

PUBLIC ANNEX B

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The Rome Statute
of the International
Criminal Court

A Commentary

Third Edition

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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: Fourmy, O., 'Powers of the Pre-Trial Chambers', in: A. Cassese (ed.), *The Rome Statute of the International Criminal Court* (OUP 2002) 1207; Friman, H., 'The Rules of Procedure and Evidence in the Investigative Stage', in: H. Fischer, C. Krefß and S.R. Lüder (eds.), *International and National Prosecution of Crimes Under International Law* (Arno Spitz 2001) 191; *id.*, 'Investigation and Prosecution', in: R.S. Lee *et al.* (eds.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 493; Guariglia, F., 'Investigation and Prosecution', in: R.S. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute* (Kluwer Law International 1999) 227; Krefß, C., 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise', (2003) *JICJ* 603; De Smet, S., 'A structural analysis of the role of the Pre-Trial Chamber in the fact-finding process of the ICC', in: C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009) 405.

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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 Prosecutor.¹ 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

¹ International Law Commission 'Report of the International Law Commission on the Work of its 46th Session, Draft Statute for an International Criminal Court' (2 May – 22 July 1994) UNGA 49th Session Supp No 10 UN Doc A/49/10 arts 26 para 4, 27 para 2 and 28.

² UN GA 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court' (1995) 50th Session UN Doc Supp No 22 (A/50/22) 50.

³ Statement contained in the 1995 Ad Hoc Committee Report (n 2) 29.

⁴ UN GA 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' (1996) 51st Session UN Doc Supp No 22 (A/51/22) vol II 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 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 Guariglia and Hochmayr below article 57 mn 17.

Presidency 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 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 Rome,⁹ 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 trial.¹¹

B. Analysis and interpretation of elements

I. Paragraph 1

1. 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 (eg a mass-grave exhumation), but rather a record of the way in which it was obtained will be

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.*, 216.

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

⁸ *Ibid.*

⁹ See UN Doc A/CONF.183/C.1/WP.GM/L.38, A/CONF.183/C.1/WP.GM/L.38/Rev.1 and A/CONF.183/C.1/WP.GM/L.38/Rev.1/Corr.1.

¹⁰ See para 1 (b).

¹¹ Cf. Kreß (2003) JICJ 607: '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'. See further Schabas, *ICC Commentary* (2010) 692: 'Although in principle, evidence must be presented at trial, article 56 provides an exceptional mechanism by which it may be collected under judicial oversight and then made available at trial'. De Smet, in: Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009) 405, 426.

¹² See Maier, *Derecho Procesal Penal* (1996) vol I 589.

relied upon,¹³ 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 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 (eg 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, eg, the Prosecutor's only temporary access to items,¹⁶ the transitory nature of the evidence (as traces of DNA) or a witness being mortally ill.¹⁷ 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 undetermined.¹⁸ The Court could eventually resort to this option by combining this provision with article 68 para 1,¹⁹ if it concludes that there is an excessive risk of traumatising of a child or a victim of sexual or gender violence, capable of leading to the effective unavailability of the testimony at trial.²⁰

In relation to testimony that becomes subsequently unavailable at trial, it is important to note that a recent amendment to rule 68 of the RPE has expanded the permissible uses of prior recorded testimony at trial. The former text of rule 68 only allowed the use of prior recorded testimony at trial if both parties had had the opportunity to examine the witness during the recording or if the witness, present before the Trial Chamber, did not object to the presentation of the prior recorded testimony and made him- or herself available for

¹³ See Preparatory Committee document UN Doc A/AC.249/L.6 n to rule 89bis.

¹⁴ See commentary to art 57 in Bassiouni (ed.), 'Model Draft Statute for the International Criminal Court based on the Preparatory Committee's text to the Diplomatic Conference' (1998) 13*ter* NEP 89.

¹⁵ As Kreß (2003) *JICJ* 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. *Situation in the Democratic Republic of Congo*, No. ICC-01/04-93, Decision following the Consultation held on 11 October 2005 and the Prosecution's Submission on Jurisdiction and Admissibility filed on 31 October 2005, Pre-Trial Chamber I (9 November 2005).

¹⁷ Fourmy, in: Cassese (ed.), *The Rome Statute of the International Criminal Court* (2002) 1218; Schabas, *An Introduction to the International Criminal Court* (2007) 254.

¹⁸ See Friman, in: Fischer *et al.* (eds.), *International and National Prosecution of Crimes under International Law* (2001) 196.

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 Kreß, in: Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law* (2001) 309, 362 *et seq.*, who proposes r 68 sub-r 1 (a) as an alternative legal basis to spare vulnerable witnesses from a repetition of testimony. De Smet, in: Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009), 427 *et seq.*, considers that art 56 covers situations where 'evidence may no longer be available in optimal form [...]. The role of the Pre-Trial Chamber would then be not only to ensure that evidence is preserved but also that it is captured when the quality is still good'. This broad interpretation focuses on the requirement that the evidence 'may not be available subsequently for the purposes of a trial' and seems to neglect that intervention by the Pre-Trial Chamber is strictly confined to a 'unique investigative opportunity'.

examination at trial. This applied '[w]hen the Pre-Trial Chamber had not taken measures under article 56'.²¹ The provision now allows for admission of prior recorded testimony in the absence of the witness, even if both parties could not examine the witness previously, in a number of cases, including situations of death of the witness and/or of witness interference,²² subject to a number of strict criteria for admissibility, including a requirement that the Chamber weigh whether the evidence goes to proof of acts and conduct of the accused. Thus, the Prosecutor has at his or her disposal now two mechanisms to deal with unavailable witnesses: a *prospective* one, namely article 56 para 1 (a), where the Prosecutor can determine *ex ante* that the witness may not be available for trial, and which is only subject to the general admissibility criteria set forth in article 69,²³ and a *retrospective* one, governing situations where the witness has become unavailable at trial and no measures under article 56 have been taken, this one subject to additional requirements for admissibility.

2. Decision on measures upon request of the Prosecutor

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). 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 implementation.²⁴

It must be stressed that article 56 should not be read as creating a *juge d' instruction* in the traditional sense of the term, ie, an investigative judge.²⁵ 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 defence.²⁶ Furthermore, the article establishes that, as a principle, the intervention of the Pre-

²¹ Rule 68 RPE, chapeau.

²² Witness interference has allegedly happened a number of times in cases before the Court. See, for instance, *Situation in the Central African Republic*, ICC-01/05-01/13, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 11 November 2014.

²³ See art 56 (4).

²⁴ See, e.g., *Situation in the Democratic Republic of Congo*, ICC-01/04-19, Decision to Hold Consultation under Rule 114, Pre-Trial Chamber I (21 April 2005).

²⁵ That is how Blakesley considers the role of the PTC under art 56; see Sadat Wexler (special edn), 'Observations on the consolidated ICC text before the final session of the Preparatory Committee' (1998) 13*bis* NEP 77.

²⁶ 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.

Trial Chamber must be triggered by the Prosecutor (subparagraph (a)), another substantial difference with the *juge d'* instruction, who usually enjoys full investigative powers.²⁷

- 9 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 9.²⁸

3. Duty to inform the 'suspect'

- 10 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 participate.²⁹ 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 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 drafts,³⁰ 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.

²⁷ An ex officio intervention under para 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 Delmas-Marty (ed.), *Procedures Penales d'Europe* (1995) 437.

²⁸ For a general authorization of audio- or video-recording or the presence of persons at the request of the Court see eg Austrian 'Bundesgesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof', § 14 BGBl I 2002/135.

²⁹ Para 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'; Blakesley, see Sadat Wexler (special edn), 'Observations on the consolidated ICC text before the final session of the Preparatory Committee' (1998) 13*bis* NEP 77. Notification to the defence is also a necessary requirement for a valid taking of evidence in the legal systems, see Italian Code of Criminal Procedure, arts 392 *et seq.*, Model Code of Criminal Procedure for Latin America, article 258.

³⁰ 'Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997' (1997) UN Doc A/AC.249/1997/L.8/Rev.1 p 20 fn 18.

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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 wording³¹ 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)).³² 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 2.³³

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.

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, and, following similar provisions in national systems,³⁴ 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.³⁵ 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-examination.³⁶

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.

³¹ 'The measures ... may include' (emphasis added).

³² Fourmy, in: Cassese (ed.), *The Rome Statute of the International Criminal Court* (2002) 1219, assumes that the measures listed 'indicate that the PTC should envisage its role in this respect rather broadly'.

³³ Cf. Friman, in: Fischer et al. (eds.), *International and National Prosecution of Crimes Under International Law* (2001) 18; *id.*, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 493, 507.

³⁴ See Code of Criminal Procedure of Costa Rica, art 294.

³⁵ Pursuant to reg 77 of the Regulations, 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)'.

³⁶ See ICTY Rules of Procedure and Evidence Rule 71 (C).

- 17 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 measures:³⁷ 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 period³⁸ – 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 laboratory.³⁹

III. Paragraph 3: Decision on measures proprio motu

- 18 This paragraph was drafted anew at the Rome Conference.⁴⁰ 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 defence⁴¹ 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.
- 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

³⁷ *Situation in the Democratic Republic of Congo*, ICC-01/04-21, Decision on the Prosecutor's Request for Measures under article 56, Pre-Trial Chamber I (26 April 2005).

³⁸ Namely until a copy of any additional report produced had been provided to the Registrar.

³⁹ *Situation in the Democratic Republic of the Congo*, ICC-01/04-112, Decision Establishing a Deadline for Final Submissions on the NFI's Additional Report, Pre-Trial Chamber I (8 February 2006).

⁴⁰ See UN Doc A/CONF183/C1/WGPM/L38/Rev1/Corr1.

⁴¹ See art 57 para 3 (b). Victims are not entitled to request measures pursuant to article 56; *Situation in Uganda*, ICC-02/04-112, Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Application for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, Pre-Trial Chamber II, paras 31 *et seq.* (19 December 2007) stating that victims have no right to trigger proceedings pursuant to articles 56 and 57. They may only present their views and concerns under evidence gathering procedures according to article 56. See further Schabas, *ICC Commentary* (2010) 693.

or she risks the loss of the evidence, since the Trial Chamber may determine the evidence as inadmissible.⁴² 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.

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'.⁴³ As far as article 56 is concerned, this view is controversial⁴⁴. Article 56 para 3 (a) solely deals with *measures* to preserve evidence.⁴⁵ 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 itself.⁴⁶

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

Regulation 48 para 1 of the Regulations 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 may only incorporate provisions which are necessary for the routine functioning of the Court.⁴⁷ 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 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, 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'.⁴⁸

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

⁴² 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 art 57 para 3 (c). For details see Guariglia and Hochmayr below art 57 mn 19 and 29.

⁴³ *Situation of Uganda*, No. ICC-02/04-01/05-90-US-Exp. 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, Pre-Trial Chamber II, para 35 (10 July 2006).

⁴⁴ For a discussion, whether article 57 para 3 (c) grants such a power to the Chamber, see Guariglia and Hochmayr below art 57 mn 29.

⁴⁵ See the wording of para 3 (a): 'measures pursuant to this article'; 'such measures'.

⁴⁶ Concurring van Heec, *Die Weiterentwicklung des formellen Völkerstrafrechts* (2006) 210. For a different view, see Krefß (2003) *JICJ* 607, stating that art 56 'entrusts the Pre-Trial Chamber with a subsidiary proprio motu role as an investigative body'.

⁴⁷ Article 52 para 1.

⁴⁸ 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'; *Situation in the Democratic Republic of Congo*, No. ICC-01/04-12-Anx, Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference, para 22 (8 March 2005). This seems self-evident, since, in the first place, the Chamber has to work towards the Prosecution seeking the measures.

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.⁴⁹

IV. Paragraph 4: Admissibility of evidence

- 25 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*⁵⁰. 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.

⁴⁹ Under article 56, the defence does not have a right to appeal the decision by the PTC to act on its own initiative. According to article 82 para 1 (c) either party may appeal a decision of the PTC to act on its own initiative under art 56 para 3. Schabas, *ICC Commentary* (2012) 694, suggests to dissolve the discrepancy in favour of the defence.

⁵⁰ See Maier, *Derecho Procesal Penal* (1996) vol I 355.