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Working Group on Procedural Matters

WORKING DOCUMENT: NEW DRAFT PROPOSAL FOR ARTICLES 57 AND 57**bis**

Article 57

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 inform the Pre-Trial Chamber and the Pre-Trial Chamber may, upon request of the Prosecutor [or on its own motion], <sup>1</sup> 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.

(b) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall also inform the person who has been arrested or appeared in response to a summons in connection with the investigation, in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (a) may include the power to:

(a) Make recommendations or orders, in its discretion, regarding procedures to be followed;

(b) Direct that a record be made of the proceedings;

(c) Appoint an expert to assist;

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<sup>1</sup>If this bracketed text is retained, paragraph 3 may not be required.

(d) Authorize 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, appoint a lawyer to attend and represent the interests of the defence;

(e) Name one of its members or, if necessary, an available judge of the Court, to observe and make recommendations or orders, in its discretion, regarding the collection and preservation of evidence and the questioning of persons;

(f) Take such other action as may be necessary to collect or preserve evidence.

[3. Where the Prosecutor has not sought measures under paragraph 2, but the Pre-Trial Chamber is of the view that such measures are required to preserve evidence essential for a proper determination of guilt or innocence at trial (giving due regard for the protection of the rights of the defence), it shall consult with the Prosecutor and if the Prosecutor fails to request those measures, it may act on its own initiative.]

4. Evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be admitted at trial in accordance with article 69, and given such weight as determined by the Trial Chamber.<sup>2</sup>

**N.B. The ability of the arrested or summoned person to use this article would be provided for in article 57 bis, paragraph 3 (b).**

Article 57 bis

Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided for by this Statute, functions of the Pre-Trial Chamber shall be exercised in accordance with the provisions of this article.<sup>3</sup>

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<sup>2</sup>From Chairman's text on article 63.

<sup>3</sup>To assist the reader, a list of potential functions to be exercised by the Pre-Trial Chamber has been issued as a discussion paper (A/CONF.183/C.1/WGPM/L.40).

2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles [13], [16], 17, [54 bis (1 bis)], <sup>4</sup> 61 (6) [and 71] must be concurred in by a majority of its judges; <sup>5</sup>

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for under this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

(a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;

(b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders (including measures such as those described in article 57, paragraph 2), or seek such cooperation pursuant to Part 9, as may be necessary to assist the person in the preparation of his or her defence;

(c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

(d) Authorize the Prosecutor to take specific investigative steps within the territory of a State without having secured the cooperation of that State under Part 9 if, having regard whenever possible to the views of the State concerned, it has determined that the State is clearly unable to execute

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<sup>4</sup>This citation refers to the text of the working paper on article 54 set forth in A/CONF.183/C.1/WGPM/L.1.

<sup>5</sup>References in this text to the potential functions conferred on the Pre-Trial Chamber in articles 13, 16, 54 bis (1) (b) are without prejudice to the separate discussion regarding the merits of those articles. Should these provisions (or a number of other functions also remaining in brackets; see discussion paper A/CONF.183/C.1/WGPM/L.40) ultimately not be included in the Statute, the text of this subparagraph would have to be adjusted accordingly.

a request for cooperation due to the total or partial collapse or unavailability of its national judicial system;<sup>6</sup>

(e) Having regard to the strength of the evidence, seek the cooperation of States pursuant to article 90 for the purpose of taking protective measures, strictly necessary to preserve the possibility for the Court to order reparations to, or in respect of, victims, in accordance with article 73.<sup>7</sup>

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<sup>6</sup>The term "national judicial system" was understood to include those authorities competent for executing a request for assistance under Part 9, that are not members of the judiciary. A number of delegations felt further consultations might result in a more precise formulation. An alternative formulation is provided in option 2 on page 76 of A/CONF.183/2/Add.1. Some delegates expressed the view that, even if there had been a partial collapse of the national judicial system, the issue for decision by the Court would be whether there existed authorities capable of responding to a request for assistance; and if there were, the article would not apply.

<sup>7</sup>In deciding whether to grant protective measures, the Court will have to take into account the interests and rights of the (unconvicted) person(s) in respect of whose property protective measures are sought. The view was expressed that the proposed text did not provide a clear threshold in relation to these measures. The close connection between this proposal and article 73 was also pointed out.