



UNITED
NATIONS



**United Nations Diplomatic Conference
of Plenipotentiaries on the
Establishment of an International
Criminal Court**

Distr.
LIMITED

A/CONF.183/C.1/WGPM/L.1
18 June 1998

Original: ENGLISH

Rome, Italy
15 June-17 July 1998

COMMITTEE OF THE WHOLE
Working Group on Procedural Matters

WORKING PAPER ON ARTICLE 54

Article 54

Initiation of an investigation

1. The Prosecutor shall initiate an investigation upon ...,¹ unless he or she determines there is no reasonable basis for a prosecution under this Statute. In making such a determination, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 15; and

[(c) A prosecution under this Statute would be in the interests of justice, taking into account the interests of victims; and]

[(d) An investigation would be consistent with the terms of any Security Council decision].

¹This draft does not attempt to prejudge the resolution of the number of proposals to be considered by the Committee of the Whole regarding the starting point for the Prosecutor's investigative authority. These include, among others, referrals by States, referrals by the Security Council, *proprio motu* authority and *proprio motu* authority subject to approval by the Pre-Trial Chamber. In the event the last proposal is among those accepted, the text might read "... shall initiate an investigation upon ... or shall seek the approval of the Pre-Trial Chamber to initiate an investigation in a case under article 13, unless ..."

[2. RESERVED. ²]

3. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 15; or

[(c) A prosecution is not in the interests of justice, having taken into account the interests of victims,]

he or she shall inform the Pre-Trial Chamber and the State making a referral under article 11 [or the Security Council in a case under article 10, paragraph 1] of his or her decision and the reasons for the decision. [At the request of such State [or the Security Council], the Pre-Trial Chamber may review a decision of the Prosecutor not to proceed under paragraph 1 or this paragraph and may request the Prosecutor to reconsider that decision. [In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed based solely on paragraph 1 (c) or 3 (c), in which case the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.]]

4. The Prosecutor may at any time reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Article 54 bis

Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor may:

(a) Request the presence of and question suspects, victims and witnesses;

(b) Collect and examine evidence;

²This paragraph would address the issues of whether and to whom the Prosecutor should give notice of there being a potential basis for an investigation, and whether and the extent to which he or she should defer initiating an investigation pending responses by States regarding their own investigative activity and possible intent to seek rulings on admissibility. However, these issues are closely related to the questions of the trigger mechanism, the *proprio motu* powers of the Prosecutor and procedures regarding admissibility which arise under articles 15 to 17. Therefore, it is recommended that the Working Group reserve the treatment of these matters until the larger issues are resolved in the Committee of the Whole.

(c) Seek the cooperation of any State or intergovernmental organization [or, subject to its mandate, any peacekeeping force that may be present in the territory where an investigation is to be undertaken];

(d) Enter into such arrangements or agreements, not otherwise inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization, or person;

(e) Agree not to disclose at any stage of the proceedings documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and

(f) Take the necessary measures to ensure the confidentiality of information or the protection of any person.

[1 bis. The Prosecutor may conduct investigations on the territory of a State.

(a) In accordance with the provisions set forth in Part 9;³ or

(b) As authorized by the Pre-Trial Chamber under article 57 (x).]⁴

2. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute and, in doing so, investigate equally incriminating and exonerating circumstances;

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, shall respect the interests and personal circumstances of victims and witnesses, including age, gender and health, and take into account the nature of the crime, in particular, but not limited to, where it involves sexual or gender violence or violence against children; and

(c) Fully respect the rights of persons arising under this Statute and the Rules of Procedure and Evidence.

³Two issues arise in the text of article 54 regarding investigations on the territory of a State which are better addressed in the context of cooperation of States under article 90. The first is whether the consent of a State is required for such investigations, and the second is whether notice to the State is sufficient for the Prosecutor to conduct such an investigation.

⁴See the proposed amendment to article 57, set forth below.

Article 54 ter

Rights of suspects and other persons during an investigation

1. A person in respect of whom there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court and who is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, shall have the right:

(a) Prior to being questioned, to be informed that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court and of the rights under (b) to (d) hereafter;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing [, or to have legal assistance assigned by the Court where the interests of justice so require and the person lacks sufficient means to pay for such assistance, and legal assistance has not otherwise been provided by national authorities]; and

[(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.]

2. In respect of an investigation under this Statute, a person:

(a) Shall not be compelled to incriminate himself or to confess guilt;

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any form of cruel, inhuman or degrading treatment or punishment; and

(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness.

* * *

Provisions to be moved to article 57

1. In lieu of the current article 54 (5), article 57 (2) would be amended to add the following subparagraph:

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

2. Add to article 57 a procedure by which the Pre-Trial Chamber authorizes the Prosecutor to conduct investigations within the territory of a State outside the cooperative framework of Part 9, which might appear as follows:

"The Pre-Trial Chamber may 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 it is manifestly apparent that the State is unable to execute a request for cooperation due to the total or partial collapse or unavailability of its national judicial system."

If such a provision is incorporated, issues of enforcement will have to be addressed.

3. In lieu of the current article 54 (13), add to article 57 a provision as follows:

"Upon the request of a person who has been arrested or appeared pursuant to a summons under article 58, the Pre-Trial Chamber may issue such orders or seek cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence."
