to determine that the Prosecutor's failure is unjustified.

- 19 Paragraph 3 does not explicitly regulate whether the Pre-Trial Chamber's intervention needs to be triggered by prior information under paragraph 1 (a) or whether the Pre-Trial Chamber is allowed to take measures *proprio motu* even if it was not informed of a unique investigative opportunity by the Prosecutor. The literal and systematic interpretation alludes that paragraph 3 is only applicable in case of prior information by the Prosecutor. Paragraph 1 distinguishes clearly between the information of a unique investigative opportunity (subparagraph (a)) and the seeking of measures according to subparagraph (b). The linguistic differentiation leads to the conclusion that paragraph 3 refers to a situation where the Prosecutor has informed the Chamber of a unique investigative opportunity, but has failed to make a request under paragraph 1 (b). This interpretation is supported by the fact that paragraph 1 (a) leaves it to the Prosecutor's discretion to consider whether an investigation presents a unique investigative opportunity. A contrary interpretation would bestow on the Pre-Trial Chamber a more active role than intended in the Rome Conference. Thus, it is for the Prosecutor to decide whether an investigation presents a unique investigative opportunity and for the Pre-Trial Chamber to decide whether measures under paragraph 2 are necessary. If the Prosecutor fails to consider an investigation as a unique investigative opportunity, he or she risks the loss of the evidence, since the Trial Chamber may determine the evidence as inadmissible³⁹. In so far as exonerating evidence is concerned, the Trial Chamber has the authority to take any failure by the Prosecutor to timely trigger article 56 procedures into consideration in its overall assessment of the evidence before it and the fairness of the proceedings.

- 20 In an *obiter dictum* Pre-Trial Chamber II stated that, pursuant to article 56 para. 3 (a) and article 57 para. 3 (c), "the Chamber may even preserve evidence in favour of the defence"⁴⁰. As far as article 56 is concerned, this view is controversial⁴¹. Article 56 para. 3 (a) solely deals with measures to preserve evidence⁴². Under this provision, the Chamber may impose conditions on the modalities of taking evidence, even if the Prosecutor has not requested such measures. But this provision does not appear, on its face, to empower the Chamber to take evidence itself⁴³.

- 21 Rule 114 sub-rule 2 stipulates that a decision under paragraph 3 (a) is to be taken by the full Chamber.

- 22 Regulation 48 para. 1 of the Regulations of the Court vests the Pre-Trial Chamber with added authority to request information from the Prosecutor. When interpreting this much debated provision, it must be kept in mind that the Regulations of the Court may only incorporate provisions which are necessary for the routine functioning of the Court⁴⁴. By no means can the Regulations modify the divisions of functions between Prosecution and Pre-Trial Chambers, as envisaged in the Statute and the Rules. Thus, the Regulations of the Court must be interpreted in conformity with the Statute and the Rules. Additional authority granted to Chambers of the Court by virtue of the Regulations should be interpreted in a restrictive manner,

³⁹ It must be noted that the Pre-Trial Chamber may, at the request of the defence, request a State Party to preserve the evidence. Alternatively, the Pre-Trial Chamber may provide for the preservation of evidence according to article 57 para. 3 (c). For details see article 57, margin Nos. 19 and 29.

⁴⁰ Decision on Prosecutor's Applications for Leave to Appeal dated the 15th Day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11th Day of May 2006, 10 July 2006, ICC-02/04-01/05, Case of Kony *et al*, para. 35.

⁴¹ For a discussion, whether article 57 para. 3 (c) grants such a power to the Chamber, see article 57, margin No. 29.

⁴² See the wording of paragraph 3 (a): "measures pursuant to this article"; "such measures".

⁴³ Concurring St. van Heeck, DIE WEITERENTWICKLUNG DES FORMELLEN VÖLKERSTRAFRECHTS 210 (2006). For a different view, see C. Kreß (*supra* note 11, 608), stating that article 56 "entrusts the Pre-Trial Chamber with a subsidiary *proprio motu* role as an investigative body".

⁴⁴ Article 52 para. 1.

and always with the objective of fostering the Court's routine functioning. This guideline makes clear that under regulation 48 the Chamber may only request additional information, if the consultation with the Prosecutor leaves serious doubts as to whether there was "good reason for the Prosecutor's failure to request the measures". In this case, the Chamber "may request the Prosecutor to provide specific or additional information or documents in his or her possession, or summaries thereof"⁴⁵.

The Rules of Procedure and Evidence do not explicitly provide for consultations with the defence before a decision by the Pre-Trial Chamber on its own motion. However, since measures according to paragraph 3 aim at the preservation of evidence essential for the defence, it seems advisable to hold consultations not only with the Prosecution, but also with the defence, where appropriate, provided that there is a person arrested or who appeared in response of a summons.

Subparagraph (b) was included to address the concerns of some delegations that feared that an unjustified or excessive intrusion of the Pre-Trial Chamber could jeopardize the investigation of crimes within the jurisdiction of the Court. In order to avoid undue delay in the proceedings, it was decided that an appeal brought by the Prosecutor against the Chamber's Decision should be heard on an expedited basis.

IV. Paragraph 4: Admissibility of evidence

In an important decision, delegations decided not to specify the relative weight to be attached to evidence taken under article 56, but rather to leave the determination of its probative value, as well as its admissibility, to the Trial Chamber under the principles established in article 69. This is consistent with the rationale underpinning article 56, which is to ensure efficiency, integrity and fairness in the collection of specific evidence, but not to create "sacred" evidence that may not be subsequently challenged or tested at trial, as used to happen in many civil law systems with the evidence collected by the *juge d' instruction*⁴⁶. Accordingly, the Trial Chamber is free to rule on the admissibility and relevance of evidence obtained pursuant to article 56, subject to the criteria set forth in article 69 para. 4 and in the Rules of Procedure and Evidence, and even to decide its exclusion in the scenario envisaged by article 69 para. 7.

⁴⁵ In the situation in the Democratic Republic of Congo, the Prosecutor expressed his opinion that "the consultation process enshrined in Article 56 (3) and Rule 114 (2), ... necessarily require the provision of details pertaining to the measures being considered"; Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference, 8 March 2005, ICC-01/04, para. 22. This seems self-evident, since, in the first place, the Chamber has to work towards the Prosecution seeking the measures. See J. Maier, *supra* note 12, 355.