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Karel De Meester

The Investigation Phase in International Criminal Procedure

In Search of Common Rules

**The Investigation Phase
in International Criminal Procedure:
In Search of Common Rules**

Volume I

Cover image: Rudolf Hess being interrogated by members of the American prosecution team at Nuremberg, by William S. Hechter. Courtesy of Yad Vashem Photo Archives, <http://www.yadvashem.org>.

**The Investigation Phase
in International Criminal Procedure:
In Search of Common Rules**

ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad van doctor
aan de Universiteit van Amsterdam
op gezag van de Rector Magnificus
Prof. Dr. D.C. van den Boom

ten overstaan van een door het college voor promoties ingestelde
commissie, in het openbaar te verdedigen in de Agnietenkapel

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door

Karel De Meester

geboren te Roeselare, België

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACommHR	African Commission on Human and Peoples' Rights
ACtHR	African Court on Human and Peoples' Rights
AIDP	Association Internationale de Droit Pénal
ASP	Assembly of States Parties
CoE	Council of Europe
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECommHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FRY	Federal Republic of Yugoslavia
GC	Geneva Convention
HRC	Human Rights Committee
IACCommHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East

OTP	Office of the Prosecutor
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
SCU	Special Crimes Unit
SPSC	Special Panels for Serious Crimes
STL	Special Tribunal for Lebanon
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor
VCLT	Vienna Convention on the Law of Treaties
VWU	Victims and Witnesses Unit

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SECTION I: FRAMING THE RESEARCH

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I. THE INVESTIGATIVE DEFICIT

On 19 November 1997, *Barayagwiza* was transferred from Cameroon to the International Criminal Tribunal for Rwanda ('ICTR'). This event in itself would not be spectacular, if Barayagwiza had not previously been held in custody in Cameroon since 15 April 1996. It was held by the ICTR Appeals Chamber that only on 10 March 1997, or 11 months after he was arrested, Barayagwiza was first to be informed of the general nature of the charges against him.¹ While detained, Barayagwiza challenged the lawfulness of his detention (*habeas corpus*), but he was never heard by the Court.² Even after his transfer to Arusha, it would still take 96 days before he was eventually brought before a Judge.³ On 3 November 1999, the ICTR Appeals Chamber held that the fundamental rights of the Appellant were repeatedly violated and concluded that this constituted an abuse of process. The Appeals Chamber stated that "[w]hat may be worse, it appears that the Prosecutor's failure to prosecute this case was tantamount to negligence. We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy available for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him." However, on 31 March 2000, in a bold move, the Appeals Chamber reconsidered its decision and concluded in light of several "new facts" presented by the Prosecutor that the violations of Barayagwiza's rights were less "intense" and that the role played by the failings of the

¹ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 85 and 101.

² *Ibid.*, par. 8, 90, 104.

³ *Ibid.*, par. 68.

Prosecutor was smaller. Hence, the remedy was disproportionate in relation to the events and a remedy should be fixed at the time of the first instance judgement.⁴

In the *RUF* case before the Special Court for Sierra Leone ('SCSL'), Trial Chamber I on 30 June 2008 unanimously decided not to admit into evidence statements taken from the accused during custodial interrogations in March and April 2003, upon finding that these statements had been obtained involuntarily from Sesay.⁵ In the course of the proceedings, it became clear that the Prosecution had induced Sesay into cooperating and thereby violated his rights not to be compelled to testify against himself and to remain silent. The consequence was that more than one thousand pages of transcripts resulting from custodial interrogations were inadmissible because they had been acquired from the accused person as a result of "fear of prejudice and hope of advantage held out [...] both expressly and implicitly by persons of authority".⁶ Among others, Prosecution investigators had informed Sesay during the interrogations that they had the authority to speak to the Judges concerning potential leniency considerations if he would cooperate, and that the Judges would accept whatever they, as investigators, would tell them.⁷ Moreover, the accused was also told that cooperation would enable the investigators to ask the Court for a reduced sentence.⁸ Furthermore, they indicated to the accused that he would be called as a witness for the Prosecution if he cooperated, creating the impression that he could avoid prosecution.⁹ Interrogations would be interrupted at regular intervals. A prosecution investigator testified that his role throughout the interviewing process had been to talk off-the-record to the accused during these breaks and to ensure the continuation of cooperation "by continuously restating and reaffirming what the Prosecution could do for him in exchange for his cooperation."¹⁰

⁴ ICTR, Decision (Prosecutor's Request for Review or Reconsideration), Case No. ICTR-97-19-AR72, A. Ch., 31 March 2000.

⁵ SCSL, Trial Transcript, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15, T. Ch. I, 22 June 2007, pp. 1 – 4; SCSL, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15, T. Ch. I, 30 June 2008. See the detailed report by P. VAN TUYL, *Effective, Efficient and Fair: An Inquiry into the Investigative Practices of the Office of the Prosecutor at the Special Court for Sierra Leone*, War Crimes Studies Center, University of California Berkeley, September 2008.

⁶ SCSL, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15, T. Ch. I, 30 June 2008, par. 22.

⁷ *Ibid.*, par. 45.

⁸ *Ibid.*, par. 45.

⁹ *Ibid.*, par. 45 - 46.

¹⁰ *Ibid.*, par. 47; SCSL, Trial Transcript, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15, T. Ch. I, 12 June 2007, pp. 35 – 37, 70.

These two examples above indicate how pre-trial events and poor investigative practices may lead to violations of the rights of suspects, accused, or other persons involved in the investigations by international(ised) criminal courts and tribunals and how these violations may seriously impact on the fairness of the trial. The *Barayagwiza* case illustrates how pre-trial events may even cause the right to a fair trial to already be irreparably damaged prior to the start of the trial. In addition, it shows how the fragmentation of the investigation over several jurisdictions may be at the detriment of the suspect or accused person (*in casu* an issue of contention was the exact period of time Cameroon was holding Barayagwiza at the behest of the ICTR).¹¹ Above all, these examples illustrate how, notwithstanding the undeniable role of these international(ised) criminal tribunals in the protection of human rights, these institutions are at risk of violating international human rights norms themselves.¹²

However, the importance of investigative actions for the further proceedings is not yet reflected to the full extent in academic writings on international criminal proceedings. Recently, the number of books, chapters, articles and other academic writings on international criminal procedure is growing rapidly. Nevertheless, it seems that the investigation phase has received far less attention than the trial phase itself. For example, a number of recent books on international criminal procedure law hardly pay any attention to the investigation phase of proceedings.¹³

Furthermore, if one scrutinises the procedural frameworks and the practice of international(ised) criminal tribunals, one notes a double ‘deficit’. First, there exists a *regulatory ‘deficit’* in the sense that the investigation phase in international criminal procedure has been the subject of far less regulation than its trial counterpart.¹⁴ While

¹¹ Consider the ‘Chronology of Events’ in ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, Appendix A.

¹² Consider e.g. F. MÉGRET, *Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure*, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, p. 72 (noting that, at first, the international criminal tribunals were characterised “by the notion that ‘the international community can do no wrong’, perhaps leading tribunals to take liberties with rules based on a faith in the ethics and good faith of international judges and prosecutors, and the self-correcting virtues of the system. As it turns out, we now know this was a dangerous road to embark on”).

¹³ L. CARTER and F. POCAR (eds.), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, Cheltenham, Edward Elgar Publishing, 2013; C. SCHUON, *International Criminal Procedure: A Clash of Legal Cultures*, The Hague, T.M.C. Asser Press, 2010. For an example to the contrary, consider C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012 (which book discusses the investigation stage of proceedings in a separate chapter).

¹⁴ Consider e.g. G. SLUITER, *The Effects of the Law of International Criminal Procedure on Domestic Proceedings Concerning International Crimes*, in G. SLUITER and S. VASILIEV (eds.), *International Criminal*

different factors may explain this, it raises the question of whether or not it is necessary to regulate the investigation phase in more detail.¹⁵ For example, at most international(ised) criminal tribunals, the investigative powers of the Prosecutor seem very broadly formulated.

Moreover, if one considers the jurisprudence of international(ised) criminal tribunals on investigative actions, one cannot but conclude that a *jurisprudential 'deficit'* exists. On many aspects of the investigation, the jurisprudence is scarce or non-existent. Many investigative activities seem to have largely taken place outside legal scrutiny. Again, several factors help to explain this gap. For example, if the Prosecutor fails to ensure the fairness and integrity of the investigation, then it is clear that the prospects for such a failure to be exposed and of the Prosecutor to be held accountable will often depend on the question of whether or not the investigation is followed by a prosecution. Furthermore, many aspects of investigations by the Prosecutor are governed by internal protocols or standard operating procedures which are not made publicly available. For this reason, the rare instances when investigators have been called to testify offer rare insights in investigative practices.¹⁶

II. PURPOSE OF THIS STUDY

The aim of this study is to scrutinise the existing law and practice of the different international(ised) criminal courts and tribunals with regard to the conduct of investigations in order to identify any (emerging) rules of international criminal procedure. More precisely, this study seeks to determine whether or not any procedural rules on the conduct of investigations are commonly shared by the international(ised) criminal tribunals and can be held to constitute the 'common core' of international criminal procedure. Underlying this study is the question whether international(ised) criminal tribunals have, notwithstanding their nature of

Procedure: Towards a Coherent Body of Law, London, CMP Publishing, 2009, pp. 470 – 476 (the author notes, among others, how the *ad hoc* tribunals “have very much overlooked the pre-trial phase, in terms of regulation and offering protection to the accused”).

¹⁵ Consider, among others, the discussion on the procedural principle of legality, *infra*, Chapter 2, VI.

¹⁶ Consider, e.g., ICC, Transcript, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009; ICC, Transcript of Deposition, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-Rule68Deposition-Red2-ENG, 16 November 2010; SCSL, Trial Transcript, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15, T. Ch. I, 12 June 2007; SCSL, Trial Transcript, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15, T. Ch. I, 13 June 2007; SCSL, Trial Transcript, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15, T. Ch. I, 17 June 2007.

‘self-contained regimes’ adopted certain common rules.¹⁷ Considering the significant differences in the procedural frameworks of these institutions, the identification of any such commonly shared rules may not be an easy task.

The relevance of identifying these commonalities primarily lies in the clarification of the content of the law of international criminal procedure. This is not only important because of the classical benefits of indicating (and any preoccupation of legal scholarship with) coherence and consistency, which then in turn supports the case for the establishment of international criminal procedure as a distinct branch of law.¹⁸ These commonly shared rules may also be of assistance for future international(ised) criminal courts and tribunals and for national legislators regarding the investigation and prosecution of core crimes.¹⁹ As evidenced by the procedural frameworks of some internationalised criminal courts, ‘international rules of international criminal procedure’ are increasingly considered in elaborating the procedures of these institutions.²⁰

There exists an additional and even more pressing need for the identification of some core rules on the conduct of investigations. This necessity primarily stems from the fact that the

¹⁷ ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić*, Case No. IT-94-1, A. Ch., 2 October 1995, par. 39 (“International law, because it lacks a centralised structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralised or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided)”).

¹⁸ Consider in that regard S. VASILIEV, General Rules and Principles of International Criminal Procedure, in G. SLUITER and S. VASILIEV (eds.), *International Criminal Procedure: Towards a Coherent Body*, Cameron May, London, 2009, p. 24 (arguing that in case international criminal procedure would consist of a ‘system’ of legal standards, structured hierarchically and containing a coherent variety of norms, this would increase the internal coherence, precision and certainty of that body of law and allow it to face systemic problems such as gaps or normative conflicts).

¹⁹ Consider e.g. G. SLUITER, Trends in the Development of a Unified Law of International Criminal Procedure, in C. STAHN and L. VAN DEN HERIK (eds.), *Future Perspectives on International Criminal Justice*, Cambridge, Cambridge University Press, 2010, pp. 592 – 597; G. SLUITER, The Law of International Criminal Procedure and Domestic War Crimes Trials, in «International Criminal Law Review», Vol. 6, 2006, pp. 605 – 635.

²⁰ With regard to the ECCC, consider Article 12 (1) ECCC Agreement (‘[w]here Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in *procedural rules established at the international level*’ (emphasis added)). In a similar vein, consider Article 20 new, 23 new, 33 new and 37 new ECCC Law. In turn, Article 28 (2) of the STL Statute establishes that the main source of procedural law are the RPE adopted by the Judges ‘who shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials *reflecting the highest standards of international criminal procedure*, with a view to ensuring a fair and expeditious trial’ (emphasis added). Finally, Section 54.5 TRCP provided that ‘[o]n points of criminal procedure not prescribed in the present regulation, *internationally recognized principles* shall apply’ (emphasis added).

investigation phase is fragmented over several jurisdictions.²¹ If any of the common rules which can be identified correspond to international human rights norms, then they should not only be upheld by the international criminal courts and tribunals, but also by states and/or other international actors involved in the investigation. In other words, these standards should be respected irrespective of the jurisdiction (the international criminal tribunal, national criminal justice system or international actor) which is responsible for conducting the investigative act. It follows that these human rights norms may to some extent prevent the fragmentation which results from the division of labour between the international and national level to be to the detriment of the suspect or accused person. It may be anticipated that if some common rules could be identified, they would be in accordance with international human rights law. It is recalled that the international(ised) criminal courts and tribunals were created as a response to egregious human rights violations and aim at ensuring and reaffirming human rights protection.²² In addition, they are occasionally referred to as ‘human rights tribunals’.²³

The present study is by no means limited to a positivist *description* or clarification of the law of international criminal procedure as relevant to the investigation phase. A *normative* element is added and an answer will be sought to the normative question what that law *ought to be*. As will be explained in detail in Chapter 2, the primary evaluative tool which will be used for this assessment consists of international human rights norms, including the fair trial rights. It will be asked what changes to the present procedural norms regulating the investigation phase are necessary in order to guarantee its fairness. This evaluative tool allows for a critical evaluation of the law of international criminal procedure and the practices of the international(ised) criminal courts and tribunals. In addition, international human rights norms will enable the formulation of certain recommendations with regard to the current state of international criminal procedure.

Considerations of ‘efficiency’ and ‘effectiveness’, while important, are not included in the present study. The reason not to include these normative tools is the absence of clear and measurable criteria and indicators for their assessment.²⁴ For example, it remains unclear

²¹ See *infra*, Chapter 2, VII.2.

²² See *infra*, Chapter 2, V.

²³ W.A. SCHABAS, Sentencing by International Tribunals: A Human Rights Approach, in «Duke Journal of Comparative and International Law», Vol. 7, 1997, p. 516.

²⁴ Consider e.g. Y. SHANY, Assessing the Effectiveness of International Courts: A Goal-Based Approach, in «American Journal of International Law», Vol. 106, 2012, p. 229 (‘The current literature’s lack of clear,

whether efficiency and effectiveness should be assessed in light of the professed goals of international criminal justice and international criminal procedure.²⁵ The following example illustrates how these goals may impact on the assessment of effectiveness. The goal of providing a historical record has been advanced as a potential goal of international criminal justice.²⁶ If the assessment of the efficiency of international criminal proceedings is contingent on this goal, it would be less problematic if proceedings take a long time, provided that this length is necessary to clarify the historical facts.²⁷ If these goals should be considered in assessing efficiency or effectiveness, the problem arises that some goals these institutions pursue are difficult to translate into indicators.²⁸ Adding to the complexity, it will be explained in Chapter 2 how these goals of international criminal procedure and international criminal justice (including their relationship to each other) remain themselves uncertain. While many academic writings use an ‘efficiency’ or ‘effectiveness’ perspective, they mostly fail to set out the conceptual parameters they rely upon. Some exceptions are noteworthy but not discussed here.²⁹

It follows that the present study undertakes to answer the following central research question:

persuasive criteria for assessing the effectiveness of international adjudication bodies, coupled with the theoretical and methodological difficulties associated with actually measuring such criteria, generates unsatisfying results as well as misunderstandings about the effectiveness of international courts”); M. HEIKKILÄ, *The Balanced Scorecard of International Criminal Tribunals*, in C. RYNGAERT, *The Effectiveness of International Criminal Justice*, Antwerp, Intersentia, 2009, p. 28 (“Effectiveness is thus something that is both difficult to define and to measure”).

²⁵ The adoption of a ‘goal-based definition of effectiveness’ has been advanced by some authors. See e.g. Y. SHANY, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, in «*American Journal of International Law*», Vol. 106, 2012, pp. 225 – 270; M. HEIKKILÄ, *The Balanced Scorecard of International Criminal Tribunals*, in C. RYNGAERT, *The Effectiveness of International Criminal Justice*, Antwerp, Intersentia, 2009, p. 28.

²⁶ See *infra*, Chapter 2, V.

²⁷ C. STAHN, *Between ‘Faith’ and ‘Facts’: By what Standards Should we Assess International Criminal Justice?*, in «*Leiden Journal of International Law*», Vol. 25, 2012, p. 263 (“More fundamentally, the overall assessment of effectiveness shifts if pace is assessed in relation to not only criminal adjudication, but also other contributions of international criminal justice, such as fact-finding, the establishment of a record, or transformative goals. A figure of four to five years may appear long for a trial, but it is less threatening if it is associated with a broader process of clarification of historical facts”).

²⁸ *Ibid.*, pp. 262 – 264.

²⁹ M. HEIKKILÄ, *The Balanced Scorecard of International Criminal Tribunals*, in C. RYNGAERT, *The Effectiveness of International Criminal Justice*, Antwerp, Intersentia, 2009, pp. 27 – 54 (the author suggests to apply a tailor-made ‘balanced scoreboard’ perspective to measure the effectiveness of international(ised) criminal courts and tribunals); Y. SHANY, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, in «*American Journal of International Law*», Vol. 106, 2012, p. 229 (the author suggests that social sciences may provide a number of conceptual frameworks and empirical indicators that could be alternatively applied in order to assess the effectiveness of international courts and tribunals).

Which rules and/or practices regarding the investigation phase in international criminal procedure are commonly shared by the different international(ised) criminal courts and tribunals and what changes to these rules are necessary to guarantee the fairness of these investigations?

Finally, it should be emphasised that it is not the ambition of the present study to develop a fully-fledged code regarding the investigation phase within international criminal procedure. At present the development of this code is a difficult undertaking, given the nascent state of international criminal procedure.³⁰

III. SCOPE OF THE STUDY

Where this study concerns international criminal procedure, it is necessary to indicate the jurisdictions which are relevant for this undertaking. In the first place, the criminal procedure applied by the International Criminal Tribunal for Rwanda ('ICTR'), the International Criminal Tribunal for the former Yugoslavia ('ICTY') and by the International Criminal Court ('ICC') is international in nature. Hence, it is axiomatic that these international criminal tribunals are included. In addition, a number of internationalised criminal tribunals³¹ (or 'hybrid courts') are included: the Special Court for Sierra Leone ('SCSL'), the former Special Panels for Serious Crimes ('SPSC') in East-Timor, the Extraordinary Chambers in the Courts of Cambodia ('ECCC') and the Special Tribunal for Lebanon ('STL'). The criterion for their inclusion is the fact that the criminal procedure they apply is mixed and originates at least to some extent in international law. Hence, they do not purely apply municipal law.³² The UN

³⁰ Consider in that regard the important work done by the International Expert Framework on International Criminal Procedure, in which the author participated. See G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013.

³¹ The author acknowledges the shortcomings in using this terminology. However, where these terms are often used in academic writings, they will also be used in this study. On these shortcomings, consider e.g. F. POCAR and L. CARTER, *The Challenge of Shaping Procedures in International Criminal Courts*, in L. CARTER and F. POCAR (eds.), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, Cheltenham, Edward Elgar Publishing, 2013, p. 6 (noting that the term 'internationalized' courts or tribunals is potentially misleading as it may create an impression that these courts "have shed their national jurisdiction and have become 'international'").

³² As far as the SCSL is concerned, the applicable procedural norms mainly follow from its Statute and RPE. Its Statute was annexed to the Agreement between the UN and Sierra Leone and is an integral part thereof. As far as the RPE are concerned, the RPE of the ICTR were applied *mutatis mutandis*, while Judges were given the authority to amend or supplement these (Article 14 SCSL Statute). Whereas, in doing so, the Judges 'may be

Mechanism for International Criminal Tribunals ('MICT') was not included because its practice remains very limited and because, at the time of writing, only the Arusha branch had started its activities.³³

Also not included in the present study are those tribunals which do not apply international criminal procedure. Among others, the 'Regulation 64 Panels' which were set up by UNMIK in Kosovo are excluded, because they were domestic courts and applied municipal law. Similarly, the War Crimes Chamber in the State Court of Bosnia and Herzegovina, while possessing some international components, applies domestic criminal procedural law and was likewise excluded. Further, the War Crimes Chamber of the Belgrade District Court in Serbia, the Iraqi High Court as well as the Bangladesh International Crimes Tribunal, which was recently established to deal with the events related to the 1971 war of independence, are excluded.³⁴ Finally, the historic IMT and IMTFE have not been included. The paradigm shift brought about by the emergence of international human rights norms makes the procedural standards these tribunals applied difficult to compare with the present-day international criminal jurisdictions covered. As explained above, international human rights norms constitute the framework which will be used for the normative evaluation of international criminal procedure.

Secondly, the term 'investigations' needs clarification. Where this study concerns investigations by international(ised) criminal tribunals, it is clear that the investigation *phase* will be of primary importance.³⁵ Hence, the emphasis will be on this phase of proceedings. Nevertheless, for the purposes of the present study, the investigation should be understood in

guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone', it is clear that the role of national criminal procedural law has been limited. In a similar vein, the STL procedural framework mainly consists of its Statute, which in turn is annexed to and an integral part of the Agreement between the UN and Lebanon (which was brought into force by a UN Security Council Resolution), as well as of the STL RPE, which were adopted by the Judges. It follows from Article 28 (2) of the STL Statute that the STL Judges, in adopting the said RPE, were guided 'as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial'. According to the explanatory memorandum to the RPE, 'other reference materials' clearly refers to the RPE of other international criminal tribunals and their 'emerging procedural practice'. See in more detail *infra*, Chapter 2, II, fn. 111 and accompanying text. As far as the ECCC are concerned, it is noted that notwithstanding the fact that they in the first place apply Cambodian law, occasionally 'guidance may also be sought in procedural rules established at the international level'. The applicable procedural regime (including its Internal Rules) is a mixture of Cambodian law and international standards. See in more detail, *infra*, Chapter 2, II. Lastly, the SPSC in the first place applied the Transitional Rules on Criminal Procedure ('TRCP'), as well as the applicable law in East-Timor and 'internationally recognized human rights standards'. See Section 3 TRCP and Sections 2 – 3 of UNTAET Regulation 1999/1 (see *infra*, Chapter 2, II).

³³ As established pursuant to Security Council Resolution 1966, 22 December 2010.

³⁴ See the 1973 International Crimes (Tribunals) Act (ICTA), 20 July 1973.

³⁵ See the definition of this term, *infra*, Chapter 3, I.3.

a broad sense. Among others, it should be understood as to also include the pre-investigative phase.³⁶ Besides, at most tribunals under review, the collection of evidence may exceptionally extend beyond the start of the prosecution phase proper.³⁷ Further, the arrest and detention, as custodial coercive measures, have been included in the scope of the investigation. It is clear that these measures extend beyond the investigation phase and into the pre-trial and trial phase. For example, at the *ad hoc* tribunals and the SCSL, the issuance of the arrest warrant is normally ordered by the Judge who has confirmed the indictment at the Prosecutor's request. This step is part of the pre-trial phase and starts with the Prosecutor's submission of the indictment.³⁸ In turn, the ICC Prosecutor may first request a warrant of arrest or a summons to appear after the confirmation of the charges and after the trial phase has formally started.

An additional caveat is warranted at this juncture. Since this study will mainly focus on the investigation phase, it is important to underline the fact that this does not imply that the investigation phase is considered to be insulated from other stages of the proceedings. Rather, it is important to conceive of international criminal procedure as a continuum and to avoid any 'segmental' understanding thereof.³⁹

IV. METHODOLOGY

A positivist method of legal research has been used for the purposes of this research. Hence, the subject of this study is the positive law. In a first step, the relevant sources of the law of international criminal procedure (the Statutes, Rules of Procedure and Evidence ('RPE') and other Regulations of the respective court or tribunal) of all jurisdictions included were identified, examined, and given their appropriate weight. Attention was paid to the evolution of the procedural frameworks, an evolution which is traced by the many amendments of their respective RPE.⁴⁰ Consideration was given not only to the law in the books but also the law in action. For that purpose, the relevant practice of the different international(ised) criminal

³⁶ See the discussion thereof *infra*, Chapter 3, I.2.

³⁷ See the discussion thereof, *infra*, Chapter 3, I.2.

³⁸ Article 19 (2) ICTY Statute, Article 18 (2) ICTR Statute. No reference to arrest is made by the SCSL Statute, leaving the issue to be regulated by the RPE; Consider also Rule 47 (H) (i) ICTY, ICTR and SCSL RPE.

³⁹ M. MCCONVILLE, A. SANDERS and R. LENG, *The Case for the Prosecution*, London, Routledge, 1991, pp. 198-199 (the criminal process is "marked by unity not disunity, and requires singular, not separate analysis").

⁴⁰ For example, since their adoption, the RPE of the ICTY, have been amended at 49 occasions, the RPE of the ICTR have been amended at 22 occasions, the RPE of the SCSL at 14 occasions, the RPE of the ECCC at 8 occasions and the RPE of the STL at 7 occasions.

courts and tribunals, as found in their judgments and decisions, was identified and examined. In a second step, a comparative evaluation of the procedural norms and practices of the tribunals and courts under review was conducted in order to determine whether any (emerging)⁴² rules of international criminal procedure could be discerned. A comparative research method was adopted for that purpose. In the absence of clear criteria for the ranking of the different international(ised) criminal courts and tribunals under review, all institutions were given the same weight in the comparative evaluation.⁴¹

This study is not limited to a description and interpretation of the law (*lex lata*). It is clear from the central research question formulated above that a *normative* analysis had to be included.⁴² This implies that a ‘critical’ (or ‘modern’) theory of positivism was used for this study, rather than a traditional one.⁴³ As will be explained in Chapter 2, the evaluative tools for that purpose were the international human rights norms including fair trial rights. The commonalities and differences found in the procedural frameworks and practices of these different jurisdictions were assessed in light of these norms. It was already explained above how ‘efficiency’ or ‘expeditiousness’ considerations were not used as a normative tool since clear parameters are lacking. Additionally, it will be explained in Chapter 2 why other parameters, including the goals of international criminal justice and international criminal procedure could not be relied upon as evaluative tools. The adoption of a normative view

⁴¹ For a similar approach, consider S. VASILIEV, Introduction, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 32.

⁴² As convincingly argued by PETERS, in addition to a positive description, “specific features of international law, notably its openness and dynamics, *require* a normative analysis of the law and of its applications (emphasis in original).” See A. PETERS, *Realizing Utopia as a Scholarly Undertaking*, in «*American Journal of International Law*», Vol. 24, 2013, pp. 550 – 551; J.M. SMITS, *Redefining Normative Legal Science: Towards an Argumentative Discipline*, in F. COOMANS, F. GRÜNFFELD and M.T. KAMMINGA (eds.), *Methods of Human Rights Research*, Antwerp, Intersentia, 2009, p. 46 (“In my view, the main business of academics should be with what the law *should* say and this cannot be decided primarily by reference to national statutes and court decisions” (emphasis in original)).

⁴³ As noted by FEICHTNER, critical positivism is the predominant legal method in Europe today. See I. FEICHTNER, *Realizing Utopia through the Practice of International Law*, in «*European Journal of International Law*», Vol. 23, 2012, p. 1144. On the term ‘critical positivism’, consider A. CASSESE, Introduction, in A. CASSESE (ed.), *Realizing Utopia: The Future of International Law*, Oxford, Oxford University Press, 2012, p. xvii (adopting the approach of a ‘judicious reformer’, engaging in critical positivism). The critical positivist investigates legal rules with ‘a proper contextualisation, both socio-politically and ideologically’. The critical positivist may draw on any general principles of the law which promote progress and justice and express universal values. These fundamental values include the pursuit of peace, human dignity etc. See A. CASSESE, *Five Masters of International Law: Conversations with R.-J. Dupuy, E. Jiménez de Aréchaga, R. Jennings, L. Henkin and O. Schachter*, Oxford, Hart Publishing, 2011, p. 258. On ‘modern’ positivism, consider B. SIMMA and A.L. PAULUS, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, in «*American Journal of International Law*», Vol. 93, 1999, pp. 302 – 317 (holding that law is not independent from its normative context).

assisted in the formulation of some recommendations that may assist in improving the law of international criminal procedure.⁴⁴ This part of the research consisted of desk research.

The study of the investigative procedures and practices cannot provide a definitive answer to all questions. In particular, since the procedural regulation of the investigative phase is limited and only provides for the general framework, a great deal of discretion is left to the different actors involved.⁴⁵ The study of publicly available sources may not always establish how such discretion is exercised and how the participants may influence the nature of the proceedings. Besides, there are several uncertainties in international criminal proceedings given that the procedural rules are often silent or unclear. Here, data collected from interviews may offer some clarification. Furthermore, since international criminal procedure is evolving at a rapid pace, the reasons for certain procedural reforms are not always clear. In that regard as well, interviews may provide a better understanding. Finally, it is evident that the law of international criminal procedure does not operate in a social, economic or political vacuum.⁴⁶ For all of these reasons, and in order to understand ‘what the law is’, it was necessary to include the professional perspectives and personal opinions of the participants involved in international criminal investigations on the applicable law. Therefore, the classic method of legal research, as outlined above, was supplemented by a qualitative empirical research method.

The inclusion of this type of research method in international legal scholarship is a relatively new phenomenon. Nevertheless, empirical research is gaining ground.⁴⁷ As far as international criminal law and procedure is concerned, SHAFFER and GINSBURG noted

⁴⁴ According to CASSESE, the formulation of proposals for the reform of rules and regulations constitutes a “moral duty” for lawyers. See A. CASSESE, *Five Masters of International Law: Conversations with R.-J. Dupuy, E. Jiménez de Aréchaga, R. Jennings, L. Henkin and O. Schachter*, Oxford, Hart Publishing, 2011, p. 256.

⁴⁵ See the discussion *infra*, Chapter 2, VI. Compare J. JACKSON and Y. M’BOGE, *The effect of Legal Culture on the Development of International Evidentiary Practice: From the “Robing Room” to the “Melting Pot”*, in «Leiden Journal of International Law», Vol. 26, 2013, pp. 951 – 952 (“the flexibility of practice and the lack of rules governing a number of aspects of international criminal procedure, particularly in the early stages of investigation, gave professionals the scope to create their own solutions to evidentiary problems”).

⁴⁶ See e.g. J.M. SMITS, *Redefining Normative Legal Science: Towards an Argumentative Discipline*, in F. COOMANS, F. GRÜNFELD and M.T. KAMMINGA (eds.), *Methods of Human Rights Research*, Antwerp, Intersentia, 2009, p. 46 (on law in general).

⁴⁷ In general, consider G. SHAFFER and T. GINSBURG, *The Empirical Turn in International Legal Scholarship*, in «American Journal of International Law», Vol. 106, 2012, pp. 1 – 46 (however, the authors acknowledge that empirical legal scholarship has its predecessors, including the New Haven School of policy science).

how “[s]cholars have paid particular attention to the inner workings of international criminal tribunals and the factors leading to the elaborating of this field of law over the last decades.”⁴⁸ In particular, they refer to a number of socio-legal studies on the ICTY. In recent years, several legal scholars have sought to supplement their research on the law of international criminal procedure by data collected from interviews with participants in international criminal proceedings. For example, reference can be made to TURNER’s study which included field interviews in an academic article on defence counsels’ perspectives on the purposes of international criminal trials.⁴⁹ In a similar vein, MÉGRET relied on data collected from interviews in an article on the ICTY’s legacy.⁵⁰ Less ambitiously, and often in the absence of a clear methodological underpinning, other academics have relied on data gathered from some interviews in their writings on international criminal procedure.⁵¹ Further evidence of the growing interest among scholars in using empirical research can be found in the recent inclusion of a symposium on “Integrating a Socio-Legal Approach to Evidence in the International Criminal Tribunals”, in the *Leiden Journal of International Law*.⁵²

For the purposes of this study, as a first step, standardised questionnaires were prepared for interviews with Judges (including senior legal officers of the Chambers), the Prosecution and the Defence.⁵³ In an attempt to mitigate some of the challenges typically associated with this form of empirical research (e.g. the inclusion of questions that reflect the predispositions of the interviewer), the questionnaires were externally reviewed. In addition, the author participated in some interview training sessions.⁵⁴ As a second step, the tribunals and courts covered were requested to authorise a research visit which included the conduct of interviews.

⁴⁸ *Ibid.*, p. 27.

⁴⁹ J.I. TURNER, Defense Perspectives on Law and Politics in International Criminal Trials, in «Virginia Journal of International Law», Vol. 48, 2008, pp. 529 – 594.

⁵⁰ F. MÉGRET, The Legacy of the ICTY as Seen Through Some of its Actors and Observers, in «Goettingen Journal of International Law», Vol. 3, 2011, pp. 1011 – 1052 (the author notes that “[t]he interview format was chosen as part of an effort to engage in more dialogical scholarship, and push the formal boundaries of what can be published in an international law journal [...]. But the interview format also seemed particularly suited to an article on a tribunal’s *legacy*” (emphasis in original)).

⁵¹ Consider, e.g., L. WALDORF; “A mere Pretense of Justice”: Complementarity, Sham Trials, and Victor’s Justice at the Rwanda Tribunal, in «Fordham International Law Journal», Vol. 33, 2010, pp. 1221 – 1277; C.C. JALLOH, Special Court for Sierra Leone: Achieving Justice?, in «Michigan Journal of International Law», Vol. 32, 2011, pp. 395 – 460; S. KATZENSTEIN, Hybrid Tribunals: Searching for Justice in East Timor, in «Harvard Human Rights Journal», Vol. 16, 2003, pp. 245 – 278; K. CLAUSSEN, Up to the Bar? Designing the Hybrid Khmer Rouge Tribunal in Cambodia, in «Yale Journal of International Law», Vol. 33, 2008, pp. 253 – 258.

⁵² J. JACKSON and Y. M’BOGE, Integrating a Socio-Legal Approach to Evidence in the International Criminal Tribunals, in «Leiden Journal of International Law», Vol. 26, 2013, pp. 933 – 935.

⁵³ All questionnaires used are on file with the author and with the University of Amsterdam.

⁵⁴ The author is grateful to Prof. Dr. Bruinsma, professor of legal sociology at the University of Utrecht who offered training in interview techniques for this purpose.

Positive answers were received from the ICTR, the SCSL and the ECCC. No request was sent to the SPSC as these panels had already suspended their operations. Staff who work with these institutions were then invited to participate in the research. While the participants came from different backgrounds (e.g. civil law or common law), such variables were not scientifically controlled.

In total, 67 face-to-face interviews were conducted.⁵⁵ In 2008, 39 interviews were held at the ICTR premises in Arusha. They included interviews with 9 Judges, 10 legal officers of the Chambers, 10 members of the Office of the Prosecution ('OTP') as well as 10 defence counsel. In 2009, further interviews were held during research visits at the SCSL and the ECCC. At the SCSL, interviews were held in Freetown and at the sub-office in The Hague. Thirteen persons were interviewed in total. These included interviews with a number of Judges, defence counsel and other defence team members as well as members of the OTP. Finally, 15 interviews were held with staff of the ECCC in Phnom-Penh, including international staff members of the Office of the Co-Investigating Judges, national and international staff members of the Office of the Co-Prosecutors as well as with national and international defence counsel.

All of the staff interviewed were working at these institutions at the time of their interviews. On some occasions, the assistance of an interpreter was required during the interview. The questionnaires were sent to the interviewees beforehand. While the interview in principle followed the order of the questions included in the questionnaire, some flexibility was allowed. Interviews were only semi-structured, implying that additional follow-up-questions were put to the participants and that the order of the questions sometimes differed, depending on the answers provided by the person interviewed. No questions pertaining to cases that the participant was or had been involved in at the time of the interview were included. Prior to the start of the interview, the participant was told that he or she had the possibility to say anything 'off-the-record', in which case the recording was switched off. Unless the participant later agreed to have the 'off-the record' statements included in the transcript, they were excluded. The participants were offered the possibility of anonymity for their responses. The majority of interviewees preferred not to be identified by name. Hence, these interviews will be cited by referring to the participant's affiliation ('a staff member of the ICTR OTP', 'a Judge from the

⁵⁵ All interview recordings and transcripts are on file with the author and with the University of Amsterdam.

SCSL’, etc.). Once the interviews had been transcribed, the interviewees were offered the possibility of revising the interview transcription and to introduce any corrections they considered necessary. The questions included in the questionnaire dealt with the law of international criminal procedure.

The present study takes into consideration legal developments up to 1 June 2013. Some parts of this study are adapted and updated versions of reports submitted to the ‘International Expert Framework on International Criminal Procedure’, in which the author participated.⁵⁶ This is true, more specifically, of some of the descriptive parts of Chapters 4 – 6 on the collection of evidence. However, a different methodology was used for the purposes of that research project.

V. ORGANISATION OF THE CHAPTERS

This study consists of four sections which follow the topic in a chronological fashion. At the outset, it is necessary to precisely define what international criminal procedure *is*. Any meaningful discussion on the investigation phase within international criminal proceedings presupposes the precise conceptualisation and definition of international criminal procedure. Therefore, in the first chapter of Section I, its sources will be explored, the goals it is intended to serve, its relationship to the civil law and common law models of criminal justice and the extent to which international(ised) criminal courts and tribunals are bound by international human rights norms. From a more general discussion on the law of international criminal procedure, attention will then gradually move to the investigation phase, the subject-matter of this study. The specific characteristics of investigations conducted by international(ised) criminal tribunals will be analysed. At the end of Chapter 2, the choices with regard to the normative framework for this study will be explained.

⁵⁶ See K. DE MEESTER, K. PITCHER, R. RASTAN and G. SLUITER, Investigation, Coercive Measures, Arrest and Surrender, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, pp. 171 – 380. Because of a mistake made by the publisher, this chapter is presented as a co-authored chapter. However, part 3 of this chapter (‘Collection of Evidence’) is to be attributed to this author. This will be corrected with the next print.

Chapter 3 seeks to further define and delineate the investigation phase. Different sub-phases within the investigation phase will be identified and discussed. It will be noted how different courts and tribunals under review offer different answers to the question of when the investigation phase starts and when it ends. Determining the precise starting point of the investigation is important insofar that it determines the moment the full gamut of prosecutorial investigative powers becomes available. It needs to be examined whether a minimum threshold is required for the commencement of the investigation. In a similar vein, it needs to be assessed whether, and if so, under what conditions, international criminal procedure allows investigative efforts to continue after the end of the investigation phase proper. Subsequently, a great deal of attention will be given to the question of whether the international Prosecutor is guided by a principle of legality or whether he or she enjoys certain discretion in selecting cases for investigation and prosecution. This attention is justified since the answer to this question has important consequences for the organisation of the investigation. Finally, a number of normative principles that are relevant to the conduct of investigations before international(ised) criminal tribunals will be discussed in more detail. These include the prosecutorial principle of objectivity and the ethical duty of due diligence incumbent on the parties in international criminal proceedings.

This delineation and definition of the investigation phase in international criminal procedure forms the background for the discussion, in Section II, of the collection of evidence by the parties in the proceedings. Section II consists of Chapters 4 to 6. An important distinction will be drawn between non-coercive and non-custodial coercive investigative measures. Without any claim to exhaustiveness, investigative measures relevant to the collection of evidence have been included based on the criterion of their actual relevance according to the practice of the international(ised) criminal courts and tribunals. First, Chapter 4 discusses the interrogation of suspects and accused persons. Both the power-conferring rules relevant to this investigative act (sword dimension) as well as the relevant procedural safeguards and rules on the recording procedure (shield dimension) will be analysed. Where investigative measures can be executed by national law enforcement officials, by the Prosecutor him or herself or by a combination thereof, the determination of the applicable procedural regime will be important. Subsequently, and in a similar manner, Chapter 5 discusses the questioning of witnesses by the parties in the proceedings. The use to which statements resulting from pre-trial witness interviews are put at trial falls outside the scope of this study. However, the requirements for the admission of prior witness statements at trial may provide us with some

hints as to what procedural norms are to be upheld during the questioning of witnesses and on what the preferable standard for the recording of pre-trial witness statements is. Hence, this issue will be considered indirectly. Finally, Chapter 6 deals with non-custodial coercive measures. The first part of Chapter 6 is devoted to the identification of formal and substantial safeguards for the use of non-custodial coercive measures. The second part discusses some individual coercive investigative measures in detail, including search and seizures or the interception of communications. Where any use of coercive powers by an international Prosecutor on the territory of states is a delicate matter, attention will be paid to the question of whether and, if so, under what conditions, the international Prosecutor may directly execute coercive measures on the territory of a state.

Chapters 7 and 8, which together form Section III of this study, deal with custodial coercive measures. Chapter 7 explores the issue of the arrest and the transfer of suspects and accused persons. This chapter distinguishes arrests pursuant to a warrant of arrest from the arrest in emergency situations. In addition, the alternatives to arrest that are provided for in international criminal procedural law will be examined. In line with other chapters, the rights of arrested and detained persons will be discussed at length. Furthermore, based on the practice of the tribunals, irregularities in the execution of the arrest and/or the transfer of persons will be examined. Notably, such irregularities raise complex questions as to the attribution of responsibility to the international criminal tribunals for pre-transfer violations. Finally, the issue of remedies for violations of the rights of suspects or accused persons in the context of the deprivation of liberty will be examined. In turn, Chapter 8 discusses the issues of provisional detention and release prior to the commencement of the trial. In order to determine the provisional detention/release regime in international criminal procedure, the formal and material requirements for pre-trial detention and/or release will be examined. Besides, the applicable standard of proof, the party carrying the burden of proof and the presence (or lack thereof) of judicial discretion in ordering provisional detention or release needs to be determined. Again, the analysis will look beyond the black letter law and examine the practice of the various courts and tribunals under review, in detail. This allows for the identification of the major obstacles these institutions face in relation to the issue of provisional detention and release.

Finally, the concluding Section IV will set out the main findings of the study. It will attempt to answer the question of whether any rules and/or practices on the investigation phase are

commonly shared by the different international(ised) courts and tribunals under review. In addition, in an attempt to answer the second part of the central research question, a number of general and more specific recommendations will be formulated that are necessary to ensure the fairness of investigations.

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I. INTRODUCTION

Before embarking on a detailed survey of the investigation phase in international criminal procedure, it is necessary to first determine what ‘international criminal procedure’ *is*. As indicated in the general introduction, it is a concept which is difficult to define. Until recently, international criminal procedure only received limited attention in comparison to its substantive counterpart. Recently, that picture is changing rapidly as the procedural aspects of international criminal law receive the attention they deserve.¹

¹ Consider e.g. S. BIBAS and W.W. BURKE-WHITE, International Idealism Meets Domestic-Criminal Procedure Realism, in «Duke Law Journal», Vol. 59, 2010, p. 637 (the authors note that scholarly writings have neglected “institutional design and procedure questions” and should learn more from their domestic

Not too long ago, SCHWARZENBERGER concluded that “[t]he Law of International Criminal Procedure, as with International Criminal Law in any substantive sense, does not exist in the international customary law of unorganized international society.”² SCHWARZENBERGER argued that the Charters of the IMT and IMTFE were nothing more than a joint effort by the cobelligerents of what they could do separately under the laws of war: exercising extraordinary jurisdiction against persons accused of being war criminals.³ Therefore, international criminal procedure, like international criminal law, could not be unequivocally established as a separate branch of law.

Since then, the world has witnessed the “proliferation” of international as well as of internationalised criminal tribunals. This could add weight to the case for the existence of international criminal procedure as a separate body of law. However, a quick glance to the procedural frameworks of the different courts and tribunals under review reveals a substantial level of fragmentation and incoherence. It rather seems that each tribunal or court has its own, self-contained procedural regime. One gets the idea that procedural choices are primarily influenced by political whims and are made without much regard to the societal interests.⁴ Moreover, notwithstanding the mushrooming of new (forms) of international criminal tribunals, there is no clear hierarchical structure between them.⁵ In light of this fragmentation and in the absence of a coordinating legislature, CARCANO even holds that it would be

counterparts). Recently, a great number of academic writings and monographs on international criminal procedure have emerged. These include, among others, G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013; C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012; L. CARTER and F. POCAR (eds.), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, Cheltenham, Edward Elgar Publishing, 2013; L. REYDAMS, J. WOUTERS and C. REYNGAERT (eds.), *International Prosecutors*, Oxford, Oxford University Press, 2012; C. SCHUON, *International Criminal Procedure: A Clash of Legal Cultures*, The Hague, T.M.C. Asser Press, 2010; G. SLUITER and S. VASILIEV (eds.), *International Criminal Procedure: Towards a Coherent Body of Law*, London, CMP Publishing, 2009.

² G. SCHWARZENBERGER, *The Province of International Judicial Law*, in «Notre Dame International Law Journal», Vol. 21, 1983, p. 25. The author adds that “[s]ubject to insignificant consensual exceptions, International Criminal Procedure as the adjective law of an International Criminal Law in any substantive sense remains in the limbo of *lex ferenda*”). Consider also G. SCHWARZENBERGER, *The Problem of an International Criminal Law*, in «Current Legal Problems », Vol. 3, 1950, pp. 295 – 296.

³ G. SCHWARZENBERGER, *The Province of International Judicial Law*, in «Notre Dame International Law Journal», Vol. 21, 1983, p. 25.

⁴ G. SLUITER, *The Effects of the Law of International Criminal Procedure on Domestic Proceedings Concerning International Crimes*, in G. SLUITER and S. VASILIEV (eds.), *International Criminal Procedure: Towards a Coherent Body of Law*, London, CMP Publishing, 2009, p. 460.

⁵ C. BROWN, *The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals*, in «Loyola of Los Angeles International and Comparative Law Review», Vol. 30, 2008, p. 219.

inappropriate to speak of international criminal justice *systems*, preferring the term ‘mechanisms’.⁶

It follows that one can easily agree with AMBOS and BOCK, who conclude that a uniform code of international criminal procedure does not yet exist.⁷ However, the understanding that at least a ‘core’ of international criminal procedure exists, seems to be gaining ground.⁸ In this regard, commentators increasingly explore the commonalities in the procedural regimes of different international(ised) criminal tribunals.⁹ In turn, disagreement seems to persist as to whether it is sufficiently homogeneous and coherent in nature for it to constitute a discrete body of law.¹⁰ Some commentators respond in the affirmative to the question,¹¹ while others

⁶ A. CARCANO, the ICTY Appeals Chamber’s *Nikolić* Decision on Legality of Arrest: Can an International Criminal Court Assert Jurisdiction over Illegally Seized Offenders?, in *Italian Yearbook of International Law*, Vol. 13, 2003, p. 88 (“This mechanism, it should be clarified, is not a system, at least when compared with national legal systems, because of its rudimentary and fragmented nature and the lack of an international legislature coordinating it and harmonising its development as a whole. The above mentioned courts share, however, common characteristics in that they are international judicial bodies, are charged with the prosecution of the same kinds of crime (i.e. genocide, crimes against humanity and war crimes), are established under international law and apply, *inter alia*, principles of international criminal law. National courts, although formally not part of this mechanism, act as part of it to the extent that they foster the goal of prosecuting crimes of international concern”).

⁷ K. AMBOS and S. BOCK, *Procedural Regimes*, in L. REYDAMS, J. WOUTERS and C. REYNGAERT (eds.), *International Prosecutors*, Oxford, Oxford University Press, 2012, p. 540.

⁸ Consider e.g. SLUITER, who refers to the existence of a “unified core” of international criminal procedure: G. SLUITER, *Trends in the Development of a Unified Law of International Criminal Procedure*, in C. STAHN and L. VAN DEN HERIK (eds.), *Future Perspectives on International Criminal Justice*, Cambridge, Cambridge University Press, 2010, p. 586; S. BIBAS and W.W. BURKE-WHITE, *International Idealism Meets Domestic-Criminal Procedure Realism*, in *Duke Law Journal*, Vol. 59, 2010, p. 654 (“Though it remains dysfunctional, international criminal justice today is a nascent system guided by core principles”); S. VASILIEV, Introduction, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 5 (referring to the “emergence and consolidation of international criminal procedure as an academic discipline”).

⁹ S. BIBAS and W.W. BURKE-WHITE, *International Idealism Meets Domestic-Criminal Procedure Realism*, in *Duke Law Journal*, Vol. 59, 2010, p. 656 (“these courts [...] have far more in common than commentators recognize. [...] Second, international criminal courts have developed detailed procedural rules, some of which have migrated into the practice of hybrid tribunals as well”).

¹⁰ See S. VASILIEV, Introduction, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 5; G. BOAS, J.L. BISCHOFF, N.L. REID and B. DON TAYLOR III, *International Criminal Law Practitioner Library*, Vol. III: *International Criminal Procedure*, Cambridge, Cambridge University Press, 2011, pp. 1, 4.

¹¹ Consider e.g. *ibid.*, pp. 463 - 466 (on the basis of the analysis of its sources and coherence, the authors conclude that international criminal procedure can be earmarked as a coherent body of international law. While the authors admit that divergences in the procedures applied by the international criminal tribunals certainly exist, they hold, in comparing with domestic criminal procedure, that such divergences “[do] not undermine the coherence, nor the legitimacy, of domestic criminal procedure, particularly where a constitutional foundation secures fair trial protections rooted in a governing source and from which none of the divergent procedures may derogate. That differences exist within a broadly coherent body of procedural rules is a common and healthy feature of a functioning legal system.” The review of international criminal procedure suggests “far greater cohesion than it does incoherence and fragmentation”. Even the differences show a “singularity of purpose”); J.D. OHLIN, *Goals of International Criminal Justice and International Criminal Procedure*, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and*

seem to be more hesitant,¹² or respond negatively.¹³ At least, it is clear that the formation process of international criminal procedure is not finished.¹⁴ The argument that international criminal procedure is emerging as a body of law, should be considered in light of parallel arguments that a “common law of international adjudication” is emerging in international law.¹⁵

Below, several aspects of international criminal procedure will shortly be addressed. The discussion will gradually evolve from more general observations on the law of international criminal procedure towards the discussion of the more specific characteristics of the investigation phase. Logically, any excursion on the law of international criminal procedure

Rules, Oxford, Oxford University Press, 2013, p. 55 (labelling international criminal procedure a subsidiary discipline of international criminal justice).

¹² Consider e.g. G. SLUITER, *The Law of International Criminal Procedure and Domestic War Crimes Trials*, in «International Criminal Law Review», Vol. 6, 2006, p. 607 (“there is no true international design of criminal procedure”), p. 618 (“the law of international criminal procedure is still a highly diverse body of rules, far from being settled law in many respects”), p. 35 (“the law of international criminal procedure should aspire to develop as much as possible in a uniform and coherent body of law”). Elsewhere, SLUITER refers to international criminal procedure as a “deficient body of law in many respects”. See G. SLUITER, *The Effects of the Law of International Criminal Procedure on Domestic Proceedings Concerning International Crimes*, in G. SLUITER and S. VASILIEV (eds.), *International Criminal Procedure: Towards a Coherent Body of Law*, London, CMP Publishing, 2009, p. 460.

¹³ Consider e.g. A. CASSESE, *International Criminal Law* (2nd Ed.), Oxford, Oxford University Press, 2008, p. 378 (“There do not yet exist international general *rules* on international criminal proceedings. Each international court has its own Rules of Procedure and Evidence (RPE).” However, the author adds that when the *ad hoc* tribunals finish their activities and where the ICC continues its work, the consolidation of some general principles is probable. Besides, the author argues that some *general principles* governing international trials could already be discerned, which derive from the Statutes and Charters of the present and past international criminal tribunals as well as from judicial practice); A. CASSESE, *The Influence of the European Court of Human Rights on International Criminal Tribunals – Some Methodological Remarks*, in M. BERGSMO, *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide*, Leiden, Martinus Nijhoff Publishers, 2003, p. 19 (labelling the provisions of international criminal procedure “rudimentary”); G. BITTI, *Article 21 of the Statute of the ICC and the Treatment of Sources of Law in the Jurisprudence of the ICC*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 298 (“it seems doubtful whether the concept of “international criminal practice” exists in reality. “International criminal proceedings” are widely fragmented as a result of the unprecedented development of “internationalized” or “mixed” criminal tribunals which follow very different approaches as far as criminal procedural law is concerned”); K. AMBOS and S. BOCK, *Procedural Regimes*, in L. REYDAMS, J. WOUTERS and C. REYNGAERT (eds.), *International Prosecutors*, Oxford, Oxford University Press, 2012, p. 540 (concluding that each tribunal “has developed its own, more or less unique, procedural code”).

¹⁴ Consider K. MARTIN-CHENUT, *Procès international et modèles de justice pénale*, in H. ASCENSIO (ed.), *Droit international pénal*, Paris, Pedone, 2012, p. 849 (noting that where international criminal procedure is in constant formation, this allows it to be flexible).

¹⁵ See e.g. C. BROWN, *The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals*, in «Loyola of Los Angeles International and Comparative Law Review», Vol. 30, 2008, pp. 221 – 222 (“A review of the practice of international courts and tribunals on a range of issues relating to procedure and remedies reveals evidence suggesting that there is a tendency, or at least an instinct, on the part of international courts and tribunals to adopt common approaches. These universal approaches have led to increasing commonality in the case law of international courts. This commonality concerns both the existence of procedural and remedial powers and the manner in which those powers are exercised. The practice has given rise to the emergence of what might be called a “common law of international adjudication”).

should start with a discussion of its sources. Secondly, it will be asked what role international human rights norms play in international criminal procedure. The exact relationship between human rights norms and international criminal procedure will be clarified. Thirdly, another useful parameter to discover the nature of international criminal procedure is by enquiring into what goals it is intended to serve. Attention will be paid to the goals of international criminal procedure and of international criminal justice more general. Fourthly, it will be clarified whether, and, if so, to what extent, international criminal procedure can be qualified in terms of the ‘adversarial’ and ‘inquisitorial’ models of criminal procedure; models which are used in comparative criminal procedure scholarship and are often applied to the procedures of the international(ised) criminal courts and tribunals. Fifthly, it will be asked whether the ‘sketchy’ or ‘rudimentary’ character of at least some parts of international criminal proceedings, and in particular of the investigation phase, is problematic and whether or not international(ised) criminal courts and tribunals are bound by a procedural principle of legality. Consequently, several particular features of investigations before international(ised) criminal courts and tribunals will be scrutinised. These particular features distinguish investigations conducted by international(ised) criminal courts and tribunals from their municipal counterparts. The discussion of these aspects should allow us to, in a final part, identify the normative parameters which will further be employed in this study.

II. THE UNCERTAIN SOURCES OF INTERNATIONAL CRIMINAL PROCEDURE (and its methods of interpretation)

In order to define what international criminal procedure is, its sources need to be considered. The question whether, and to what extent, international human rights norms are binding on the international criminal tribunals is of special importance for our normative evaluation and will be discussed separately.¹⁶ To a large extent, the sources of international criminal procedure are the same as those of international criminal law, which in turn, are to a large extent similar to the sources of international law.¹⁷ As far as international criminal *procedure*

¹⁶ See *infra*, Chapter 2, III.

¹⁷ These are in the first place the sources as enumerated in Article 38 of the ICJ Statute. See G. BOAS, J.L. BISCHOFF, N.L. REID and B. DON TAYLOR III, *International Criminal Law Practitioner Library*, Vol. III: *International Criminal Procedure*, Cambridge, Cambridge University Press, 2011, pp. 2 – 3; O. QUIRICO, *The Relationship between General Principles and Custom in International Criminal Law*, Working Paper, European University Institute, Florence, 2006, (<http://www.eui.eu/Documents/DepartmentsCentres/%20Law/ResearchTeaching/WorkingGroups/WGCriminalLawMinutes22Nov2006.pdf>, last visited 10 February 2014), p. 5.

is concerned, it is evident that these tribunals apply in the first place their own Statutes and RPE's, which set forth the applicable procedural rules. Here, a tendency towards more detailed procedural rules can be noted.¹⁸ When the *ad hoc* tribunals were set up, only the broader lines were set out, leaving it to the Judges to further define the details of the procedure.¹⁹ This was even more the case at the IMT and the IMTFE.²⁰

The Statutes and RPE are interpreted by the Judges, according to the Vienna Convention on the Law of Treaties ('VCLT'), regardless of whether they constitute a treaty (ICC), or rather should be qualified documents *sui generis*, which 'resemble' treaties (ICTY, ICTR).²¹ More problematic is that such an interpretation may occasionally lead to a liberal interpretation of provisions which is at tension with the *in dubio pro reo* principle.²² While it is open to

¹⁸ Consider in that regard the remark by MÉGRET that "international criminal procedure offers a unique and almost experimental glimpse into the genesis and evolution of any criminal procedure and how it evolves from next to nothing into a sophisticated system of rules and understandings." See F. MÉGRET, Beyond "Fairness": Understanding the Determinants of International Criminal Procedure, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, p. 40.

¹⁹ F. MÉGRET, The Sources of International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), International Criminal Procedure: Principles and Rules, Oxford, Oxford University Press, 2013, pp. 68 – 69. On the question whether it is acceptable for the law of international criminal procedure only to be regulated rudimentary, see *infra*, Chapter 2, VI.

²⁰ First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/49/342-S/1994/1007, 29 August 1994, par. 54; ICTY, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadić*, Case No. IT-94-1, T. Ch., 10 August 1995, par. 20 (noting that there were only 11 procedural rules at the IMT and nine at the IMTFE, leaving it to the Judges to resolve procedural issues).

²¹ ICTR, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-A, A. Ch., 3 June 1999, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, par. 15 (the Judges note that the Statute "shares with treaties fundamental similarities." They add that "[b]ecause the Vienna Convention codifies logical and practical norms that are consistent with domestic law, it is applicable under customary international law to international instruments which are not treaties"). Consider ICTY, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadić*, Case No. IT-94-1, T. Ch., 10 August 1995, par. 18 (stating, without further explaining, that "the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties appear relevant"). The use of the VCLT to interpret the Statute of the international criminal tribunals does not seem problematic, it has also been used in interpreting, for example, the ICJ Statute. See N.A. AFFOLDER, *Tadić*, the Anonymous Witness and the Sources of International Procedural Law, in «Michigan Journal of International Law», Vol. 19, 1998, p. 475. More hesitant, consider P.L. ROBINSON, Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia, in «European Journal of European Law», Vol. 11, 2000, p. 571 (noting that the Statute lacks one essential element of a treaty: the presence of an agreement).

²² D. AKANDE, Sources of International Criminal Law, in A. CASSESE (ed.), The Oxford Companion to International Criminal Justice, Oxford, Oxford University Press, 2009, p. 44 – 45 (holding that these principles should limit the application of the VCLT methods of interpretation, insofar as these enable reference to the *travaux préparatoires* in case the interpretation under Article 31 leaves the meaning ambiguous or obscure. In such situation, the meaning most favourable to the accused should be adopted (cf. Article 22 (2) ICC Statute). Consider also the recent discussion thereof at the EJIL: Talk! Weblog, <http://www.ejiltalk.org/treaty-interpretation-the-vclt-and-the-icc-statute-a-response-to-kevin-jon-heller-dov-jacobs/>, 25 August 2013 (last visited 10 February 2014).

discussion whether this principle also applies to procedural issues, a liberal approach suggests that it does.²³ Besides these being *international* courts, the international criminal courts and tribunals are bound to apply the extraneous categories of sources which can be found in Article 38 ICJ Statute (which reflects customary international law). All categories of sources of international law (treaties, customary international law and general principles of law) have been applied by international criminal tribunals.²⁴ Much has been written on the use of these sources of law by the tribunals.²⁵ Occasionally, the *ad hoc* tribunals have referred to categories of sources additional to the ones set forth in Article 38 ICJ Statute.²⁶

Unlike the *ad hoc* tribunals, Article 21 of the ICC Statute provides for a conclusive enumeration of sources of international criminal law.²⁷ While this provision is largely based

²³ F. MÉGRET, The Sources of International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 70.

²⁴ Consider e.g. ICTY, Judgment, *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, T. Ch. II, 14 January 2000, par. 591 (“in resolving matters in dispute on the scope of persecution, the Trial Chamber must of necessity turn to customary international law. Indeed, any time the Statute does not regulate a specific matter, and the *Report of the Secretary-General* does not prove to be of any assistance in the interpretation of the Statute, it falls to the International Tribunal to draw upon (i) rules of customary international law or (ii) general principles of international criminal law; or, lacking such principles, (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice. It must be assumed that the draftspersons intended the Statute to be based on international law, with the consequence that any possible *lacunae* must be filled by having recourse to that body of law”); Note that this enumeration is not fully in line with Article 38 ICJ Statute, where Article 38 does not include ‘general principles of international criminal law’ or ‘general principles of law consonant with the basic requirements of international justice’; SCSL, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), *Prosecutor v. Norman*, Case No. SCSL-04-14-AR72(E), A. Ch., 31 May 2004, par. 9 (discussing international conventions and international customary law); ICTY, Judgment, *Prosecutor v. Erdemović*, Case No. IT-96-22-A, A. Ch., 7 October 1997, Joint Separate Opinion of Judge McDonald and Judge Vohrah, par. 40; ICTY, Decision on Defence Request for Audio Recording of Prosecution Witness Proofing Sessions, *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, T. Ch. I, 23 May 2007, par. 15 – 17 (the Trial Chamber considers whether an order for the Prosecution to audio-record witness proofing sessions would be contrary to customary international law).

²⁵ For example, consider A. ZAHAR and G. SLUITER, *International Criminal Law: a Critical Introduction*, Oxford, Oxford University Press, 2008, p. 92 *et seq.*; under the title ‘methods of discovery or methods of creation’, the authors compare the interpretation and application of sources by the *ad hoc* tribunals to “the life of hunter-gatherers in a legal wilderness” (*ibid.*, p. 80).

²⁶ Consider e.g. ICTY, Judgement, *Prosecutor v. Furundžija*, Case No. 95-17/1-T, T. Ch., 10 December 1998, par. 182 (referring to “general principles of international criminal law” and “if such principles are of no avail, to the general principles of international law”). It seems to set forward ‘general principles of international criminal law’ and ‘general principles of international law’ as sources separate from general principles of law. Critical thereof, consider S. VASILIEV, *General Rules and Principles of International Criminal Procedure*, in G. SLUITER and S. VASILIEV (eds.), *International Criminal Procedure: Towards a Coherent Body*, Cameron May, London, 2009, p. 77 (“it would be fundamentally misconceived to look at the general principles of international (criminal) law as being an autonomous source. Even though they occupy a very special position in the normative structure of the LICP, they constitute nothing more than a class of legal provisions encompassed by the sources of that law—the treaties, customs and general principles of law”).

²⁷ Consider e.g. A. PELLET, *Applicable Law*, in A. CASSESE, P. GAETA and J. R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1053; G. HAFNER

on Article 38 ICJ Statute, referred to above, it has a number of distinctive features.²⁸ First and foremost, it follows from the wording and structure of Article 21 (1) ICC Statute that a certain hierarchy (or even several hierarchies²⁹) is (are) included therein.³⁰ It details the order in which the applicable sources are to be consulted.³¹ This is clear from the exact wording of Article 21 (1) and (2) ('The Court shall apply: (a) In the first place... (b) In the second place...(2) Failing that').³² The Court should first resort to the ICC Statute, as complemented both by the RPE and the Elements of Crimes.³³ Only in case of a *lacuna* which cannot be filled by the application of the criteria provided for in Article 31 and 32 VCLT, can resort be

and C. BINDER, *The Interpretation of Article 21 (3) ICC Statute: Opinion Reviewed*, in «Austrian Review of International and European Law», Vol. 9, 2004, p. 165. It is to be noted that the inclusion of a comparable provision on 'secondary sources' into the ICTY Statute was proposed, among others by the U.S. proposal. See N.A. AFFOLDER, *Tadić, the Anonymous Witness and the Sources of International Procedural Law*, in «Michigan Journal of International Law», Vol. 19, 1998, p. 484. Besides, a limited enumeration of sources can be found in Rule 89 (B) of the ICTY and ICTR Statute ('In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law') (compare Rule 89 (B) SCSL RPE).

²⁸ S. VASILIEV, *Proofing the Ban on 'Witness Proofing': Did the ICC get it right?*, in «Criminal Law Forum», Vol. 20, 2009, p. 210.

²⁹ PELLET holds that Article 21 (3) evidences that the formal hierarchy of sources in Article 21 (1) is complemented by another hierarchy, whereby certain rules are superior based on their "subject-matter or their veritable substance". Hence, the sources of applicable law under Article 21 (1) and (2) are overlaid by another substantial hierarchy. See A. PELLET, *Applicable Law*, in A. CASSESE, P. GAETA and J.R.W.D. JONES, (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, pp. 1079, 1082; S. VASILIEV, *Proofing the Ban on 'Witness Proofing': Did the ICC get it right?*, in «Criminal Law Forum», Vol. 20, 2009, pp. 211 – 214 ("Article 21 enshrines multiple and partly overlapping hierarchies, namely a hierarchy of sources and a hierarchy of norms ranked by their legal force". The author adds that where the normative hierarchy does not follow the first hierarchy of sources, this implies that in case of a (highly unlikely) conflict between a statutory norm which conflicts with a rule of customary law, the former does not necessary prevail); G. BITTI, *Article 21 of the Statute of the ICC and the Treatment of Sources of Law in the Jurisprudence of the ICC*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 287 (referring to "a multiplicity of hierarchies").

³⁰ ICC, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 29 ("This article contains a list of sources of law and establishes a hierarchy between them"); Consider, e.g., G.E. EDWARDS, *International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy*, in «The Yale Journal of International Law», Vol. 26, 2001, p. 369 ("the sources are listed hierarchically"); M.M. DEGUZMAN, *Article 21*, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 702; J. VERHOEVEN, *Article 21 of the Rome Statute and the Ambiguities of Applicable Law*, in «Netherlands Yearbook of International Law», Vol. 33, 2002, p. 11.

³¹ See e.g. G.E. EDWARDS, *International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy*, in «The Yale Journal of International Law», Vol. 26, 2001, p. 370.

³² At least one commentator seems to defend an understanding whereby Article 21 (1) (a) and (b) are considered together. VERHOEVEN argues that the "[i]ntrinsic primacy of those rules over the treaties and principles or rules of international law referred to in paragraph 1(b) of Article 21 does not exist. The mention of a 'second place' only means that such treaties, principles or rules only apply to issues that are not settled by the first category rules, either because the Statute is incomplete in certain respects, or because the point at stake is not as such concerned with its provisions." See J. VERHOEVEN, *Article 21 of the Rome Statute and the Ambiguities of Applicable Law* in «Netherlands Yearbook of International Law», Vol. 33, 2002, p. 11.

³³ In case of a conflict between the ICC Statute and the RPE or the Elements of Crimes, the Statute prevails. See Articles 51 (5) and Article 9 (3) ICC Statute respectively.

had to other sources of law. This understanding is confirmed by the ICC Appeals Chamber, which held that if a matter is exhaustively dealt with by the ICC Statute or the RPE, then “no room is left for recourse to the second or third source of law to determine the presence or absence of a rule governing a given subject.”³⁴ In other words, if an issue is dealt with exhaustively by Article 21 (1) (a) ICC Statute, then there is no need to look to Article 21 (1) (b) and (c). From this consultation order, and contrary to the *ad hoc* tribunals’ jurisprudence, it seems to follow that statutory provisions cannot be disregarded if they would, for example, be inconsistent with a rule of international customary law. On the other hand, if one distinguishes, as indicated above, between several hierarchies of sources in Article 21 (a consultation order and a normative hierarchy), this is not necessarily the case.³⁵ This would bring Article 21 in line with the jurisprudence of the *ad hoc* tribunals.³⁶ However, as acknowledged by VERHOEVEN, “the rarity of general international law rules governing

³⁴ As referred to in ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 34; ICC, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, *Situation in the DRC*, Case No. ICC-01/04-168, A. Ch., 13 July 2006, par. 39 (the Appeals Chamber held that Article 21 (1) (c) cannot be looked at where there was no *lacuna* in the Statute (with regard to the right to appeal against decisions by first instance courts (Article 82 ICC Statute))); ICC, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Prosecutor v. Al Bashir, Situation in Darfur, Sudan*, Case No. ICC 02/05-01/09-3, PTC I, 4 March 2009, par. 44; ICC, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Prosecutor v. Al Bashir, Situation in Darfur, Sudan*, Case No. ICC-02/05-01/09-139, PTC I, 12 December 2011, p. 4. Consider additionally: ICC, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-1049, T. Ch. I, 30 November 2007, par. 44 – 45 (“if ICC legislation is not definitive on the issue, the Trial Chamber should apply, where appropriate, principles and rules of international law”). Consider also G. BITTI, Article 21 of the Statute of the ICC and the Treatment of Sources of Law in the Jurisprudence of the ICC, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 296 (stating that this jurisprudence affirms that the sources in Article 21 (1) (b) and (c) constitute *subsidiary* and not *additional* sources of law. This results in a less flexible use of sources by the ICC, something which is according to BITTI understandable in light of the more detailed and precise character of the ICC Statute and RPE when compared to the governing law of the *ad hoc* tribunals).

³⁵ See fn. 29 and accompanying text. *Contra* D. AKANDE, Sources of International Criminal Law, in A. CASSESE (ed.), *The Oxford Companion to International Criminal Justice*, Oxford, Oxford University Press, 2009, pp. 47 – 48 (holding that the Statute, RPE and the elements of crimes take precedence over treaties other than the ICC, customary international law and general principles of law). Consider also the argumentation in ICTY, Judgment, *Prosecutor v. Furundžija*, A. Ch., 21 July 2000, Declaration of Judge Patrick Robinson, par. 279 (“A relevant rule of customary international law does not necessarily control interpretation. For the Statute may itself derogate from customary international law, as it does in Article 29 by obliging States to co-operate with the Tribunal and to comply with requests and orders from the Tribunal for assistance in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law”).

³⁶ Consider e.g. ICTR, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, *Prosecutor v. Kanyabashi*, A. Ch., 3 June 1999, Joint Separate and Concurring Opinion of Judge Wagh and Judge Nieto-Navia, par. 20 (“certain general principles of law, recognised by all major legal systems but not explicitly provided for by the Statute, would always, we submit, assume precedence over the need to incorporate in the Rules a new practice that may appear to the Judges to be useful”).

either the functioning of courts or the punishment of crimes considerably limits [...] the practical relevance of this point.”³⁷ In this respect, one commentator notes a certain tendency in the case law of the ICC “to treat the sources enumerated in article 21(1) as a complete codification, especially with respect to procedural issues.”³⁸

Further, as a caveat, it should be noted that “silence on the part of the proper instruments of the ICC does not necessarily mean that there is a lacuna which must be filled by parts (b) or (c) of paragraph 1 of Article 21 of the ICC Statute.”³⁹ Rather, one should look for whether or not this silence was a decision against this rule. Through the ordinary methods of treaty interpretation, one may find that the drafters intentionally chose not to include a certain rule.⁴⁰

‘In the second place’, Article 21 (1) (b) provides for the application, ‘where appropriate’ of (i) applicable treaties and (ii) the principles and rules of international law, including the established principles of the international law of armed conflict. The addition ‘where appropriate’, is held to refer to the discretion Judges hold in the determination of the applicability of treaties.⁴¹ It is rather unclear what is meant by ‘applicable’ rather than ‘relevant’ treaties.⁴² PELLET argues in this regard that it is difficult to see how the ICC would have to apply a treaty, other than the Statute.⁴³ In general, and contrary to substantive

³⁷ J. VERHOEVEN, Article 21 of the Rome Statute and the Ambiguities of Applicable Law in «Netherlands Yearbook of International Law», Vol. 33, 2002, p. 11.

³⁸ W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 389. The author provides some examples where the Court hesitated in relying on extraneous sources of law with regard to procedural issues. Consider e.g. ICC, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-1049, T. Ch. I, 30 November 2007, par. 44 (“In the instant case, the issue before the Chamber is procedural in nature. While this would not, *ipso facto*, prevent all procedural issues from scrutiny under Article 21(1)(b), the Chamber does not consider the procedural rules and jurisprudence of the *ad hoc* Tribunals to be automatically applicable to the ICC without detailed analysis”).

³⁹ V. NERLICH, *The Status of ICTY and ICTR Precedent in Proceedings before the ICC*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 312, fn. 31; C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 763.

⁴⁰ *Ibid.*, pp. 763 - 764.

⁴¹ M.M. DEGUZMAN, Article 21, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 705. According to PAULUSSEN, it should be understood to mean “where it (according to the judges) fits”. In this manner, it tempers the wording of the *chapeau* of Article 21 (“shall apply”). See C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 762.

⁴² M.M. DEGUZMAN, Article 21, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 706 (holding that “[u]ltimately, [...] the drafter’s choice of the term applicable, rather than relevant, may have little practical effect”).

⁴³ A. PELLET, *Applicable Law*, in A. CASSESE, P. GAETA and J. R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1069.

international criminal law, other treaties will only be of limited relevance to international criminal procedure.⁴⁴ It is clear that in case treaties are not ‘applicable’, they may offer proof of ‘rules and principles of international law’.

Divergent interpretations exist regarding the term ‘principles and rules of international law’, more precisely whether or not this wording is limited to customary international law or not.⁴⁵ It could be held to also include the judicial decisions of other international judicial bodies.⁴⁶ However, the ICC’s case law is clear in that the jurisprudence of other tribunals is not automatically applicable to the ICC.⁴⁷ Further, different views exist in scholarly writings as to whether ‘principles’ and ‘rules’ of international law can be distinguished.⁴⁸ The reference to ‘principles and rules of international law’, rather than to customary international law, may be explained by the reluctance of some criminal lawyers, given the implications thereof for the

⁴⁴ F. MÉGRET, *The Sources of International Criminal Procedure*, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 71.

⁴⁵ See e.g. A. PELLET, *Applicable Law*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1071 (“In reality, there is little doubt that this provision refers, exclusively, to customary international law, of which the ‘established principles of the international law of armed conflict’ clearly form an integral part”); C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 796 (“It may indeed be the case that the “principles and rules of international law” are broader than mere customary international law, but many agree that the principles and rules of international law, in any case, cover customary international law”).

⁴⁶ M.M. EL ZEIDY, *Critical Thoughts on Article 59(2) of the ICC Statute*, in «*Journal of International Criminal Justice*», Vol. 4, 2006, p. 462: “Although Article 21 does not state clearly whether decisions of the other international judicial bodies is considered an applicable source of law, arguably the phrase ‘principles and rules of international law’ mentioned in Article 21(1)(b) covers those decisions as a secondary source.”

⁴⁷ ICC, *Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-1049, T. Ch. I, 30 November 2007, par. 44 – 45 (“the Chamber does not consider the procedural rules and jurisprudence of the *ad hoc* Tribunals to be automatically applicable to the ICC without detailed analysis”); ICC, *Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, Situation in Uganda*, Case No. 02/04-01/05-60, PTC II, 28 October 2005, par. 19 (“Accordingly, the rules and practice of other jurisdictions, whether national or international, are not as such “applicable law” before the Court beyond the scope of article 21 of the Statute. More specifically, the law and practice of the *ad hoc* tribunals, which the Prosecutor refers to, cannot per se form a sufficient basis for importing into the Court’s procedural framework remedies other than those enshrined in the Statute”).

⁴⁸ As suggested, for example, by M.M. DEGUZMAN, *Article 21*, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 706 – 708. *Contra*, consider A. PELLET, *Applicable Law*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1072 (“Is it necessary to make a distinction between ‘principles’ of international law on the one hand, and ‘rules’ on the other? Undoubtedly not, at least with regard to their nature. In both cases, they are customary norms.”); J. VERHOEVEN, *Article 21 of the Rome Statute and the Ambiguities of Applicable Law*, in «*Netherlands Yearbook of International Law*», Vol. 33, 2002, p. 9 (“The mention of ‘principles’, apart from rules, is, however, vague”).

principle of legality.⁴⁹ However, apart from human rights norms⁵⁰, customary international law is only of limited relevance for international criminal procedure.⁵¹ Indeed, different from substantive international criminal law, customary international law is of limited value in resolving procedural issues.⁵²

If these sources do not provide an answer, ('Failing that'), the Court may (pursuant to Article 21 (1) (c) ICC Statute) look at general principles of law, derived from the laws of legal systems of the world, including, as appropriate, the national laws of states that would normally exercise jurisdiction over the crime, and provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards. What is meant here are general principles of law, in the sense of Article 38 (1)

⁴⁹ A. PELLET, Applicable Law, in A. CASSESE, P. GAETA and J. R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1071 (if the word 'custom' was excluded, it is most likely due to the fact that the criminal lawyers, whose influence increased during [the] drafting of the Statute, opposed it in the name of an erroneous conception of the principle of the legality of offences and punishment"); M.M. DEGUZMAN, Article 21, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 707.

⁵⁰ ICTY, Judgement, *Prosecutor v. Furundžija*, A. Ch., 21 July 2000, Declaration of Judge Patrick Robinson, par. 274 ("If there is in general a need to ascertain whether a rule of customary international law impacts on the interpretation of the Statute and Rules, it is all the more important to conduct that exercise in relation to the construction of those provisions which concern the fundamental rights of the accused, because over time, and particularly, in the post-war era, many such rules have developed, and now abound in that area").

⁵¹ Consider e.g. J. VERHOEVEN, Article 21 of the Rome Statute and the Ambiguities of Applicable Law, in «Netherlands Yearbook of International Law», Vol. 33, 2002, p. 18 ("there does not exist many conventional or customary rules concerning the punishment of criminals in international law, despite the few elements contained in the statutes or case-law of the *ad hoc* international tribunals"). International customary law may also be of limited relevance because of the lack of *usus* relating to the organisation of criminal proceedings regarding international crimes and because of the lack of *opinio juris*. In this regard, consider the argument made by MÉGRET that domestic practices may offer proof of state practice, but are very unlikely to be a manifestation of an *opinio juris*, except in relation to human rights. See F. MÉGRET, *The Sources of International Criminal Procedure*, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 71; S. VASILIEV, *General Rules and Principles of International Criminal Procedure*, in G. SLUITER and S. VASILIEV (eds.), *International Criminal Procedure: Towards a Coherent Body*, Cameron May, London, 2009, p. 69 ("It is natural that the state practice (*usus*), which is an indispensable component of the customary process along with the *opinio juris*, relating to the organization of criminal proceedings specifically in the cases of international crimes is quite scarce and thus has not much to offer. [...] Thus, discerning customary law from state practice is a highly burdensome task, if not 'mission impossible'").

⁵² See e.g. ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, T. Ch. III, 31 January 2007, par. 27 ("On the basis of the above, the Chamber considers that there is insufficient evidence of State practice or of the recognition by States of this practice as law to establish that customary international law provides for compensation to an acquitted person in circumstances involving a grave and manifest miscarriage of justice") and par. 31 ("For the above reasons, while the Chamber acknowledges the importance of the principle provided for in Article 85(3) of the ICC Statute, it does not find that at present customary international law provides for a right to compensation for an acquitted person in circumstances involving a grave and manifest miscarriage of justice"); ICTR, Judgment and Sentence, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, T. Ch. II, 1 December 2003, par. 41 (on the finding that corroboration of evidence does not constitute customary law).

(c) ICJ Statute.⁵³ The inclusion of general principles of law originates in the understanding that it was impractical, if not impossible, to foresee every eventuality when drafting the Statute.⁵⁴ It is an auxiliary source which mainly fulfils a gap-filling function.⁵⁵ It is known that the identification of general principles consists of three steps: to know (1) a comparison between national systems, (2) the search for ‘common principles’ and (3) the transposition thereof to the international echelon.⁵⁶ It follows from the wording of the provision (‘national

⁵³ Consider e.g. A. PELLET, *Applicable Law*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1073 (criticizing DEGUZMAN on this point); J. VERHOEVEN, *Article 21 of the Rome Statute and the Ambiguities of Applicable Law*, in «*Netherlands Yearbook of International Law*», Vol. 33, 2002, p. 9. *Contra*, consider W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 389 (who contends that general principles of law should rather be included in Article 21 (1) (b) than under (c), the latter provision referring to general principles in a comparative criminal law context. He explains that the inclusion of general principles of international law into article 21 (1) (c) would be illogical, because of the addition ‘provided that those principles are not inconsistent with [...] international law and internationally recognized norms and standards’ therein).

⁵⁴ G.E. EDWARDS, *International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy*, in «*The Yale Journal of International Law*», Vol. 26, 2001, pp. 406 – 407. It has been noted that the present formulation is a compromise between two divergent viewpoints. The first one was that the Court should directly apply national law, the other one that in resorting to ‘general principles’ references to particular criminal justice systems should be avoided. See M.M. DEGUZMAN, *Article 21*, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, Article by Article, München, Verlag C.H. Beck, 2008, p. 702.

⁵⁵ F.O. RAIMONDO, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, Leiden, Martinus Nijhoff Publishers, 2008, p. 193; M.M. DEGUZMAN, *Article 21*, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, München, Verlag C.H. Beck, 2008, p. 709 (noting that it “serves to address the unavoidable occurrence of interstices in international criminal law”); K. AMBOS, *From Ad Hoc Imposition to a Treaty-Based Universal System*, in C. STAHN and L. VAN DEN HERIK (eds.), *Future Perspectives on International Criminal Justice*, Cambridge, Cambridge University Press, 2010, p. 171; M. KLAMBERG, *Evidence in International Criminal Procedure: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Stockholm, Stockholm University, p. 27; N.A. AFFOLDER, *Tadić, the Anonymous Witness and the Sources of International Procedural Law*, in «*Michigan Journal of International Law*», Vol. 19, 1998, pp. 464 – 465 (noting that where the Court’s statute or RPE are not determinative on a matter, the Judges look at general principles of law as a gap-filling device or a means of treaty interpretation).

⁵⁶ See e.g. A. PELLET, *Applicable Law*, in A. CASSESE, P. GAETA and J. R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1073. With regard to this last step, Judge Fulford emphasised that “a Chamber should undertake a careful assessment as to whether the policy considerations underlying the domestic legal doctrine are applicable at this Court, and it should investigate the doctrine’s compatibility with the Rome Statute framework. This applies regardless of whether the domestic and the ICC provisions mirror each other in their formulation. It would be dangerous to apply a national statutory interpretation simply because of similarities of language, given the overall context is likely to be significantly different.” See ICC, *Judgement pursuant to Article 74 of the Statute, Prosecutor v. Lubanga Dyllo, Situation in the DRC*, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, Separate Opinion of Judge Adrian Fulford, par. 10. Consider also ICTY, *Judgment, Prosecutor v. Erdemović*, Case No. IT-96-22-A, A. Ch., 7 October 1997, Separate and Dissenting Opinion of Judge Cassese, par. 2-5, where CASSESE held that “legal constructs and terms of art upheld in national law should not be automatically applied at the international level. They cannot be mechanically imported into international criminal proceedings. The International Tribunal, being an international body based on the law of nations, must first of all look to the object and purpose of the relevant provisions of its Statute and Rules.” According to him, three considerations are important: (i) one should explore all the means available at the international level before turning to national law; (ii) it would be inappropriate mechanically to incorporate into international criminal proceedings ideas, legal constructs, concepts or terms of art which only belong, and are unique, to a specific group of national legal systems, say,

laws of legal systems of the world'), that a comparison of *all* legal systems is not required.⁵⁷ It is unclear whether the reference to the laws of the legal systems of the world also includes case law.⁵⁸ Also the *ad hoc* tribunals' case law occasionally referred to general principles. It was emphasised by the ICTY Trial Chamber in *Furundžija* that care must be taken whenever international criminal tribunals resort to 'general principles'. First, care must be taken that reference is only made to "general concepts and legal institutions common to all the major legal systems of the world" ('common denominators').⁵⁹ Furthermore,

"since international trials exhibit a number of features that differentiate them from national criminal proceedings', account must be taken of the specificity of international criminal proceedings when utilising national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided, as well as the attendant distortions of the unique traits of such proceedings."⁶⁰

In general, because of the many differences between different criminal law justice systems, and in particular, between common law and civil law criminal justice systems, it can be doubted whether these general principles of law may be a helpful tool with regard to procedural law, as it may be difficult to identify such general principles.⁶¹ Some authors, like

common law or civil law systems, and (iii) due consideration should be given to the specificity of international criminal proceedings. Consider additionally A. CASSESE, *The Contribution of the International Criminal Tribunal for the Former Yugoslavia to the Ascertainment of General Principles of Law Recognized by the Community of Nations*, in S. YEE and W. TIEYA (eds.), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, London and New York, Routledge, 2001, p. 55 (CASSESE confirms that great caution is necessary in ascertaining general principles and in transposing them to the level of international law).

⁵⁷ A. PELLET, *Applicable Law*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1073.

⁵⁸ J.K. COGAN, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, in «*Yale Journal of International Law*», Vol. 27, 2002, p. 117, fn. 30.

⁵⁹ ICTY, *Judgement, Prosecutor v. Furundžija*, Case No. 95-17/1-T, T. Ch., 10 December 1998, par. 178; ICTY, *Judgment, Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, T. Ch., 22 February 2001, par. 439 ("In considering these national legal systems the Trial Chamber does not conduct a survey of the major legal systems of the world in order to identify a specific legal provision which is adopted by a majority of legal systems but to consider, from an examination of national systems generally, whether it is possible to identify certain basic principles, or in the words of the *Furundžija* judgement, 'common denominators'").

⁶⁰ ICTY, *Judgement, Prosecutor v. Furundžija*, Case No. 95-17/1-T, T. Ch., 10 December 1998, par. 178.

⁶¹ G. BITTI, *Article 21 of the Statute of the ICC and the Treatment of Sources of Law in the Jurisprudence of the ICC*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 300 (noting that considerable differences exist, even within states. Besides the author adds that even in case such general principle of law could be identified, it would be difficult to apply it before an international criminal tribunal, considering the very different structure of these courts); S. VASILIEV, *General Rules and Principles of International Criminal Procedure*, in G. SLUITER and S. VASILIEV (eds.), *International Criminal Procedure: Towards a Coherent Body*, Cameron May, London, 2009, p. 70 ("given that national legal systems demonstrate a strong divide between common law, civil law, and other legal traditions; the establishment of common grounds is a methodologically difficult and often unfeasible task. This is especially

DELMAS-MARTY, seem more enthusiastic about the use of general principles to fill gaps or to resolve ambiguities in international criminal procedure.⁶² However, it seems difficult to imagine any such general principles, apart from very abstract ones.⁶³ MALANCZUK only identifies a number of abstract procedural general principles: to know the right to a fair hearing, *in dubio pro reo* and denial of justice.⁶⁴ It was previously noted how the ICTY jurisprudence has sought to further distinguish between general principles of international law, general principles of international criminal law and general principles of criminal law.⁶⁵ Whereas a distinction between general principles of international law and general principles of law seems acceptable, on the basis of the distinct methodology for their identification, it is unclear what the legal basis is to further distinguish general principles of international criminal law.⁶⁶

true for procedural issues, as in the most cases, the international criminal tribunals and courts ascertained a lack of the general principles of law”); F. MÉGRET, The Sources of International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 71 (“At least on issues that neatly divide the common law and the civil law traditions, it may be very difficult to identify general principles without doing violence to one system or engaging in an illegitimate majoritarian or hegemonic exercise”); A. CASSESE, The Contribution of the International Criminal Tribunal for the Former Yugoslavia to the Ascertainment of General Principles of Law Recognized by the Community of Nations, in S. YEE and W. TIEYA (eds.), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, London and New York, Routledge, 2001, p. 54 (arguing that the low number of general principles identified by the case law of the ICTY “is probably due to the difficulty in finding, especially in the field of international criminal procedure, areas where common law and civil law systems take the same approach on a legal issue”).

⁶² Nevertheless, she warns that such method should not lead to the preference, under the cover of comparative criminal law, of one system over the other. See M. DELMAS-MARTY, *Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC*, in «*Journal of International Criminal Justice*», Vol. 4, 2006, p. 3.

⁶³ F. MÉGRET, The Sources of International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 72.

⁶⁴ P. MALANCZUK, *Akehurst’s Modern Introduction in International Law* (7th revised ed.), London and New York, Routledge, 1997, p. 49.

⁶⁵ *Supra*, fn. 26 and accompanying text.

⁶⁶ Consider D. AKANDE, Sources of International Criminal Law, in A. CASSESE (ed.), *The Oxford Companion to International Criminal Justice*, Oxford, Oxford University Press, 2009, pp. 51 – 52 (who explains that general principles of law require a comparative analysis of national law and the transposition of principles to the international echelon, whereas general principles of international law are based on the fundaments and basic requirements of international criminal justice). In addition, he argues that “it is difficult to see that there is a separate category of general principles of ICL which does not fall into the other two categories” (*ibid.*, p. 52). *Contra*, consider CASSESE, who holds that in case the Statute (or other treaties to which it refers) and customary international law do not solve a problem, or do so in an ambiguous, contradictory or unclear manner, the tribunals can refer to (1) general principles of international criminal law or (2) general principles of international law. Finally (3) if these principles are absent or incomplete, reference may be had to a secondary source of law, to know general principles of (criminal) law recognized by the major legal systems of the world. See A. CASSESE, The Influence of the European Court of Human Rights on International Criminal Tribunals – Some Methodological Remarks, in M. BERGSMO, *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide*, Leiden, Martinus Nijhoff Publishers, 2003, p. 20.

The reference, in the second part of Article 21 (1) (c), to the national states that would normally exercise jurisdiction, distinguishes it from Article 38 ICJ Statute. It has been argued that this latter part (unlike the first part) only refers to substantive criminal law, not to procedural law.⁶⁷ The inclusion of the latter part is rather controversial and to some extent contradictory.⁶⁸ DEGUZMAN suggests that the Judges ought to avoid referring to these particular national laws, where “[t]he less often the Court considers such reference appropriate, the more likely it will be to develop a cogent body of international law”.⁶⁹

Finally, the Judges have the *possibility*, in their discretion, to apply principles and rules of law as interpreted in their previous decisions (no *stare decisis*).⁷⁰ This is in line with the dismissal of the *stare decisis* doctrine by the jurisprudence of the *ad hoc* tribunals and the understanding that judicial precedent is not a distinct source in international criminal adjudication. Rather, it is a “subsidiary means for the determination of rules of law”, in the sense of Article 38 (1) (d) ICJ Statute.⁷¹ A reference to the decisions and judgments of other courts as an additional source of law is absent.⁷²

⁶⁷ See the argumentation by M. KLAMBERG: “It is submitted that the first part covers principles relating to substantive as well as procedural law, while the latter part of the article, which allows the Court to also apply “the national laws of States that would normally exercise jurisdiction over the crime provided”, relates only to national substantive criminal law (such as practice regarding prison sentences) and not procedural rules.” See the Commentary to the Rome Statute, (<http://www.iclklamberg.com/Statute.htm>, last visited 10 February 2014).

⁶⁸ However, PELLET notes that “the specificity of criminal law and the requirements of the *nullum crimen* principle justify this directive to the Court.” See A. PELLET, *Applicable Law*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1075.

⁶⁹ M.M. DEGUZMAN, Article 21, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 709.

⁷⁰ A. PELLET, *Applicable Law*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1063 (the author notes that this “simply seems to state the obvious”).

⁷¹ ICTY, Judgment, *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, T. Ch. II, 14 January 2000, par. 540.

⁷² ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, Dissenting Opinion of Judge Hans-Peter Kaul, par. 29 - 30 (referring to Article 20 (3) SCSL Statute and holding that the jurisprudence of other courts and tribunals may be referred to within the confines of Article 21, and more precisely in order to identify principles and rules of international law); ICC, Judgement pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 603 (“the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute”); ICC, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Situation in the Republic of Kenya*, Case No. ICC-01/09-01/11-373, PTC II, 23 January 2012, par. 289 (“The jurisprudence of other international or hybrid tribunals is not, in principle, applicable law before the Court and may be resorted to only as a sort of persuasive authority, unless it is indicative of a principle or rule of international law”).

For internationalised criminal tribunals, things are more complicated. The description of the sources of international criminal procedure described above cannot simply be transposed. This is easily understood if one considers that in the case of a norm conflict, *domestic* courts cannot always apply international law and therefore disregard the conflicting national norms.⁷³ As far as the SPSC are concerned, it followed from Section 3 TRCP that if an issue was not regulated by the TRCP, then a list of sources which resembles Article 21 ICC Statute, albeit with modifications, was inserted in Section 3 of UNTAET Regulation 2000/15. From this provision, read in conjunction with Section 3 of the TRCP and Sections 2 and 3 of UNTAET Regulation 1999/1, it followed that if an issue was not regulated by the TRCP, then the panels had to apply ('shall apply') (i) 'internationally recognized human rights standards' as well as (ii) the applicable laws in East-Timor (as determined by Section 3 of UNTAET Regulation 1999/1 (Indonesian law previously in force, until replaced by any UNTAET regulations or subsequent legislation⁷⁴)), to the extent that these are in conformity with 'international human rights standards'.⁷⁵ In addition, Article 3.1 (b) UNTAET Regulation 2000/15 referred to extraneous sources and added that the Panels had to apply, 'where appropriate,' 'applicable treaties and recognised principles and norms of international law, including the established principles of the international law of armed conflict'. No reference to 'general principles of law' (cf. Article 21 (1) (c) ICC Statute) was included and no hierarchy of sources was expressly provided for. In a similar vein, the SCSL RPE incorporated sources of international (criminal law) through Rule 72*bis* RPE.⁷⁶ It resembles Article 21 ICC Statute, with some minor modifications.⁷⁷ The STL, as far as *substantive* law is concerned, needs to apply Lebanese law, as interpreted and applied by Lebanese Courts.⁷⁸ According to the STL Statute, the main source of *procedural law* are the RPE adopted by the

⁷³ This will depend on the national constellation and the constitutional principles on the implementation of international law in the national legal order. See B. SWART, *Internationalized Courts and Substantive Criminal Law*, in C.P.R. ROMANO, A. NOLLKAEMPER and J. KLEFFNER (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia*, Oxford, Oxford University Press, 2004, pp. 291 - 316.

⁷⁴ See <http://jsmp.tl/wp-content/uploads/2012/08/Special-Panel-delivers-its-own-decision-on-the-applicable-law-24-July-2003.pdf>, last visited 14 February 2014.

⁷⁵ Section 3 TRCP *juncto* Section 3.1 UNTAET Regulation 2000/15 *juncto* Section 2 - 3 UNTAET Regulation 1999/1.

⁷⁶ As adopted on 29 May 2004.

⁷⁷ Among others: whereas Article 21 (1) (b) ICC Statute refers to 'principles and rules of international law', Rule 72*bis* (ii) refers to 'principles and rules of international *customary* law' (emphasis added). Moreover, and logically, the reference to 'the national laws of States that would normally exercise jurisdiction over the crime' was replaced by a reference to the 'national laws of the Republic of Sierra Leone'. Further, it is not clear from the provision whether a hierarchy of sources was intended.

⁷⁸ Article 2 STL Statute and STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I, A. Ch., 16 February 2011, par. 33 - 35.

Judges ‘who shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial’.⁷⁹ Similarly, the Secretary-General’s Report mandates the application of the ‘highest standards of justice’ and holds that the STL’s procedural and evidentiary rules “are to be inspired, in part, by reference materials reflecting the highest standards of international criminal procedure.”⁸⁰ This leaves the door open for the consideration of extraneous sources. Furthermore, in line with the Appeals Chamber’s argument relating to substantive law, given that the STL is an international or internationalised criminal tribunal, the sources of international law may ‘correct’ Lebanese criminal procedure when the application and interpretation of this law “appears to be *unreasonable*, or may result in a *manifest injustice*, or is *not consonant with international principles and rules* binding upon Lebanon.”⁸¹ Lastly, the ECCC should apply Cambodian law. However, it follows from Article 12 (1) ECCC Agreement that:

⁷⁹ Article 28 (2) STL Statute. In interpreting the STL Statute the Judges rely on the VCLT. See Article 2 STL Statute; STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I, A. Ch., 16 February 2011, par. 26 (“this is so regardless whether the Statute is understood to be part of the agreement between Lebanon and the UN or part of a binding UN Security Council Resolution under Chapter VII, because these rules of interpretation apply to all international binding instruments whatever its normative source”).

⁸⁰ United Nations, Report of the Secretary-General on the Establishment of the Special Tribunal for Lebanon, U.N. Doc. S/2006/893, 15 November 2006, par. 7.

⁸¹ Consider, *mutatis mutandis*, STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I, A. Ch., 16 February 2011, par. 39 (emphasis in original) (see the references in accompanying footnotes). Confirming, consider K. AMBOS; Judicial Creativity at the Special Tribunal for Lebanon: Is there a Crime of Terrorism under International Law?, in «Leiden Journal of International Law», Vol. 24, 2011, p. 657. The STL Appeals Chamber seems to have accorded an even broader function to international law. The Appeals Chamber first held that, despite the existence of a customary international law definition of the crime of terrorism, and the consideration that, in the absence of any domestic provision, the Lebanese courts regularly apply international customary law (albeit not in penal matters), this definition could not be applied where Article 2 requires that codified Lebanese law is applied to the substantive crimes prosecuted by the STL (STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I, A. Ch., 16 February 2011, par. 117 – 123). However, it then concluded that such does not imply that the customary international law definition should completely be disregarded in interpreting and applying relevant provisions of Lebanese law where these international standards specifically address transnational terrorism and are binding on Lebanon. This is so where the events within the jurisdiction of the STL have been considered by the UNSC to be a “threat to international peace and security” and have justified the establishment of an international tribunal (*ibid.*, par. 124). Such interpretation is open to criticism. Consider e.g. K. AMBOS; Judicial Creativity at the Special Tribunal for Lebanon: Is there a Crime of Terrorism under International Law?, in «Leiden Journal of International Law», Vol. 24, 2011, p. 660 (who argues, among others, that the qualification of the events as ‘threats to international peace and security’ only served to trigger the establishment of the Court under Chapter VII of the UN Charter but did not lead to the inclusion of international crimes in the STL Statute. Besides the transnational character of a crime does not as such make international law applicable, not even as a means of interpretation).

“[w]here Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.”⁸²

Nevertheless, the Internal Rules have been adopted with the purpose of consolidating applicable Cambodian procedure and to adopt additional procedural rules which were necessary for the instances referred to in Article 12 (1) of the Agreement.⁸³ It follows that these Internal Rules in practice are the most important procedural source.⁸⁴ The Pre-Trial Chamber addressed the relationship between the Internal Rules and the Criminal Procedure Code of Cambodia. It confirmed that the Internal Rules form a “self-contained regime of procedural law related to the unique circumstances of the ECCC.”⁸⁵ It follows that the Internal Rules “do not stand in opposition to the Cambodian Criminal Procedure Code (“CPC”) but the focus of the ECCC differs substantially enough from the normal operation of the Cambodian criminal courts to warrant a specialised system. Therefore, the Internal Rules constitute the primary instrument to which reference should be made in determining the procedures before the ECCC where there is a difference between the procedures in the Internal Rules and the CPC.”⁸⁶ Hence, the CPC is only applied when an issue is not addressed by the Internal Rules.⁸⁷

⁸² See also Article 20 new, 23 new, 33 new and 37 new ECCC Law as well as Rule 2 ECCC IR.

⁸³ Preamble to the Internal Rules.

⁸⁴ G. ACQUAVIVA, *New Paths in International Criminal Justice: The Internal Rules of the Cambodian Extraordinary Chambers*, in «Journal of International Criminal Justice», Vol. 6, 2008, p. 132 (“at least the international staff and the internationally appointed Judicial Officers will likely work on the assumption that the Internal Rules form a sort of ‘code’ of its own, which delineates the efforts to find complex compromises between the Cambodian and the international components of the ECCC”).

⁸⁵ ECCC, Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, *Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC/OJIC (PTC06), PTC, 26 August 2008, par. 14. This holding was later adopted by the ECCC Trial Chamber. See ECCC, Decision on Nuon Chea’s Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules, *NUON Chea et al.*, Case No. 002/19-09-2007/ECCC/TC, T. Ch., 8 August 2011, par. 7.

⁸⁶ ECCC, Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OJIC (PTC06), PTC, 26 August 2008, par. 14.

⁸⁷ *Ibid.*, par. 15.

From the above, it can be concluded that when the procedural framework becomes more detailed, the importance of other extraneous sources of law declines.⁸⁸ Furthermore, since only a limited number of customary rules and general principles of law relevant to international criminal procedure can be discerned, it could be concluded that domestic law and case law will only be of limited value in the determination of international criminal procedural law. Nevertheless, MÉGRET argues that domestic practice is an important ‘source of inspiration’. In this manner, domestic practices “are in a sense in objective competition and often exert a stronger pull than actual sources of international law.”⁸⁹ Through autonomous interpretation at the international level, these domestic practices assist in the construction of international criminal procedure. However, it may be noted that some risks are inherent in such methodology.⁹⁰

III. HUMAN RIGHTS AND INTERNATIONAL CRIMINAL PROCEDURE: MINIMUM STANDARDS?

III.1. Applicability of human rights norms to international criminal courts and tribunals

After the brief analysis of the sources of international criminal procedure, it still needs to be examined what precise position and function human rights norms have therein. In academic writings, these norms are often relied upon as an *external* evaluative tool.⁹¹ The importance of human rights as an evaluative tool hardly requires further clarification. By nature, these individual entitlements protect against the abuse of public power, and as such, provide the “backbone of the rules governing the conduct of investigations and trials.”⁹² However, in the

⁸⁸ F. MÉGRET, *The Sources of International Criminal Procedure*, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 69.

⁸⁹ *Ibid.*, p. 70 (the author adds that “resort to such domestic sources [...] is most likely to be part of a pragmatic exercise in cherry-picking elements of rules that are at any one point seen as most conducive to the goals of international criminal justice”); *ibid.*, p. 72 (the author refers to the “pragmatic approach” which conceives of domestic criminal procedure as a “vast reservoir of possible solutions that can be combined in more or less creative ways to accomplish international criminal justice’s goals”).

⁹⁰ R. SKILBECK, *Frankenstein’s Monster: Creating a New International Procedure*, in *Journal of International Criminal Justice*, Vol. 8, 2010, pp. 451- 462.

⁹¹ Consider e.g. ZAPPALÀ, who considers human rights to be an ‘ideal lens’ or ‘interpretative tool’ to observe the system of international criminal tribunals. See S. ZAPPALÀ, *Human rights in International Criminal Proceedings*, Oxford, Oxford University Press, 2003.

⁹² L. GRADONI, *International Criminal Courts and Tribunals: Bound by Human Rights Norms...or Tied Down?*, in *Leiden Journal of International Law*, Vol. 19, 2006, p. 847. Consider also G. BOAS, J.L. BISCHOFF, N.L. REID and B. DON TAYLOR III, *International Criminal Law Practitioner Library*, Vol. III: *International Criminal Procedure*, Cambridge, Cambridge University Press, 2011, pp. 13, 464 (“they are the glue that binds together the entire body of international criminal procedure”).

same token, it is important that the most important shortcoming of using human rights as an evaluative tool is acknowledged. Human rights are not sufficiently detailed to determine the manner in which international criminal proceedings ought to be organised and what system is to be preferred.⁹³ Different procedural solutions may be considered that are in conformity with these more abstract minimum rules. Human rights law will not always allow us to clearly choose between procedural set-ups.⁹⁴ This equally holds true for the organisation and structure of the investigation phase.⁹⁵

Notwithstanding the application of these norms as an *external* evaluative tool, the extent to which international(ised) criminal courts are *internally* bound by this body of law first needs to be examined. The reasons thereof are straightforward: if the question above has to be answered positively, the importance of this evaluative tool and the needs for compliance with human rights norms will obviously be greater. The question, *de lege ferenda*, whether a new human rights instrument and an accompanying supervisory body, adjusted to the needs of international criminal proceedings, should be adopted, will not be discussed in this section.⁹⁶

As a starting point, there is agreement that international criminal tribunals are bound by human rights norms.⁹⁷ This implies that the applicability is not a mere ‘policy choice’.⁹⁸ It

⁹³ E.g. B. SWART, Damaška and the Faces of International Criminal Justice, in «Journal of International Criminal Justice», Vol. 6, 2008, p. 96; C. WARBRICK, International Criminal Courts and Fair Trial, in «Journal of Conflict and Security Law», Vol. 3, 1998, p. 51 (stating that human rights provisions, even while being the fundamental bedrock of international criminal trials, are not per se sufficient thoroughly to organise proceedings and do not indicate what procedural model must be followed); F. MÉGRET, Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, pp. 49 – 58 (the author argues that human rights standards are “too broad and under-determinative” for them to function as an “external arbiter”). This is not to say that human rights norms and the right to a fair trial have no implications on the manner in which the criminal process should be organised and structured. Notably, several principles have been developed in the case law of the ECtHR which should be present for the trial to be fair. They include the principle of an adversarial character and the principle of equality of arms.

⁹⁴ Consider e.g. L. GRADONI, The Human Rights Dimension of International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), International Criminal Procedure: Principles and Rules, Oxford, Oxford University Press, 2013, p. 74 (noting that human rights “are in most cases compatible with more than one cluster of procedural rules”). The author adds that the relationship between rules of criminal procedure and human rights norms can be described in terms of ‘ends’ and ‘means’, where full respect of human rights can be achieved through various solutions).

⁹⁵ Some authors have noted the Court’s “lack of coherent theorizing about the connection between the form of the trial and the investigation and the consequent differences in the nature of the rights that are required in the respective phases.” See J.D. JACKSON and S.J. SUMMERS, The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions, Cambridge, Cambridge University Press, 2012, p. 100.

⁹⁶ On this, consider e.g. M. FEDOROVA and G. SLUITER, Human Rights as *Minimum* Standards in International Criminal Proceedings, in «Human Rights & International Legal Discourse», Vol. 3, 2009, p. 56.

⁹⁷ Consider e.g. G. BOAS, J.L. BISCHOFF, N.L. REID and B. DON TAYLOR III, International Criminal Law Practitioner Library, Vol. III: International Criminal Procedure, Cambridge, Cambridge University Press, 2011,

follows that human rights cannot be considered to *solely* constitute an external evaluative tool. Notwithstanding such agreement, the *extent* of the applicability of international human rights law to international criminal proceedings is still not entirely settled.⁹⁹ In any case, provided that human rights law and international criminal law are different in nature, one should be careful when transposing human rights norms to international criminal law.¹⁰⁰ Below, several arguments are advanced which provide evidence that international criminal tribunals are bound by international human rights norms. It is evident that unlike states, international criminal tribunals are not parties to, and cannot accede to any of the international (or regional) human rights conventions.¹⁰¹ However, human rights norms enter the legal framework of international criminal tribunals in different other ways.

§ *Human rights clauses*

In the first place, several provisions of the Statutes of all international(ised) criminal tribunals under review repeat international human rights provisions almost *verbatim*. In particular, Article 21 ICTY Statute, Article 20 ICTR Statute and Article 17 SCSL Statute reflect Article 14 ICCPR.¹⁰² Furthermore, several provisions of the Statute and the RPE highlight the

p. 12 (the authors argue that the law of international criminal procedure is built upon “human rights principles which are the foundational part of the construct of international criminal law”).

⁹⁸ Cf. the argumentation by ZAPPALÀ, see S. ZAPPALÀ, *Human rights in International Criminal Proceedings*, Oxford, Oxford University Press, 2003, p. 7 (“the starting point adopted in this book is that this [the extension of due process principles to international criminal trials] is more a *policy* issue than a legal question. And the policy choice has been made in favour of an extension to international criminal proceedings.” This argumentation has been faulted by GRADONI, consider in general: L. GRADONI, *International Criminal Courts and Tribunals: Bound by Human Rights Norms...or Tied Down?*, in «Leiden Journal of International Law», Vol. 19, 2006, pp. 847 – 873.

⁹⁹ S. VASILIEV, Introduction, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 27; see also D. ABELS, *Prisoners of the International Community: The Legal Position of Persons Detained at International Criminal Tribunals*, The Hague, T.M.C. Asser Press, 2012, p. 136.

¹⁰⁰ V. DIMITRIJEVIĆ and M. MILANOVIĆ, *Human Rights before International Criminal Courts*, in J. GRIMHEDEN and R. RING (eds.), *Human Rights Law, From Dissemination to Application: Essays in Honour of Göran Melander*, Leiden, Martinus Nijhoff Publishers, 2006, p. 150 (“These distinct features of international criminal proceedings make it impossible to simply transpose to them the human rights standards developed in the context of domestic criminal procedure”); *ibid.*, p. 167 (“The Statutes and the rules of the international criminal courts and tribunals are in general conformity with the body of international human rights law, though with certain qualifications. It is sometimes not possible to apply these standards in the same manner as municipal and international criminal proceedings”); W.A. SCHABAS, *Droit pénal et droit international des droits de l’homme: faux frères ?*, in M. HENZELIN and R. ROTH (eds.), *Le Droit Pénal à l’épreuve de l’internationalisation*, Genève, Georg Éditeur, 2002, pp. 165-182.

¹⁰¹ Consider e.g. ICTY, *Judgement, Prosecutor v. Stanislav Galić*, Case No. 98-29-A, A. Ch., 30 November 2006, Separate and Partially Dissenting Opinion of Judge Schomburg, par. 25.

¹⁰² See e.g. E. MØSE, *Impact of Human Rights Convention on the two ad hoc Tribunals*, in M. BERGSMO (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide*, Leiden,

importance of a fair trial and demand respect for the rights of the accused person.¹⁰³ The same can be said about the ICC Statute. Among others, Articles 67 (rights of the accused), 55 (rights of persons during investigations) and 66 of the ICC Statute (presumption of innocence) have directly been inspired by human rights norms. However, as will be discussed in chapters to come, it is clear these provisions are more elaborate than the parallel provisions at the *ad hoc* tribunals and the SCSL.¹⁰⁴ In particular, and unlike other tribunals under review, Article 21 (3) ICC Statute contains an explicit reference that decisions of all Court organs should be consistent with internationally recognized human rights.¹⁰⁵ Where appropriate, applicable treaties can be applied pursuant to Article 21 (1) (b), including the ICCPR or ECHR.¹⁰⁶

Also the other internationalised tribunals under review contain provisions reflecting human rights norms. As a caveat, it is to be noted that for this category of tribunals, obligations may

Martinus Nijhoff Publishers, 2003, p. 185; V. DIMITRIJEVIĆ and M. MILANOVIĆ, Human Rights before International Criminal Courts, in J. GRIMHEDEN and R. RING (eds.), Human Rights Law, From Dissemination to Application: Essays in Honour of Göran Melander, Leiden, Martinus Nijhoff Publishers, 2006, p. 151; W.A. SCHABAS, Synergy or Fragmentation, International Criminal Law and the European Convention on Human Rights, in «Journal of International Criminal Justice», Vol. 9, 2011, p. 613.

¹⁰³ Consider, amongst many other provisions: Article 20 (1) ICTY and Article 19 (1) ICTR Statute ('The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses'); Article 20 (2) – (4) ICTY and Article 19 (2) - (4) ICTR Statute (containing more specific rights of the accused); Rule 26*bis* SCSL RPE ('The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses'); Rule 11*bis* (B) ICTY, ICTR and SCSL RPE (on the fairness of the trial in case of the referral of lower-level accused); Rules 42 and 43 ICTY, ICTR and SCSL RPE (outlining some rights of suspects in case of questioning); Rule 55 ICTY, ICTR and SCSL RPE (detailing some of the rights of the accused with regard to the execution of the arrest warrant); Rule 65*ter* (B) ICTY and ICTR RPE (on the responsibility of the Pre-Trial Judge to 'take any measure necessary to prepare the case for a fair and expeditious trial'); Rule 70 (G) ICTY and ICTR RPE (on disclosure and the overarching power of the Trial Chamber to exclude evidence if the probative value is outweighed by the need to ensure a fair trial); Rule 73*bis* (D) ICTY and ICTR RPE and Rule 73*bis* (G) SCSL RPE (on the power of the Trial Chamber to reduce, in the interests of a fair and expeditious trial, the number of counts charged or to fix the number of crime sites or incidents comprised in one or more of the charges); Rule 73*bis* (E) ICTY and ICTR RPE (on the power of the Trial Chamber to direct the Prosecutor to select the counts in the indictment on which to proceed, in the interest of a fair and expeditious trial) and Rule 89 (D) ICTY and ICTR RPE (power of the Trial Chamber to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial).

¹⁰⁴ Consider e.g. V. DIMITRIJEVIĆ and M. MILANOVIĆ, Human Rights before International Criminal Courts, in J. GRIMHEDEN and R. RING (eds.), Human Rights Law, From Dissemination to Application: Essays in Honour of Göran Melander, Leiden, Martinus Nijhoff Publishers, 2006, p. 151.

¹⁰⁵ Article 21 (3) ICC Statute reads: "The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status." See the discussion thereof, *infra*, Chapter 2, III.3.

¹⁰⁶ However, PELLET warns that the reference to these human rights treaties was seldomly raised during preparatory debates. See A. PELLET, Applicable Law, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court, Oxford, Oxford University Press, 2002, p. 1068.

not only follow from their internal law but also from obligations which are incumbent on the state to which they belong. In line with the ICC, the STL Statute contains separate provisions on the rights of suspects and the rights of the accused.¹⁰⁷ The RPE further detail these rights.¹⁰⁸ Additionally, it is argued that Article 28 (2) STL Statute may “act as a conduit for ‘human-rights-proof’ procedural norms.”¹⁰⁹ It states that in adopting the RPE, the STL Judges will be *guided* ‘as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial’.¹¹⁰ According to the explanatory memorandum to the RPE, ‘other reference materials’ clearly refers to the RPE of other international criminal tribunals and their ‘emerging procedural practice’.¹¹¹ However, it is clear that the value of this provision indeed depends on the human rights conformity of the RPE and the practice of these other tribunals.

As far as the SPSC are concerned, Section 2 (Fair Trial and Due Process) and Section 6 (Rights of the Suspect and Accused) of the TRCP reflect international human rights norms. Apart from these human rights clauses, Section 3 (1) (a) UNTAET Regulation 2000/15 on the ‘applicable law’ refers to Section 2 of Regulation 1999/1, from which it follows that the Judges shall observe ‘internationally recognized human rights standards’.¹¹² In addition, Section (3) (1) (b) stipulates that the panels shall apply, ‘*where appropriate*, applicable treaties and recognised principles and norms of international law, including the established principles of the international law of armed conflict’.¹¹³

¹⁰⁷ Articles 15 and 16 STL Statute.

¹⁰⁸ Consider for example Rules 65 and 66 (detailing rights of suspects during the investigation) and 69 STL RPE (on the *mutatis mutandis* application of these rights to accused persons).

¹⁰⁹ L. GRADONI, The Human Rights Dimension of International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 77.

¹¹⁰ Compare Article 149 (A) and (B) STL RPE.

¹¹¹ STL Rules of Procedure and Evidence (as of 25 November 2010): Explanatory Memorandum by the Tribunal’s President, par. 1 (referring, in particular, to the ICC, ICTY, ICTR, SCSL, SPSC and the ECCC).

¹¹² According to Section 2 of Regulation 1999/1, ‘In particular’, the Judges shall apply, ‘The Universal Declaration on Human Rights of 10 December 1948; The International Covenant on Civil and Political Rights of 16 December 1966 and its Protocols; The International Covenant on Economic, Social and Cultural Rights of 16 December 1966; The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965; The Convention on the Elimination of All Forms of Discrimination Against Women of 17 December 1979; The Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984; The International Convention on the Rights of the Child of 20 November 1989.’ Besides, ‘[t]hey shall not discriminate against any person on any ground such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or all other status’. See also the reference in Section 3 TRCP.

¹¹³ Emphasis added.

Finally, the ECCC agreement goes one step further in referring directly to the ICCPR. More precisely, Article 12 (2) of the ECCC Agreement contains an express reference to the ICCPR in holding that: ‘The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party’. To this, Article 13 (1) adds that ‘[t]he rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process’.¹¹⁴ Further conformity with international human rights norms is ensured by the fact that the ECCC may, under certain conditions, seek guidance in procedural rules established at the international level.¹¹⁵

It follows that all tribunals contain clauses outlining a number of human rights. In addition, the procedural frameworks of the SPSC and the ECCC contain explicit provisions incorporating international human rights norms. Furthermore, a trend is visible whereby these human rights provisions within the statutory documents of the international(ised) criminal tribunals have become more detailed and complex.¹¹⁶ Among others, human rights guarantees in the governing law of the tribunals no longer only apply to accused persons, but also to suspects.¹¹⁷

Secondly, with regard to the ICTY, reference is often made to the pronouncements in the Report of the Secretary-General accompanying the adoption of the ICTY Statute. The report states that:

“it is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In

¹¹⁴ It adds that “[s]uch rights shall, in particular, include the right: to a fair and public hearing; to be presumed innocent until proved guilty; to engage a counsel of his or her choice; to have adequate time and facilities for the preparation of his or her defence; to have counsel provided if he or she does not have sufficient means to pay for it; and to examine or have examined the witnesses against him or her’.

¹¹⁵ See *supra*, Chapter 2, II, fn. 82 and accompanying text.

¹¹⁶ L. GRADONI, *The Human Rights Dimension of International Criminal Procedure*, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 75 (noting that “practice has evolved towards an ever clearer recognition of the salience of human rights norms in international criminal proceedings. Practice also shows a trend of increasing functional complexity, moving from the once habitual compilation of perfunctory catalogues of the basic rights of the accused to a wider acknowledgement of the direct applicability of human rights norms and of the pervasiveness of their interpretive role, not only to the benefit of persons standing accused but also in the interest of other categories of individuals concerned by the proceedings”).

¹¹⁷ *Ibid.*, p. 80.

the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights»¹¹⁸

It follows that these human rights are part of the tribunal's legal framework.¹¹⁹ In practice, in applying human rights, Judges of the *ad hoc* tribunals occasionally suffice with a simple reference to this statement.¹²⁰ However, several aspects of this phrase remain unclear. For example, it remains unresolved what human rights standards exactly are included ('internationally recognized standards'). Arguably, it does not only refer to customary law, but also encompasses conventional sources of law.¹²¹ Furthermore, the phrase fails to clarify the relevance of the interpretation of international human rights norms by (quasi-) judicial bodies.¹²² On the one hand, this statement provides further proof that the adherence to international human rights norms was intentional and not a mere 'policy choice'.¹²³ On the other hand, the reference above is not instructive regarding the binding force of international human rights norms. In other words, it does not tell us anything on the extent to which the ICTY is *internally bound* to respect these norms. VASILIEV argues that the report in any case expresses the tribunal's legislator intent, allowing for it to be used as a "normative shortcut".¹²⁴ Therefore, Judges can directly rely on this pronouncement as to the applicability of international human rights norms.¹²⁵

¹¹⁸ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, par. 106.

¹¹⁹ C. DEFRANCIA, Due Process in International Criminal Courts, in «Virginia Law Review», Vol. 87, 2001, p. 1393.

¹²⁰ Consider *e.g.* ICTY, Decision on Momčilo Krajišnik's Motion to Self-Represent, on Counsel's Motions in Relation to Appointment of *Amicus Curiae*, and on the Prosecution Motion of 16 February 2007, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, A. Ch., 11 May 2007, par. 12; ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, T. Ch. III, 31 January 2007, par. 48.

¹²¹ L. GRADONI, The Human Rights Dimension of International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 83 ("The Secretary-General had emphasized in his Report, [...] the necessity to abide by 'internationally recognized' human rights standards, an expression by which he might have meant something more than custom").

¹²² ICTY, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadić*, Case No. IT-94-1, T. Ch., 10 August 1995, par. 19 ("The Report of the Secretary-General gives little guidance regarding the applicable sources of law in construing and applying the Statute and Rules of the International Tribunal. Although the Report of the Secretary-General states that many of the provisions in the Statute are formulations based upon provisions found in existing international instruments, it does not indicate the relevance of the interpretation given to these provisions by other international judicial bodies").

¹²³ L. GRADONI, *International Criminal Courts and Tribunals: Bound by Human Rights Norms...or Tied Down?*, in «Leiden Journal of International Law», Vol. 19, 2006, p. 852.

¹²⁴ S. VASILIEV, *Fairness and Its Metric in International Criminal Procedure*, 2013, (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2253177, last visited 14 February 2014), p. 9 (noting that

Thirdly, with regard to the *ad hoc* tribunals, it has been argued that as subsidiary organs of the UN Security Council, they inherit their obligations from the United Nations. Underlying this reasoning is the understanding that the parent body cannot transfer more powers to the subsidiary organs than it possesses itself. Where respect of human rights follows from the goals of the UN under Articles 1 (3) and 55 (c) of the UN Charter and from the fact that many human rights documents were adopted under the auspices of the UN, it then also follows that powers conferred to the *ad hoc* tribunals by the UNSC are also delimited by the respect of human rights. In other words, the Security Council cannot exempt subsidiary organs from the respect of human rights.¹²⁶

Fourthly, whereas the international criminal tribunals cannot accede to the international human rights treaties, the provisions of international human rights treaties may reflect or be identical to customary international law or general principles of law, which the international criminal tribunals are bound to apply.¹²⁷ As *subjects of international law* having international legal personality (either *qua* independent international organisations or being a subsidiary

“the ‘axiomatic’ rhetoric in the Report, in view of its endorsement by the UNSC, is sufficiently prescriptive to operate as a legal norm that governs the interpretation and application of the law by the ICTY”).

¹²⁵ *Ibid.*, pp. 9 – 10.

¹²⁶ Consider e.g. F. POCAR and L. CARTER, *The Challenge of Shaping Procedures in International Criminal Courts*, in L. CARTER and F. POCAR (eds.), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, Cheltenham, Edward Elgar Publishing, 2013, p. 8 (arguing that where the ICCPR was adopted by a resolution of the UN General Assembly, “[e]specially for the UN-created courts (ICTY, ICTR and SCSL), it would be odd to regard the Covenant as having no binding effect on the organization which promoted and endorsed the principles contained therein”). See ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, T. Ch. III, 31 January 2007, par. 48. See also e.g. ICTR, Judgement, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, A. Ch., 26 May 2003, Dissenting Opinion of Judge Pocar, p. 2 (“the ICCPR is not only a treaty between States which have ratified it, but, like other human rights treaties, also a document that was adopted – unanimously – as a resolution by the General Assembly. As such, it also expresses the view of the General Assembly as to the principles enshrined therein. It would therefore have to be assumed that the Security Council, as a UN body, would act in compliance with that declaration of principles of the General Assembly”).

¹²⁷ L. GRADONI, *International Criminal Courts and Tribunals: Bound by Human Rights Norms...or Tied Down?*, in «Leiden Journal of International Law», Vol. 19, 2006, p. 850; L. GRADONI, *The Human Rights Dimension of International Criminal Procedure*, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 81; G. SLUITER, *International Criminal Proceedings and the Protection of Human Rights*, in «New England Law Review», Vol. 37, 2002 – 2003, p. 937; M. FEDOROVA and G. SLUITER, *Human Rights as Minimum Standards in International Criminal Proceedings*, in «Human Rights & International Legal Discourse», Vol. 3, 2009, p. 29. This contradicts in part the argumentation by SCHOMBURG and NEMITZ who argue that the ICCPR is not binding upon the Judges of the ICTR, the rights embodied therein being a “clear guideline” to the *ad hoc* tribunals. See W. SCHOMBURG and J.C. NEMITZ, *The Protection of Human Rights of the Accused Before the International Criminal Tribunal for Rwanda*, in E. DECAUX, A. DIENG and M. SOW (eds.), *From Human Rights to International Criminal Law: Studies in Honour of an African Jurist, the Late Judge Laïty Kama*, Leiden / Boston, Martinus Nijhoff Publishers, 2007, p. 91.

organ of such international organisation)¹²⁸ the international criminal courts are bound by any rights and duties under the general rules of international law.¹²⁹ These include generally recognised human rights norms.¹³⁰ It follows that all acts of these international criminal tribunals which are incompatible with these obligations should be set aside by these courts' judicial organs.¹³¹ From there, it has been argued that the Judges hold the power to set aside provisions of the Statute and RPE which are inconsistent with generally recognised human rights norms.¹³² To some extent, this understanding can be found in the Taylor 'Immunity from Jurisdiction Decision' of the Appeals Chamber of the Special Court, where it acknowledged that peremptory norms of international law (*jus cogens*) can require it to set aside the Statute.¹³³ AKANDE emphasises that such Statute-overriding powers cannot solely

¹²⁸ Consider e.g. Article 4 (1) ICC Statute.

¹²⁹ As acknowledged by ICTR Trial Chamber III in *Rwamakuba*: ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, T. Ch. III, 31 January 2007, par. 48 ("the Tribunal, as a special kind of subsidiary organ of the UN Security Council, is bound to respect and ensure respect for generally accepted human rights norms. Indeed, the United Nations, as an international subject, is bound to respect rules of customary international law, including those rules which relate to the protection of fundamental human rights"). See also L. GRADONI, *International Criminal Courts and Tribunals: Bound by Human Rights Norms...or Tied Down?*, in «Leiden Journal of International Law», Vol. 19, 2006, pp. 850 – 851; G. ACQUAVIVA, *Human Rights Violations before International Tribunals: Reflections on Responsibility of International Organizations*, in «Leiden Journal of International Law», Vol. 20, 2007, p. 614; M. FEDOROVA and G. SLUITER, *Human Rights as Minimum Standards in International Criminal Proceedings*, in «Human Rights & International Legal Discourse», Vol. 3, 2009, p. 20; M.N. SHAW, *International Law* (6th Edition), Cambridge, Cambridge University Press, 2008, p. 1311; L. GRADONI, *The Human Rights Dimension of International Criminal Procedure*, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 81; G. SLUITER, *International Criminal Proceedings and the Protection of Human Rights*, in «New England Law Review», Vol. 37, 2002 – 2003, p. 937. Consider in that regard ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 November 1980, I.C.J. Reports 1980, pp. 73, 89–90 ("International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties").

¹³⁰ G. ACQUAVIVA, *Human Rights Violations before International Tribunals: Reflections on Responsibility of International Organizations*, in «Leiden Journal of International Law», Vol. 20, 2007, p. 615.

¹³¹ L. GRADONI, *International Criminal Courts and Tribunals: Bound by Human Rights Norms...or Tied Down?*, in «Leiden Journal of International Law», Vol. 19, 2006, p. 870. As noted by the author, "the wrongfulness of an act or omission by an international organisation may not be excluded by the circumstance that another organ of the same organization has acted, or requires the first organ, to act in breach of the obligation in question".

¹³² *Ibid.*, pp. 870 – 71. *Contra*, consider S. VASILIEV, *Fairness and Its Metric in International Criminal Procedure*, 2013, (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2253177, last visited 14 February 2014), p. 42 (noting that "Beyond employing the 'external' human rights standards for gap-filling function, the tribunals have not really taken their reverence for human rights so far as to express preparedness to overtly misapply their primary law, rather than to re-interpret it in the way that would allow addressing the legal collision at stake").

¹³³ SCSL, *Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)*, *Prosecutor v. Norman*, Case No. SCSL-04-14-AR72(E), A. Ch., 31 May 2004, par. 43: "The Special Court cannot ignore whatever the Statute directs or permits or empowers it to do unless such provisions are void as being in conflict with a peremptory norm of general international law." According to GRADONI, "*jus cogens*" is not indispensable in this context: the Security Council cannot effectively exempt its subsidiary organs from observing generally recognized human rights norms. Even if one were to argue that the Special Court is a hybrid court, and thus not bound by the general rules of international law, it follows from Article 72*bis* SCSL RPE on

derive from the reference to human rights in the Secretary-General's report and should be grounded in sources of law which are hierarchically superior to the tribunals' Statutes.¹³⁴

Adding to the complexity, it is not unthinkable that dissimilarities may exist between the previously discussed human rights clauses within the Statute and Rules of the international criminal tribunals and the generally recognised human rights these institutions are bound to apply.¹³⁵ From the case law of the *ad hoc* tribunals, it emerges that these courts consider themselves to be bound by customary human rights norms.¹³⁶ These courts often apply provisions of human rights treaties, as proof of general international law, rather than *qua* treaty law.¹³⁷

From the above, it also emerges that those tribunals which are based on a treaty (such as the ICC) may well derogate *inter se* from generally recognised human rights.¹³⁸ However, they would then remain bound to observe these rights in their relations to third states.¹³⁹

Lastly, some authors formulate additional reasons why international criminal tribunals are bound by human rights norms. For example, they argue that this follows from their intended

the 'applicable law', that the Court can, where appropriate, rely on 'applicable treaties', 'customary law' and 'general principles of law'. See L. GRADONI, International Criminal Courts and Tribunals: Bound by Human Rights Norms...or Tied Down?, in «Leiden Journal of International Law», Vol. 19, 2006, p. 871.

¹³⁴ D. AKANDE, Sources of International Criminal Law, in A. CASSESE (ed.), The Oxford Companion to International Criminal Justice, Oxford, Oxford University Press, 2009, p. 46 (arguing that the concern (as expressed by the Secretary-General) that the *ad hoc* tribunals respect human rights does not give these Courts the right to override the Statutes).

¹³⁵ However, it has rightly been noted that the identification of the precise obligations which follow from human rights law is not an easy task. See M. FEDOROVA and G. SLUITER, Human Rights as *Minimum* Standards in International Criminal Proceedings, in «Human Rights & International Legal Discourse», Vol. 3, 2009, pp. 25 – 28. In particular, the authors note that human rights treaties do not always reflect general international law and that the determination of the status of human rights norms as reflecting customary international law or general principles of law is a complicated and time-intensive process, which risks being selective.

¹³⁶ Consider e.g. ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 209. The importance of such confirmation by the jurisprudence lies where customary norms do not automatically become part of the legal system of these tribunals. An act of incorporation is necessary in order for these not only to apply as external standards whose violation entails international responsibility of the organisation, but which are also applicable in the proceedings. See L. GRADONI, The Human Rights Dimension of International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), International Criminal Procedure: Principles and Rules, Oxford, Oxford University Press, 2013, p. 82.

¹³⁷ D. AKANDE, Sources of International Criminal Law, in A. CASSESE (ed.), The Oxford Companion to International Criminal Justice, Oxford, Oxford University Press, 2009, p. 49.

¹³⁸ L. GRADONI, International Criminal Courts and Tribunals: Bound by Human Rights Norms...or Tied Down?, in «Leiden Journal of International Law», Vol. 19, 2006, p. 873.

¹³⁹ *Ibid.*, p. 873.

main purpose, which is to redress the most grievous violations of human rights.¹⁴⁰ Related to this is the argument that the apparent paradox in promoting human rights through criminal law enforcement “would be unsustainable were it not accompanied by respect for the rights of the accused to the greatest extent possible.”¹⁴¹

§ Practice

The practice of the international criminal tribunals confirms the binding character of human rights norms. It is known that the ICTY first addressed the issue of the binding character of international human rights law in the *Tadić* Protective Measures Decision. In the often cited wording of the tribunal:

“[T]he International Tribunal is adjudicating crimes which are considered so horrific as to warrant universal jurisdiction. The international Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence.”¹⁴²

The tribunal added that human rights norms should be interpreted within its own legal context, adopting a “contextual approach.”¹⁴³ Later case law of the tribunals did not follow the dubious approach in *Tadić* and showed less restraints to rely on human rights law.¹⁴⁴ It

¹⁴⁰ V. DIMITRIJEVIĆ and M. MILANOVIĆ, Human Rights before International Criminal Courts, in J. GRIMHEDEN and R. RING (eds.), *Human Rights Law, From Dissemination to Application: Essays in Honour of Göran Melander*, Leiden, Martinus Nijhoff Publishers, 2006, pp. 149, 167 (adding that “[i]f international courts are to assist in any way the process of reconciliation and transitional justice, they must follow the highest standards of fairness, for the people on all sides of wars and conflicts have to trust these judicial institutions and believe in the veracity and fairness of their decisions”).

¹⁴¹ R. ROTH and F. TULKENS, Symposium, The Influence of the European Court of Human Rights’ Case Law on (International) Criminal Law: Introduction, in «Journal of International Criminal Justice», Vol. 9, 2011, p. 573.

¹⁴² ICTY, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadić*, Case No. IT-94-1, T. Ch., 10 August 1995, par. 28.

¹⁴³ *Ibid.*, par. 28, 30: “As such, the Trial Chamber agrees with the Prosecutor that the International Tribunal must interpret its provisions within its own context and determine where the balance lies between the accused’s right to a fair and public trial and the protection of victims and witnesses within its unique legal framework. While the jurisprudence of other international judicial bodies is relevant when examining the meaning of concepts such as “fair trial”, whether or not the proper balance is met depends on the context of the legal system in which the concepts are being applied.”; see also G. MCINTYRE, *Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY*, in G. BOAS and W.A. SCHABAS (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Leiden, Martinus Nijhoff Publishers, 2003, pp. 193 - 238.

¹⁴⁴ For example, the ICTY Appeals Chamber stated in the *Tadić* case that: “For the reasons outlined below, Appellant has not satisfied this Chamber that the requirements laid down in these three conventions must apply not only in the context of national legal systems but also with respect to proceedings conducted before an

held that while regional and universal human rights instruments are not applicable as such, the Court “must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.”¹⁴⁵ A similar approach is to be found in the case law of the ICTR. Its case law confirmed that:

“The International Covenant on Civil and Political Rights is part of general international law and is applied on that basis. Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom.”¹⁴⁶

Occasionally, the ICTY sought to explain the special importance of both the ICCPR and the ECHR by referring to the fact that parts of the Former Yugoslavia are United Nations member states and parties to the ICCPR as well as member states or candidate-member states of the Council of Europe.¹⁴⁷

international court. This Chamber is, however, satisfied that the principle that a tribunal must be established by law, as explained below, is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting. It follows from this principle that it is incumbent on all States to organize their system of criminal justice in such a way as to ensure that all individuals are guaranteed the right to have a criminal charge determined by a tribunal established by law. This does not mean, however, that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be “established by law.” See ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić*, Case No. IT-94-1, A. Ch., 2 October 1995, par. 42.

¹⁴⁵ ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić*, Case No. IT-94-1, A. Ch., 2 October 1995, par. 45.

¹⁴⁶ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 40, as acknowledged by Trial Chamber III in *Rwamakuba*: ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, T. Ch. III, 31 January 2007, par. 48.

¹⁴⁷ ICTY, Decision Granting Provisional Release to Enver Hadžihasanović, *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-PT, T. Ch. II, 19 December 2001, par. 4. Similarly, see ICTY, Decision Granting Provisional Release to Amir Kubura, *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, T. Ch. II, 19 December 2001, par. 4. A more or less similar argumentation is to be found in other cases. For example, ICTY, Decision on Darko Mrda's Request for Provisional Release, *Prosecutor v. Mrda*, Case No. IT-02-59-PT, T. Ch. II, 15 April 2003, par. 21 – 26 (here, the Trial Chamber additionally notes, without further explaining, that the ICCPR and the ECHR are part of public international law).

Finally, internationalised criminal courts and tribunals also have accepted that they should comply with human rights norms which are part of general international law.¹⁴⁸

§ *Persuasiveness of the jurisprudence of human rights supervisory bodies*

On a regular basis, international criminal courts refer to the decisions of the human rights courts and supervisory bodies. It is important to determine in how far international criminal tribunals are bound by the jurisprudence of these bodies. The aforementioned Report of the Secretary-General accompanying the adoption of the ICTY Statute does not clarify this matter.¹⁴⁹ It is known that Article 38 (1) (d) ICJ Statute refers to judicial decisions as ‘subsidiary means’ for the determination of the rule of law. It follows that international criminal tribunals are not bound by human rights case law, with the exception of the instance when they constitute evidence of customary law.¹⁵⁰ Confirmation thereof is found in the prevalent use that has been made of human rights case law by international criminal tribunals: as an authoritative source on the interpretation and application of human rights provisions, to which the tribunals can have resort in establishing a rule of customary international law or a

¹⁴⁸ Consider e.g. SCSL, Decision on Constitutionality and Lack of Jurisdiction, *Prosecutor v. Kallon et al.*, Case No. SCSL-2004-15-AR72 (E), A. Ch., 13 March 2004, par. 55. Also the STL jurisprudence has accepted that it may not derogate from or fail to comply with customary human rights norms. See STL, Order Assigning Matter to Pre-Trial Judge, *El Sayed*, Case No. CH/PRES/2010/01, President, 15 April 2010, par. 35 (“Whether or not it is held that the international general norm on the right to justice has been elevated to the rank of *jus cogens* (with the consequence that States may not derogate from it either through treaties or national legislation), it is axiomatic that an international court such as the STL may not derogate from or fail to comply with such a general norm”). On the ICC, see *infra*, Chapter 3, III.3 and the jurisprudence cited therein.

¹⁴⁹ See ICTY, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadić*, Case No. IT-94-1, T. Ch., 10 August 1995, par. 19 (“it does not indicate the relevance of the interpretation given to these provisions by other international judicial bodies”). But consider G. MCINTYRE, *Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY*, in G. BOAS and W.A. SCHABAS (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Leiden, Martinus Nijhoff Publishers, 2003, p. 198 (“The reliance by the Secretary-General on Article 14 of the ICCPR suggests the intention that the Tribunal would accord an accused those rights as understood by other judicial bodies charged with the application of them, in particular the interpretation of the ICCPR by the United Nations Human Rights Committee (HRC) and of comparable principles set out by the European Court of Human Rights (ECtHR)”).

¹⁵⁰ L. GRADONI, *International Criminal Courts and Tribunals: Bound by Human Rights Norms...or Tied Down?*, in «Leiden Journal of International Law», Vol. 19, 2006, p. 855; M. FEDOROVA and G. SLUTER, *Human Rights as Minimum Standards in International Criminal Proceedings*, in «Human Rights & International Legal Discourse», Vol. 3, 2009, p. 29 (labelling the jurisprudence of human rights monitoring bodies “authoritative sources of interpretation and application of the conventional norms”); M. FEDOROVA, *The Principle of Equality of Arms in International Criminal Proceedings*, Antwerp, Intersentia, 2012, (non-commercial edition), p. 29 (arguing that one should distinguish between the internationally recognized human rights standards and their practical interpretation and application by human rights bodies. The latter do not possess the same normative force).

general principle of international law.¹⁵¹ This understanding was confirmed by all Judges and legal officers who were interviewed.¹⁵² It would only be binding insofar as it evidences customary international law.¹⁵³

¹⁵¹ Consider in particular: ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 40 (“they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom”); ICTY, Judgment, *Prosecutor v. Delalić et al. (Čelebići case)*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 24 (“Although the Appeals Chamber will necessarily take into consideration decisions of other international courts, it may, after careful consideration, come to a different conclusion”); M. FEDOROVA and G. SLUITER, Human Rights as *Minimum* Standards in International Criminal Proceedings, in «Human Rights & International Legal Discourse», Vol. 3, 2009, p. 27; J.K. COGAN, International Criminal Courts and Fair Trials: Difficulties and Prospects, in *Yale Journal of International Law*, Vol. 27, 2002, p. 117.

¹⁵² Interview with Judge Weinberg de Roca of the ICTR, ICTR-01, Arusha, 19 May 2008, p. 2 (“we are not bound by the jurisprudence of the international courts, but we do not ignore it”); Interview with Judge De Silva of the ICTR, ICTR-06, Arusha, 2 June 2008, p. 3 (“We are not bound by their decisions [decisions by human rights courts such as the ECtHR and the IACtHR, as well as by monitoring bodies such as the HRC]. Sometimes, they have persuasive authority. You see, we consider them. We consider them because they are reasoned decisions. We cannot simply ignore them”); Interview with a Legal Officer of the ICTR, ICTR-29, Arusha 5 June 2008, p. 3 (“I think it is persuasive. That is what the law says. It is just there for persuasive effect. They do not bind the Tribunal. Invariably, the Tribunal follows good law and good precedent. I do not think that they should be binding, but I think that they are persuasive, and they should remain persuasive so as to allow the Judges to look at them and use them as the justice of individual cases demand”); Interview with a Legal Officer of the ICTR, ICTR-28, Arusha, 30 May 2008, p. 3 (“Il est difficile de dire qu’elle est contraignante en soi, c’est-à-dire que les Juges y seraient tenus et s’ils ne la suivaient pas, il y aura une sanction. Mais, il est clair que les normes établies par d’autres organes en matière de droits de l’homme s’imposent implicitement. [M]ême si elle ne dit pas qu’elle est tenue par cette ‘jurisprudence’, dans la mesure où elle applique le principe qui est tiré de cette jurisprudence, cette jurisprudence est intégrée comme faisant partie de la jurisprudence internationale que le tribunal suit”); Interview with Judge Møse, ICTR-03, Arusha, 20 May 2008, pp. 3 – 4 (“I think it is common ground that a supervisory body under one convention is not bound by the interpretation of another organ set up under a different instrument. This said, I consider them very authoritative”); Interview with Judge Short of the ICTR, ICTR-04, Arusha, 23 May 2008, p. 3 (“They are not binding. They are of a persuasive nature. Generally speaking, most Chambers rely on jurisprudence of the *ad hoc* Tribunals and only refer to international human rights law where the *ad hoc* Tribunals’ jurisprudence is deficient. The approach varies from Bench to Bench and depends also on the human rights issue at stake. With my human rights background, I am in favour of greater reliance on international human rights law as interpreted by the ECtHR and monitoring bodies when dealing with human rights issues such as the right to a fair trial and the right to a speedy trial”); Interview with a Legal Officer of the ICTR, ICTR-08, Arusha, 19 May 2008, p. 3 (“Definitely they will be guided. The authority of judgments and decisions of the other courts will have persuasive effect, they will guide other Judges who have not had a lot of time dealing with all sorts of issues. There is a matter of expertise that recommends looking at those authorities. But they can never be binding. They can have great weight depending on a number of factors – correct reasoning, for example”); Interview with a Legal Officer of the ICTR, ICTR-30, Arusha, 30 May 2008, p. 4 (“But, you know, it’s something that’s not necessarily – a Human Rights Committee or the Inter-American Court issues a decision, we’re not necessarily following. Obviously if it’s a well-reasoned, persuasive opinion”); Interview with a Legal Officer of the ICTR, ICTR-36, Arusha, 4 June 2008, p. 3 (“I think that it is just a source of guidance. It cannot bind this Tribunal. [...] But it can be very persuasive, and relevant whenever needed”); Interview with a Legal Officer of the ICTR, ICTR-31, Arusha, 2 June 2008, p. 2 (“The Tribunal is independent, it is not bound by any other court. It cannot be. But, certainly, decisions by the European Court of Human Rights have influenced, and have been taken into consideration”); Interview with Judge Egorov of the ICTR, ICTR-39, Arusha, 20 May 2008, p. 3 (“As far as the value and legal force of precedential law is concerned, I would not say the jurisprudence of, for example, the European Court is of a strictly binding character. This depends on the situation”); Interview with a Judge of the ICTR, ICTR-02, Arusha, 16 May 2008, p. 2 (“I think they are a source of guidance, but the case law of human rights courts will be a ground to understand our case whenever human rights issues arise”); Interview with a Judge of the SCSL, SCSL-10, The Hague, 16 December 2009, p. 5 (“Others, are not binding on us, but they are persuasive if reasoned and in accordance with the law and our Rules”); Interview with a Legal Officer of the SCSL, SCSL-12, The Hague, 4 February 2010, p. 4 (“I think the way that we approach it is that it would be persuasive”); Interview with a Judge of the SCSL, SCSL-09, The

Nevertheless, as argued by CASSESE, occasionally the *ad hoc* tribunals have attributed too much weight to the international (and national) case law, and directly applied precedents by human rights courts and bodies, using a ‘wild’, rather than a ‘wise’ approach.¹⁵⁴ In a wise approach, national and international case law is only considered by the Judges of the international criminal tribunals in clarifying a rule of customary international law or a general principle of international law, as described above,¹⁵⁵ or to consider the interpretation of an international rule by an another Judge to assess whether it may be applied by the Judge. It follows that the laws of the international criminal courts themselves prevail (pre-eminence) over the laws of other international legal systems. According to CASSESE, this approach respects the methods of law interpretation and better protects the (fair trial) rights of the accused by reducing the arbitrariness of decisions taken by the international Judge (*arbitrium judicis*).¹⁵⁶ In turn, the direct application of the case law of other international or national courts disregards (1) the fact that international tribunals “belong to a *totally distinct legal system from that of national courts*” and, (2) in applying the case law of other international courts, it also ignores that international criminal proceedings display their own specific characteristics.¹⁵⁷

Hague, 16 December 2009, p. 2 (“Not that we are bound by it, but that we are persuaded by it”); Interview with a Legal Officer of the SCSL, SCSL-13, The Hague, 16 December 2009, p. 5 (“Generally the Special Court is not bound by the jurisprudence as a legal matter, I would say, because they are not part of those conventions. The Human Rights Committee, one could argue about that, but clearly, even independent from that its jurisprudence is being applied. It seems there is no clear discussion about this whole issue in the decisions and judgements but it also seems that the Judges feel guided by their jurisprudence and value their jurisprudence in some way because they refer to them. However, there is no discussion in any of decisions or judgements of the Special Court why they are actually guided by them or what the rationale is, why they can use their jurisprudence”).

¹⁵³ Interview with a Legal Officer of the ICTR, ICTR-34, Arusha, 3 June 2008, p. 3 (“It [human rights jurisprudence] would be considered as evidence of customary international law as necessary”); Interview with a Judge of the ICTR, ICTR-07, Arusha, 16 May 2008, p. 3 (“No, I would not consider a decision of the European Court of Human Rights to be binding. Except to the extent to which it evidences what is customary international law”).

¹⁵⁴ A. CASSESE, *The Influence of the European Court of Human Rights on International Criminal Tribunals – Some Methodological Remarks*, in M. BERGSMO (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide*, Leiden, Martinus Nijhoff Publishers, 2003, pp. 20 – 24, 50 (the distinction being borrowed from the ‘*coutume sage*’, ‘*coutume sauvage*’ distinction of R.-J. Dupuy).

¹⁵⁵ Consider e.g. STL, Order Assigning Matter to Pre-Trial Judge, *El Sayed*, Case No. CH/PRES/2010/01, President, 15 April 2010, par. 26 (“the case law in question has contributed and is contributing to the evolution of the international customary rule on the right of access to justice and, by the same token, can be regarded as evidence of the contents of that customary rule”).

¹⁵⁶ A. CASSESE, *The Influence of the European Court of Human Rights on International Criminal Tribunals – Some Methodological Remarks*, in M. BERGSMO (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide*, Leiden, Martinus Nijhoff Publishers, 2003, p. 21.

¹⁵⁷ *Ibid.*, pp. 20 – 21. The wild approach “tends to place law that is “external” to the international criminal court on the same level as the law governing that court” (*ibid.*, p. 24).

Moreover, a prevalence of references to regional human rights courts can be noted. Several reasons have been advanced for this recourse to the case law of these courts, and in particular of the ECtHR.¹⁵⁸ These include: (i) the greater value of such international cases *vis-à-vis* national cases,¹⁵⁹ (ii) the quantitative and qualitative value of the case law of the ECtHR¹⁶⁰, (iii) the resemblances of statutory provisions and provisions of regional human rights treaties¹⁶¹ and (iv) the extent to which the regional character of this case law assists in the clarification of general principles, since it reconciles the common law and civil law traditions on the European continent.¹⁶² It may be surprising that the STL relies on the jurisprudence of regional human rights courts such as the IACtHR or the ECtHR. However, this approach has been defended by the STL President on the basis that “it spells out notions and legal consequences of provisions that are to a large extent similar to those of the ICCPR, a treaty that is binding on Lebanon.”¹⁶³

III.2. Human rights as a source of interpretation

As already indicated above, the procedural rules of several tribunals under review envisage human rights norms as a source of interpretation. The best example is Article 21 (3) ICC

¹⁵⁸ A noted by CASSESE, the case law of the ECtHR has had an important influence on the law of international criminal procedure. It has assisted the *ad hoc* tribunals “to elicit or refine implicit concepts, poorly enunciated in the relevant international texts, or clarify legal categories that are only sketchily outlined in international criminal rules”. See A. CASSESE, *The Influence of the European Court of Human Rights on International Criminal Tribunals – Some Methodological Remarks*, in M. BERGSMO, *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide*, Leiden, Martinus Nijhoff Publishers, 2003, pp. 26 - 49 (referring, among others, to (i) the role of the *Strasbourg* case law in defining the rights of the accused, arrest and pre-trial detention, impartiality and ‘equality of arms’ at the *ad hoc* tribunals; (ii) the role in clarifying concepts included in the Statute and Rules that were not defined or were ambiguous or unclear (e.g. the definition of arrest in *Dokmanović* (see *infra*, Chapter 7, VI) or to clarify the ‘exceptional circumstances’ criterion in former Rule 65 (B) ICTY and ICTR RPE); (iii) to support or corroborate conclusions based on the relevant international law, as a sort of *a posteriori* legitimacy (e.g. right to have the assistance of counsel during questioning); or (iv) purely *ad abundantiam*).

¹⁵⁹ *Ibid.*, p. 24.

¹⁶⁰ R. ROTH and F. TULKENS, *Symposium, The Influence of the European Court of Human Rights’ Case Law on (International) Criminal Law: Introduction*, in «Journal of International Criminal Justice», Vol. 9, 2011, p. 574; A. ZAHAR and G. SLUITER, *International Criminal Law: a Critical Introduction*, Oxford, Oxford University Press, 2008, p. 280.

¹⁶¹ A. CASSESE, *The Influence of the European Court of Human Rights on International Criminal Tribunals – Some Methodological Remarks*, in M. BERGSMO (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide*, Leiden, Martinus Nijhoff Publishers, 2003, pp. 24 – 25.

¹⁶² *Ibid.*, p. 25; R. ROTH and F. TULKENS, *Symposium, The Influence of the European Court of Human Rights’ Case Law on (International) Criminal Law: Introduction*, in «Journal of International Criminal Justice», Vol. 9, 2011, p. 574 (referring to the harmonising effect of the ECtHR).

¹⁶³ STL, *Order Assigning Matter to Pre-Trial Judge, El Sayed*, Case No. CH/PRES/2010/01, President, 15 April 2010, par. 26 (consider the references to the IACtHR and the IACCommHR (par. 24) and to the jurisprudence of the ECtHR (par. 25) with regard to the right of access to justice).

Statute. The wording of this provision reveals that, unlike the preceding Article 21 (1) and (2), this provision does not refer to a *source of law* which is to be applied by the Court as such. Rather, it implies that the *interpretation* and the *application* of the law (which is found in the first two paragraphs) ought to be consistent with internationally recognized human rights.¹⁶⁴ Although this provision has occasionally been referred to as a “general principle of interpretation”, this description is too narrow because it leaves out the ‘application’ of the sources of law in a manner consistent with internationally recognized human rights.¹⁶⁵ There should be a distinction between these two elements.¹⁶⁶ Article 21 (3) ICC Statute implies an obligation of result in that the application of the sources under Article 21 should result in a result in conformity with international human rights law.¹⁶⁷

This was confirmed by the ICC Appeals Chamber which held that Article 21 (3) “makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognized human rights. It requires the exercise of the jurisdiction of the

¹⁶⁴ Compare the formulation of the *chapeau* of Article 21 (1) and of 21 (2) ICC Statute (‘[t]he court shall apply’ and ‘[t]he Court may apply’ respectively), with the formulation of Article 21 (3) ICC Statute (‘The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights’). Such understanding is shared by most commentators, including e.g. R. YOUNG, ‘Internationally Recognized Human Rights’ Before the International Criminal Court, in «International and Comparative Law Quarterly», Vol. 60, 2011, pp. 193, 198. *Contra*, consider G. BITTI, Article 21 of the Statute of the ICC and the Treatment of Sources of Law in the Jurisprudence of the ICC, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, pp. 300, 304 (arguing that internationally recognized human rights may constitute an additional source of law).

¹⁶⁵ See e.g. ICC, Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-307, PTC I, 10 March 2008, p. 7 (noting that “the Chamber, in determining the contours of the statutory framework provided for in the Statute, the Rules and the Regulations, must, in addition to applying the general principle of interpretation set out in article 21(3) of the Statute, look at the general principles of interpretation as set out in article 31(1) of the Vienna Convention on the Law of Treaties, according to which “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”); ICC, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, ICC-01/04-01/07-474, PTC I, 13 May 2008, par. 57.

¹⁶⁶ Confirming, G. BITTI, Article 21 of the Statute of the ICC and the Treatment of Sources of Law in the Jurisprudence of the ICC, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 301; A. PELLET, *Applicable Law*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1080, fn. 163. However, these two processes are closely connected: interpretation always precedes application and implies the process of determining the legal meaning of a provision. See M. FEDOROVA and G. SLUITER, *Human Rights as Minimum Standards in International Criminal Proceedings*, in «Human Rights & International Legal Discourse», Vol. 3, 2009, p. 24, fn. 69.

¹⁶⁷ G. BITTI, Article 21 of the Statute of the ICC and the Treatment of Sources of Law in the Jurisprudence of the ICC, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 303.

Court in accordance with internationally recognized human rights norms.”¹⁶⁸ It follows that “[h]uman rights underpin the Statute; every aspect of it.”¹⁶⁹

Much of the complexity surrounding this provision boils down to uncertainties regarding the interpretation of the phrase ‘internationally recognized human rights’.¹⁷⁰ As acknowledged by SHEPPARD, some ambiguity is unavoidable considering the evolving nature of human rights law. However, he adds that the current vagueness of this terminology surpasses this need for flexibility.¹⁷¹ From the wording of this phrase, one can derive that what is intended falls below universal acceptance.¹⁷² Additionally, the same wording can be found in Article 69 (7) ICC Statute.¹⁷³ However, further indications are lacking in the Court’s statutory documents. For example, it is unclear what the qualifier ‘recognised’ should mean.¹⁷⁴ The wording also betrays that what is intended is broader than customary international law.¹⁷⁵ The *travaux préparatoires* do not resolve the matter.¹⁷⁶

¹⁶⁸ ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 36; ICC, Judgment pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 602.

¹⁶⁹ ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 37. Consider also ICC, Decision on the Fitness of Laurent Gbagbo to take part in the Proceedings before this Court, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-286-Red, PTC I, 2 November 2012, par. 45.

¹⁷⁰ See in general: R. YOUNG, ‘Internationally Recognized Human Rights’ Before the International Criminal Court, in «International and Comparative Law Quarterly», Vol. 60, 2011, pp. 189 – 208; D. SHEPPARD, The International Criminal Court and “Internationally Recognized Human Rights”: Understanding Article 21 (3) of the Rome Statute, in «Journal of International Criminal Justice», Vol. 10, 2010, pp. 43 – 71.

¹⁷¹ *Ibid.*, p. 47.

¹⁷² G. BITTI, Article 21 of the Statute of the ICC and the Treatment of Sources of Law in the Jurisprudence of the ICC, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 301; G.E. EDWARDS, International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy, in «The Yale Journal of International Law», Vol. 26, 2001, p. 378; D. SHEPPARD, The International Criminal Court and “Internationally Recognized Human Rights”: Understanding Article 21 (3) of the Rome Statute, in «Journal of International Criminal Justice», Vol. 10, 2010, p. 47; M. FEDOROVA and G. SLUITER, Human Rights as *Minimum Standards* in International Criminal Proceedings, in «Human Rights & International Legal Discourse», Vol. 3, 2009, p. 25 (the authors argue that the notion should in any case be broader than those human rights norms which are part of general international law).

¹⁷³ ‘Evidence obtained by means of a violation of this Statute or *internationally recognized human rights* shall not be admissible if [...]’ (emphasis added).

¹⁷⁴ G.E. EDWARDS, International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy, in «The Yale Journal of International Law», Vol. 26, 2001, p. 376. The author suggests that it consists of “all human rights which have been ‘recognized’ by either the international community as a whole, or by a subset of the international community (perhaps in the form of the ICC States Parties or signatories)” (*ibid.*, p. 379).

¹⁷⁵ *Ibid.*, p. 381 (“If the drafters had intended “internationally recognized human rights” to equal “customary international law,” “customary rights,” or “general principles of law derived from national laws,” presumably,

The jurisprudence has so far avoided to precisely outline its understanding of ‘internationally recognized human rights’. For our purposes, it is necessary to clarify *what rights* are included in the phrase ‘internationally recognized human rights’ at the investigation stage of proceedings. In the first place, it is clear that the general *right to a fair trial* is to be included.¹⁷⁷ The importance of this right follows from several statutory provisions (consider e.g. Articles 64 (2), 67 and Article 69 (4) ICC Statute) and the ICC Appeals Chamber also confirmed that this right is to be included.¹⁷⁸ Considering the broad nature of this right, it follows that all proceedings, including those at the investigation stage¹⁷⁹, should be in full conformity with fair trial rights, even if they are not explicitly mentioned in the Statute or the RPE. In the second place, the ICC’s jurisprudence has confirmed that the rights to privacy and to dignity fall within the ambit of ‘internationally recognized human rights’.¹⁸⁰ The clarification that the right to privacy is included in the notion of ‘internationally recognized human rights’ is important, since the statutory documents of the Court do not expressly acknowledge the existence of such a right.¹⁸¹

the drafters would have used that language in the Rome Statute”); M. FEDOROVA and G. SLUITER, *Human Rights as Minimum Standards in International Criminal Proceedings*, in «Human Rights & International Legal Discourse», Vol. 3, 2009, p. 25 (arguing that the scope should be broader than ‘general international law’ in the context of the *ad hoc* tribunals).

¹⁷⁶ R. YOUNG, ‘Internationally Recognized Human Rights’ Before the International Criminal Court, in «International and Comparative Law Quarterly», Vol. 60, 2011, pp. 196 – 198 (the author concludes that the preparatory works do not shed much light on the meaning of the phrase).

¹⁷⁷ For a discussion of the notion of a ‘fair trial’ under human rights law, see *infra*, Chapter 2, III.4.

¹⁷⁸ ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 37. Consider also ICC, Decision on the “Defence request for a permanent stay of proceedings”, *Prosecutor v. Callixte Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-264, PTC I, 1 July 2011, p. 4; ICC, Decision on the Prosecutor’s Application for Leave to Appeal Pre-Trial Chamber III’s Decision on Disclosure, *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-75, PTC III, 25 August 2008, par. 13; ICC, Decision on the Prosecutor’s “Application for Leave to Reply to ‘Conclusions de la défense en réponse au mémoire d’appel du Procureur’”, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06, A. Ch., 12 September 2006, Separate Opinion of Judge Georghios M. Pikiis, par. 3.

¹⁷⁹ ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 37 (the Appeals Chamber argues that the right to a fair trial is a broad concept, “embracing the judicial process in its entirety”).

¹⁸⁰ ICC, Decision on the Prosecutor’s Request Relating to three Forensic Experts, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-988, T. Ch. II, 25 March 2009, par. 5.

¹⁸¹ As will be discussed in detail *infra*, Chapter 6, II.2.2.

It should equally be determined what *instruments* are relevant with regard to the phrase ‘internationally recognized human rights’. Divergent views persist in the literature.¹⁸² While it seems to follow from the wording of Article 21 (3) ICC Statute that regional human rights instruments are less relevant (‘*universally* recognized human rights’), it has been argued that they can play a role because of the highly developed character of certain of these regional systems (ECHR).¹⁸³

It follows from the practice of the Court that it interprets the phrase as to also include regional human rights instruments, and in particular the ECHR, the ACHR and the ACHPR.¹⁸⁴ This may involve risks of including conflicting norms.¹⁸⁵ Additionally, non-binding human rights

¹⁸² Consider e.g. A. ZAHAR and G. SLUITER, *International Criminal Law: a Critical Introduction*, Oxford, Oxford University Press, 2008, p. 280 (the authors argue that at least the ICCPR, the UN Convention against Torture and the Convention on the Rights of the Child should be included); D. SHEPPARD, *The International Criminal Court and “Internationally Recognized Human Rights”: Understanding Article 21 (3) of the Rome Statute*, in «*Journal of International Criminal Justice*», Vol. 10, 2010, p. 63 (arguing that the core UN human rights treaties and general customary rules are to be included).

¹⁸³ See A. ZAHAR and G. SLUITER, *International Criminal Law: a Critical Introduction*, Oxford, Oxford University Press, 2008, p. 280. More hesitant is SHEPPARD: “Though ‘internationally recognized’ sets a lower standard than ‘universally recognized’, it is less clear whether it allows norms developed in one specific region to impose a binding obligation on the ICC. If a given provision were common to all of the regional human rights instruments, then the views of one of the courts could certainly be persuasive authority on the more general proposition.” See D. SHEPPARD, *The International Criminal Court and “Internationally Recognized Human Rights”*: Understanding Article 21 (3) of the Rome Statute, in «*Journal of International Criminal Justice*», Vol. 10, 2010, p. 53.

¹⁸⁴ Consider e.g. ICC Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-475, PTC II, 14 August 2009, par. 35.

¹⁸⁵ D. SHEPPARD, *The International Criminal Court and “Internationally Recognized Human Rights”*: Understanding Article 21 (3) of the Rome Statute, in «*Journal of International Criminal Justice*», Vol. 10, 2010, p. 64. The author provides a concrete example: under the ECHR, the right to a fair trial may be derogated from in times of emergency, whilst the ACHPR does not allow for such derogations. The author suggests that a solution to this problem may be found in a ‘contextual’ approach, which seeks to only apply a subset of these regional human rights norms. In making the determination what selection criteria are to be employed, the Court would consider the specifics of the case before the Court. In such scenario, a specific right under a regional instrument would be considered under Article 21 (3) where such right would have been applicable to the individual case were it to be prosecuted at the national level. Consequently, where human rights are better protected in the state that would otherwise exercise jurisdiction as a consequence of regional human rights instruments, these should be complied with by the Court. The author finds support in the opaque addition in Article 21 (1) (c) that in identifying general principles of law, the Court may ‘as appropriate’, consider ‘the national laws of States that would normally exercise jurisdiction over the crime’. In this manner, it may guarantee the principle that the Court, having an obligation to respect human rights, should not withhold rights from an accused which he or she would otherwise have enjoyed at the national level. This conforms to the principles that the state that would otherwise exercise jurisdiction has also an interest in, and an obligation to ensure that the person is not worse off at the ICC. Nevertheless, as acknowledged by the author, difficulties may arise to identify ‘the state that would otherwise exercise jurisdiction’, especially in case different states could exercise jurisdiction (*ibid.*, pp. 65 – 66).

instruments are included, such as the UDHR¹⁸⁶, the ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International humanitarian Law’ or the ‘Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power’.¹⁸⁷ The inclusion of such non-binding instruments does not seem to be prevented by the wording of Article 21 (3) ICC Statute. It even finds some, albeit limited, support in the *travaux préparatoires*.¹⁸⁸ The case law of the Court also considers the case law of regional human rights supervisory bodies such as the ECtHR¹⁸⁹, the IACtHR¹⁹⁰ or the IACCommHR on a regular basis.¹⁹¹

¹⁸⁶ Consider e.g. ICC, Redacted Decision on the Request by DRC-DOI-WWWW-0019 for Special Protective Measures Relating to his Asylum Application, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2766-Red, T. Ch. I, 5 August 2011, par. 83.

¹⁸⁷ ICC, Decision on Victim’s Participation, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-1119, T. Ch. I, 18 January 2008, par. 35 – 37; ICC, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-1432 (OA 9 OA 10), A. Ch., 11 July 2008, par. 33 (simply noting that the Trial Chamber was merely guided by the Basic Principles); ICC, Decision on the Applications by 7 Victims to Participate in the Proceedings, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-2035, T. Ch. I, 10 July 2009, par. 24 (considering the basic principles); ICC, Fourth Decision on Victims’ Participation, *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-320, PTC III, 12 December 2008, par. 16; ICC, Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-24, PTC II, 4 November 2011, par. 5. Critical, consider D. SHEPPARD, The International Criminal Court and “Internationally Recognized Human Rights”: Understanding Article 21 (3) of the Rome Statute, in «Journal of International Criminal Justice», Vol. 10, 2010, p. 51 (noting that the Appeals Chamber (in its decision in *Lubanga* of 11 July 2008) should not have answered whether the reliance on the Basic principles was *permissible*, but rather whether the use thereof was *mandatory*).

¹⁸⁸ Report of the Intersessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands (“Zutphen Draft”), U.N. Doc. A/AC.249/1998/L.13, 30 January 1998, p. 118, fn. 215 (where the text refers to internationally protected human rights, it is added in footnote that “[t]he formula ‘internationally protected human rights’ is intended to cover non-treaty standards as well and would therefore be broader than ‘international law’”). Confirming, see G. HAFNER and C. BINDER, The Interpretation of Article 21 (3) ICC Statute: Opinion Reviewed, in «Austrian Review of International and European Law», Vol. 9, 2004, pp. 184 – 185.

¹⁸⁹ ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled “Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-1486 (OA 13), A. Ch., 21 October 2008, par. 46 – 47; ICC, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Situation in the Republic of Kenya*, Case No ICC-01/09-02/11-382-Red, PTC II, 23 January 2012, Dissenting Opinion by Judge Hans-Peter Kaul, par. 53 (citing several cases before the ECtHR).

¹⁹⁰ ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, *Prosecutor v. Bemba Gombo, Situation in the CAR*, ICC-01/05-01/08-14, PTC III, 17 July 2008, par. 24; ICC, Judgment on the Appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 Entitled “Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2205 (OA15 OA16), A. Ch., 8 December 2009, par. 84.

¹⁹¹ ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-278 (OA), A. Ch., 26 October 2012, Dissenting Opinion of Judge Anita Ušacka, par. 9.

From the above, it follows that the ICC jurisprudence adheres to a broad understanding of Article 21 (3) ICC Statute.¹⁹² Likewise, many (not all) scholars favour a broadly construed concept of ‘internationally recognized human rights’.¹⁹³ Other commentators have interpreted the concept narrowly, as to only include human rights norms which form part of international customary law,¹⁹⁴ or to exclude regional human rights instruments.¹⁹⁵ As indicated, the former interpretation goes against the peculiar wording of Article 21 (3) ICC Statute.¹⁹⁶ At least one commentator criticised what he calls the ‘shotgun approach’, whereby Judges identify as many sources as possible confirming the proposition, and without further explanation conclude that the right is internationally recognised.¹⁹⁷ It follows that different instruments, with a distinct legal character or binding force are therefore lumped together. SHEPPARD argues that this approach, while relatively unproblematic with regard to non-controversial human rights, raises concerns in case of less clear human rights, such as victims’ rights.¹⁹⁸

As indicated above, the jurisprudence to date failed to define what are to be considered ‘internationally recognized human rights’. Only Judge PIKIS provided an overall definition of the term. According to him, “[i]nternationally recognized may be regarded those human rights acknowledged by customary international law and international treaties and conventions.”¹⁹⁹ However, this definition does not resolve the question as to the extent to which regional

¹⁹² Consider e.g. G. BITTI, Article 21 of the Statute of the ICC and the Treatment of Sources of Law in the Jurisprudence of the ICC, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 301.

¹⁹³ Consider e.g. R. YOUNG, ‘Internationally Recognized Human Rights’ Before the International Criminal Court, in «International and Comparative Law Quarterly», Vol. 60, 2011, pp. 193 (in contrasting the wording of Article 21 (3) to other provisions of the ICC Statute, the author concludes that a contextual interpretation hints at a broad or flexible conception of this phrase, and “does not refer narrowly to rights derived from any particular source of international law or to any specific example of human rights.” Other arguments of the author in favour of a broad interpretation are less convincing).

¹⁹⁴ A. BOS, 1948-1998: The Universal Declaration of Human Rights and the Statute of the International Criminal Court, in «Fordham International Law Journal», Vol. 22, 1998-1999, p. 234 (“In so far as human rights instruments are universally recognized as part of international customary law, the ICC must respect them in its proceedings”). Consider also PELLET, who argues that only ‘peremptory norms of general international law’ are included. See A. PELLET, *Applicable Law*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1080.

¹⁹⁵ G. HAFNER and C. BINDER, *The Interpretation of Article 21 (3) ICC Statute: Opinion Reviewed*, in «Austrian Review of International and European Law», Vol. 9, 2004, p. 187 (noting that the inclusion thereof would contradict the express wording of Article 21 (3) ICC Statute).

¹⁹⁶ See *supra*, fn. 175 and accompanying text.

¹⁹⁷ D. SHEPPARD, *The International Criminal Court and “Internationally Recognized Human Rights”*: Understanding Article 21 (3) of the Rome Statute, in «Journal of International Criminal Justice», Vol. 10, 2010, p. 49.

¹⁹⁸ *Ibid.*, p. 50.

¹⁹⁹ ICC, Decision on the Prosecutor’s “Application for Leave to Reply to ‘Conclusions de la défense en réponse au mémoire d’appel du Procureur’”, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06, A. Ch., 12 September 2006, Separate Opinion of Judge Georghios M. Pikis, par. 3.

human rights norms are to be included. Where Judge PIKIS provides the example of the right to a fair trial, he also refers to such regional instruments. Hence, it seems that Judge PIKIS would favour their inclusion.²⁰⁰

To date, the Court has applied and interpreted many procedural provisions which are relevant to the investigative and pre-trial phase in light of Article 21 (3). This illustrates the enormous potential of this provision. Among others, the Court has construed the ‘substantial grounds to believe’ evidentiary standard for the confirmation of charges under Article 61 (7) ICC in light of internationally recognized human rights²⁰¹, the ‘reasonable grounds to believe’ standard for the issuance of a warrant of arrest (Article 58 (1) (a) ICC Statute)²⁰² as well as the identical threshold for a summons to appear (Article 58 (7) ICC Statute).²⁰³ It further relied upon these internationally recognized human rights in applying and interpreting the right of the accused to legal representation by counsel,²⁰⁴ the presumption of innocence under Article 66²⁰⁵ or the provisions on provisional detention and interim release.²⁰⁶

²⁰⁰ *Ibid.*, par. 3.

²⁰¹ ICC, Decision on the Confirmation of Charges, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-717, PTC I, 30 September 2008, par. 65; ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-803-tEN, PTC I, 29 January 2007, par. 38 - 39.

²⁰² ICC, Judgment on the Appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, *Prosecutor v. Al Bashir, Situation in Darfur, Sudan*, Case No. ICC 02/05-01/09-73, PTC I, 3 February 2010, par. 31 and 39; ICC, Public Redacted Version of “Decision on the Prosecutor’s Application Pursuant to Article 58 for a Warrant of Arrest against Laurent Koudou Gbagbo”, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-9-Red, PTC III, 30 November 2011, par. 27.

²⁰³ ICC, Decision on the Prosecution Application under Article 58 (7) of the Statute, *Prosecutor v. Harun and Kushayb, Situation in Darfur, Sudan*, Case No. ICC-02-05-01/07, PTC I, 27 April 2007, par. 28.

²⁰⁴ ICC, Reasons for “Decision of the Appeals Chamber on the Defence Application ‘Demande de suspension de toute action ou procédure afin de permettre la désignation d’un nouveau Conseil de la Défense’ Filed on 20 February 2007” Issued on 23 February 2007, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-844, A. Ch., 9 March 2007, par. 12 (“Such a right is a universally recognized human right (see article 21 (3) of the Statute) that finds expression in international and regional treaties and conventions”).

²⁰⁵ ICC, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-51, PTC I, 31 January 2011, par. 9.

²⁰⁶ Consider e.g. the interpretation of Article 60 (2) ICC Statute (ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-278 (OA), A. Ch., 26 October 2012, Dissenting Opinion of Judge Anita Ušacka, par. 8; ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 28 July 2010 Entitled “Decision on the Review of the Detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rules of Procedure and Evidence”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1019 (OA 4), A. Ch., 19 November 2010, par. 49) or the interpretation of Article 60 (3) (ICC, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-475, PTC II,

The above offers proof of the privileged position human rights norms have acquired within international criminal law and international law. Commentators refer to the “quasi-constitutional”²⁰⁷, “international super-legality”²⁰⁸ or “permeating role” of human rights.²⁰⁹

§ Methodology

In applying Article 21 (3), it seems that a two step-approach needs to be followed: first: (i) the applicable sources of law ought to be determined (as outlined under Article 21 (1) and (2)), and secondly (ii) the consistency of the application and interpretation thereof with internationally recognised human rights is to be ascertained.²¹⁰ This method can easily be applied to construe concepts or phrases in the Statute or the RPE which have been not been defined or which are ambiguous. For example, since the notion of “harm” is nowhere defined in the Statute or the Rules of the court, it is for the Chamber to interpret the term on a case-by-case basis in light of Article 21 (3) of the Statute.²¹¹ Thus, in most cases, the Judges identify a procedural rule under the Statute, RPE or Regulations of the Court, and interpret and apply this provision in light of Article 21 (3).

14 August 2009, par. 35; ICC, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, *Situation in the DRC*, Case No. ICC-01/04-168, A. Ch., 13 July 2006, par. 38.

²⁰⁷ C. DEPPEZ, Extent of Applicability of Human Rights Standards to Proceedings before the International Criminal Court: On Possible Reductive Factors, in «International Criminal Law Review», Vol. 12, 2012, p. 729 (arguing that the greatest virtue of Article 21 (3) is to identify the protection of human rights as a top priority); D. SHEPPARD, The International Criminal Court and “Internationally Recognized Human Rights”: Understanding Article 21 (3) of the Rome Statute, in «Journal of International Criminal Justice», Vol. 10, 2010, p. 46.

²⁰⁸ A. PELLET, Applicable Law, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, pp. 1079 – 1081 (labelling Article 21 (3) “the most perplexing aspect of the rules laid down by the Statute with respect to the applicable law”).

²⁰⁹ R. YOUNG, ‘Internationally Recognized Human Rights’ Before the International Criminal Court, in «International and Comparative Law Quarterly», Vol. 60, 2011, p. 190; C. DEPPEZ, Extent of Applicability of Human Rights Standards to Proceedings before the International Criminal Court: On Possible Reductive Factors, in «International Criminal Law Review», Vol. 12, 2012, p. 729 (arguing that the greatest virtue of Article 21 (3) is to identify the protection of human rights as a top priority); D. SHEPPARD, The International Criminal Court and “Internationally Recognized Human Rights”: Understanding Article 21 (3) of the Rome Statute, in «Journal of International Criminal Justice», Vol. 10, 2010, p. 46; M. FEDOROVA and G. SLUITER, Human Rights as *Minimum Standards in International Criminal Proceedings*, in «Human Rights & International Legal Discourse», Vol. 3, 2009, p. 24 (the authors note that human rights rank above all other sources).

²¹⁰ See the argumentation of Pre-Trial Chamber II: ICC, Decision on the Practices of Witness Familiarisation and Witness Proofing, *Prosecutor v. Lubanga Dyilo*, *Situation in the DRC*, Case No. ICC-01/04-01/06-679, PTC I, 8 November 2006, par. 10 (“In this regard, the Chamber considers that *prior to undertaking the analysis required by article 21 (3) of the Statute*, the Chamber must find a provision, rule or principle that, under article 21 (1) (a) to (c) of the Statute, could be applicable to the issue at hand” (emphasis added)).

²¹¹ ICC, Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the DRC*, Case No. ICC-01/04-101, PTC I, 17 January 2006, par. 81.

More complicated is the situation where the sources under Article 21 (1) (a) are silent on a certain issue. Should the Judges in such a case immediately proceed to apply the sources under Article 21 (1) (b) or should they rather first try to see whether such *lacuna* can be filled through the interpretation and application of the sources under Article 21 (1) (a) in light of Article 21 (3)? The Court has adopted the latter approach. Hence, one can only resort to Article 21 (1) (b) and (c) if there is a *lacuna* in the law under Article 21 (1) (a) which cannot be filled by treaty interpretation (VCLT) and by article 21 (3) ICC Statute.²¹² To a certain extent, this understanding interferes with the hierarchy provided for under Article 21 insofar as it implies that when those sources under (b) and (c) represent internationally recognised human rights, they become already relevant when assessing Article 21 (1) (a).²¹³ This is important because if a human rights norm is applied pursuant to Article 21 (1) (b), then some discretion is built in when it is applied by the Court ('where appropriate'). Taking the right to privacy as an example, there would be more flexibility for the Judges to adapt the right to the needs of the Court under Article 21 (1) (b) ICC Statute. In the manner outlined above, a gap-filling or generative power has been attributed to Article 21 (3) ICC Statute. This power has been criticised by some commentators, on the basis that it overstretches Article 21 (3) and fails to neatly distinguish between sources of law and sources of interpretation.²¹⁴ Nevertheless, the wording of Article 21 (3) ('the *application and interpretation* of law') seems to support a broader reading.²¹⁵ According to SHEPPARD, this interpretation "avoids

²¹² ICC, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, *Situation in the DRC*, Case No. ICC-01/04-168, A. Ch., 13 July 2006, par. 39 (the Appeals Chamber held that Article 21 (1) (c) could not be looked at where there was no *lacuna* in the Statute (with regard to the right to appeal against first instance courts (Article 82 ICC Statute))); ICC, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Situation in Darfur, Sudan, Prosecutor v. Al Bashir*, Case No. ICC 02/05-01/09-3, PTC I, 4 March 2009, par. 44.

²¹³ C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 825.

²¹⁴ R. YOUNG, 'Internationally Recognized Human Rights' Before the International Criminal Court, in «International and Comparative Law Quarterly», Vol. 60, 2011, p. 201 (noting that such conception of Article 21 (3) as a gap-filling mechanism "involves a hierarchical conception in which the Statute and Rules are superior, followed by internationally recognized human rights, followed by the other sources of applicable law outlined in article 21. Such a conception fails to understand article 21(3) as a rule which works in conjunction with the applicable law outlined in paragraphs 1 and 2, not in the absence of it. It also appears to treat article 21(3) as akin to a substantive source of applicable law"); M. FEDOROVA, *The Principle of Equality of Arms in International Criminal Proceedings*, Antwerp, Intersentia, 2012, (non-commercial edition), p. 28. Compare D. SHEPPARD, *The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21 (3) of the Rome Statute*, in «Journal of International Criminal Justice», Vol. 10, 2010, p. 58 (calling this a 'conservative interpretation', which disregards that Article 21 (3) is not only a general principle of interpretation (cf. 'application')). More generally, consider G. HAFNER and C. BINDER, *The Interpretation of Article 21 (3) ICC Statute: Opinion Reviewed*, in «Austrian Review of International and European Law», Vol. 9, 2004, p. 164 (arguing that Article 21 (3) interferes with the formal hierarchy of sources in Article 21 (1) ICC Statute).

²¹⁵ See e.g. D. SHEPPARD, *The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21 (3) of the Rome Statute*, in «Journal of International Criminal Justice», Vol. 10, 2010,

the potential pitfalls of the conservative interpretation, and is more in line with the object and purpose of the Rome Statute.”²¹⁶

An example of the acceptance of this gap-filling power by the Court is the acknowledgement by the Appeals Chamber of the Judges’ power to stay the proceedings,²¹⁷ even conditionally.²¹⁸ Although the Appeals Chamber admitted that the Statute and the RPE were exhaustive and did not provide for such a possibility to stay the proceedings, it inferred this power from internationally recognised human rights norms.²¹⁹ Alternatively, it could be argued that rather than using Article 21 (3) as a gap-filling device, the Appeals Chamber relied upon the more general norm under Article 64 (2) ICC Statute in light of Article 21 (3) ICC Statute.²²⁰

pp. 58 – 59 (the author argues that the interpretation as would Article 21 (3) not be generative of powers should be rejected for two reasons: (1) it fails to consider the Article in light of its purpose and in light of the purpose of the Statute as a whole and (2) it would permit the Court to violate the rights of the accused itself).

²¹⁶ *Ibid.*, p. 60.

²¹⁷ ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 37 – 39. See also e.g. ICC, Decision on the “Corrigendum of the Challenge to the Jurisdiction to the International Criminal Court on the Basis of Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)”, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-212, PTC I, 15 August 2012, par. 89.

²¹⁸ ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled “Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-1486 (OA 13), A. Ch., 21 October 2008, par. 77 – 83.

²¹⁹ *Ibid.*, par. 77; ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 34 – 39. See also D. SHEPPARD, The International Criminal Court and “Internationally Recognized Human Rights”: Understanding Article 21 (3) of the Rome Statute, in «Journal of International Criminal Justice», Vol. 10, 2010, p. 62 (on the Appeals Chamber decision of 21 October 2008: “The Court did not simply relinquish jurisdiction though [*sic*] non-application of the Statute, but rather found a power to temporarily suspend proceedings while retaining jurisdiction, and a corresponding power to re-institute them, neither of which existed in the Statute’s text. Indeed, based on the judgment of the Appeals Chamber in the jurisdiction challenge, such powers were implicitly excluded by the Statute, precluding reliance on Article 21 (1) (b) or (c) to ground the authority. They were freestanding powers that arose entirely out of Article 21(3), illustrating judicial acceptance of its generative content”).

²²⁰ S. VASILIEV, Proofing the Ban on ‘Witness Proofing’: Did the ICC get it right?, in «Criminal Law Forum», Vol. 20, 2009, pp. 218 – 219 (“Even where not explicitly foreseen in the Statute or Rules, the said remedy will certainly lie in the broad competences of the judges and/or the relevant rights of the participants (for example, the duty to ensure and the right to receive a fair trial). Thus, the ‘revelation of a potential remedy would not be gap-filling by way of direct application of the standards specified in Article 21(3), but rather a logical corollary of the interpretation and application of the proper law of the ICC in light of those standards”).

Additionally, when provisions leave a certain amount of *discretion* to the Judges, the factors that are to be considered in exercising such discretion should be interpreted and applied in a manner consistent with internationally recognised human rights. One clear example is again Article 64 (2) ICC Statute, which mandates the Trial Chamber to “ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.” It was confirmed by the Appeals Chamber that the different factors and competing interests should be considered in light of Article 21 (3).²²¹

Likewise, the ECCC and STL explicitly accord an interpretative function to human rights norms. The RPE of the STL contain a provision on the sources of interpretation of the RPE according to which the RPE should be interpreted in accordance with ‘international standards on human rights’, in case an interpretation in accordance with the VCLT has not resolved the matter.²²² This provision to some extent mirrors Article 21 (3) ICC Statute. Nevertheless, some differences can be noted. First, the ambit of the provision is limited to the RPE, leaving out the statutory provisions. Furthermore, Rule 3 (A) is arguably broader than Article 21 (3), since it does not contain a limitation to ‘internationally *recognized* human rights’. Further, Rule 3 (A) STL RPE is limited to the ‘interpretation’ of provisions, leaving out the ‘application’. Admittedly, the ‘interpretation’ and ‘application’ are two steps which are closely related. Lastly, it seems to follow from Rule 3 (A) that in case of conflict, an interpretation according to the VCLT always prevails over an interpretation in light of international human rights law.²²³ In a similar vein, the interpretative Rule 21 of the ECCC IR

²²¹ ICC, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”: Dissenting Opinion of Judge Erkki Kourula and Judge Ekaterina Trendafilova, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-2297, A. Ch., ICC, 28 July 2010, par. 44.

²²² Rule 3 (A) STL RPE.

²²³ However, GRADONI argues that such reading would be at tension with the ‘spirit of the Statute’ and Article 28 (2) therein. See L. GRADONI, *The Human Rights Dimension of International Criminal Procedure*, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 77. In case ambiguities still remain, the rules should be interpreted, in order of precedence, in light of (i) the general principles of international criminal law and procedure, and (ii) as appropriate, the Lebanese Code of Criminal Procedure. If all methods described in Rule 3 (A) fail, then it follows from Rule 3 (B) STL RPE that ambiguities shall “be resolved by the adoption of such interpretation as is considered to be the most favourable to any relevant suspect or accused in the circumstances then under consideration” (*in dubio pro reo*). This subordinate role of the *in dubio pro reo* formula may be criticised, if one agrees that it should rather limit the application of the VCLT. See the argumentation above, fn. 22, and accompanying text.

demands respect for international human rights norms.²²⁴ From this, it emerges that more recently, international(ised) criminal courts and tribunals include human rights in interpretative clauses within their procedural framework, turning human rights into an interpretative device.²²⁵

III.3. The nature of human rights: ‘minimum standards’

Most commentators agree that human rights fulfil the function of ‘minimum standards’ for international criminal procedure.²²⁶ In the context of criminal proceedings, they evidently refer to those rights that are required to render a trial ‘fair’. Evidencing their nature of ‘minimum standards’, human rights instruments commonly include interpretative ‘savings clauses’ ensuring that the higher level of human rights protection under the national law of states prevails.²²⁷ Underlying is the aim of these instruments to *extend* the existing level of human rights protection. As ‘minimum standards’, human rights contain abstract principles, which are further detailed by procedural laws.²²⁸ It follows that it is impossible to derive an entire procedural system from human rights norms.²²⁹ Their special importance with regard to international criminal investigations lies where they constitute the common core of procedural rules that are to be protected, irrespective of where and by whom the investigative acts are conducted. The importance thereof lies in the fragmented character of international criminal investigations. As will be discussed, in many cases, investigative activities or the arrest and transfer of the suspect or accused are not carried out by the tribunal itself. Rather, these

²²⁴ Rule 21 ECCC Internal Rules, which states, among others, that ‘[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims’.

²²⁵ However, again, the ICC’s Article 21 (3) is not only an interpretative clause but also adds that the *application* of the law should be consistent with internationally recognized human rights norms.

²²⁶ Consider e.g. M. FEDOROVA and G. SLUITER, Human Rights as *Minimum* Standards in International Criminal Proceedings, in «Human Rights & International Legal Discourse», Vol. 3, 2009, pp. 9, 11; L. GRADONI, The Human Rights Dimension of International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 92.

²²⁷ See Article 5 (2) ICCPR (‘There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.’); Article 53 ECHR (‘Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party’); Article 29 (b) ACHR (‘No provision of this Convention shall be interpreted as: restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party’).

²²⁸ C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, pp. 61 – 62.

²²⁹ As argued above, Chapter 2, III.1, fn. 93 and accompanying text.

actions are conducted by the national authorities or by the staff of international organisations.²³⁰ Insofar as the national authorities and international organisations conducting investigative acts are bound by international human rights norms, these human rights may assist in preventing any gaps in the protective regime.²³¹

III.4. Applicability of the right to a fair trial to criminal investigations

The right to a fair trial is of primary importance for our present undertaking. This fundamental right guided the development and application of the procedural framework of the international(ised) criminal tribunals.²³² It features in all general international or regional human rights instruments,²³³ and consists of a gamut of rights and obligations.²³⁴ This is not to say that other rights are of no importance. Rights such as the right not to be subjected to arbitrary arrest and detention, the right to privacy or the right to property are equally relevant as external parameters to assess investigative actions.

At the outset, it should be emphasised that there is no reason to doubt the applicability of fair trial rights to complex international proceedings. The ECtHR underlined that “[t]he general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most complex.”²³⁵ Furthermore, both the ECtHR and the ECommHR have held that the *seriousness of the international crimes* for which a person is prosecuted does not deprive a person from the protection of the ECHR.²³⁶

²³⁰ See *infra*, Chapter 2, VII.2.

²³¹ See *infra*, Chapter 2, VII.2.

²³² G. BOAS, J.L. BISCHOFF, N.L. REID and B. DON TAYLOR III, *International Criminal Law Practitioner Library*, Vol. III: International Criminal Procedure, Cambridge, Cambridge University Press, 2011, p. 464.

²³³ Article 14 of the ICCPR, Article 6 ECHR, Article 8 ACHR; Article 7 ACHPR; Articles 10 and 11 UDHR.

²³⁴ C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, pp. 60 – 61 (the author distinguishes between (i) institutional guarantees (e.g. independence and impartiality of the court); (ii) moral principles that should preside over every step of the proceedings (presumption of innocence or equality of arms) and (iii) legal claims to be free from something or to be given something (some of them have overall validity and are precise enough to be called ‘self-executing’ (e.g. right to counsel, right not to be arbitrarily detained))).

²³⁵ ECtHR, *Teixeira de Castro v. Portugal*, Application No. 25829/94, Reports 1998-IV, Judgment of 9 June 1998, par. 36.

²³⁶ ECtHR, *Papon v. France*, Application No. 54210/00, Judgment of 25 July 2002, Reports 2002-VII, par. 98 (“As to the Government’s argument based on the extreme seriousness of the offences of which the applicant stood accused, the Court does not overlook the fact. However, the fact that the applicant was prosecuted for and convicted of aiding and abetting crimes against humanity does not deprive him of the guarantee of his rights and freedoms under the Convention”); ECommHR, *Koch v. Federal Republic of Germany*, Application No. 1270/61, Decision of 8 March 1962, Recueil 8, pp. 91-97 (“Considérant que la requérante se trouve détenue en exécution d’une condamnation qui lui a été infligée à raison de crimes perpétrés au mépris des droits les plus élémentaires

The right to a fair trial as laid down in human rights instruments refers to the ‘hearing’ and is silent on its application or not to the investigative or pre-trial phase.²³⁷ However, it cannot be doubted that it applies to all stages of criminal proceedings, including investigations.²³⁸ Admittedly, the enjoyment of the right to a fair trial in criminal matters under Article 14 ICCPR or Article 6 ECHR, requires the presence of a ‘criminal charge’. It follows that investigations preceding the existence of a ‘charge’ or measures outside the determination of a criminal charge fall outside their ambit.²³⁹ On the other hand, the jurisprudence of the ECtHR has clarified that this concept should be given an *autonomous interpretation*. The Court explained that “whilst ‘charge’, for the purposes of Article 6 (1), may in general be defined as ‘the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence’, it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise *substantially affect the situation of the suspect*.”²⁴⁰ Such autonomous interpretation is important, since it prevents the postponement of the moment a person becomes formally charged. While the criterion offered by the Court (‘substantially affected’) remains somewhat vague, it has been argued that the starting point may well be when defendants “are held to account for allegations.”²⁴¹ The HRC has yet to fully clarify the concept of ‘criminal charge’. On one occasion, the Committee held with regard to Article 14 (3) (a) ICCPR that it “applies to all cases of criminal charges, including those of persons not in detention, *but not to criminal*

de la personne humaine; que cette circonstance ne la prive cependant point de la garantie des droits et libertés définis dans la Convention de Sauvegarde des Droits de l'Homme et des Libertés fondamentales”); ECommHR, *Jentsch v. Germany*, Application No. 2604/65, 14 YB (1971), 876, Report of 30 November 1970, par. 10.

²³⁷ J.D. JACKSON and S.J. SUMMERS, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*, Cambridge, Cambridge University Press, 2012, p. 96 (holding that from this wording follows an understanding of a criminal process divided in two parts: “the judicially regulated trial hearing and the secret investigation or pre-trial phase”).

²³⁸ E. MØSE, *Impact of Human Rights Convention on the two ad hoc Tribunals*, in M. BERGSMO (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide*, Leiden, Martinus Nijhoff Publishers, 2003, p. 186 (noting that this holds true, even if some of its provisions are particularly relevant during the trial stage).

²³⁹ P. MAHONEY, *Right to a Fair Trial in Criminal Matters under Article 6 E.C.H.R.*, in «Judicial Studies Institute Journal», Vol. 4, 2004, pp. 107 – 129.

²⁴⁰ ECtHR, *Corigliano v. Italy*, Application No. 8304/78, Judgment of 10 December 1982, par. 34; ECtHR, *Brozicek v. Italy*, Application No. 10964/84, Judgment of 19 December 1989, par. 38; ECtHR, *Deweere v. Belgium*, Application No. 6903/75, Series A, No. 35, Judgment of 27 February 1980, par. 46. In *Kamasinski*, on the other hand, the Court seems to have interpreted the term ‘accusation’ under Article 6 (3) (a) as referring to the indictment. See ECtHR, *Kamasinski v. Austria*, Application No. 9783/82, Series A, No. 168, Judgment of 19 December 1989, par. 79.

²⁴¹ J. JACKSON, *Re-Conceptualizing the Right of Silence as an Effective Fair Trial Standard*, in «International and Comparative Law Quarterly», Vol. 58, 2009, p. 855 (according to the author, it follows that “the mere exercise of investigatory powers against a suspect should not in itself trigger the initiation of proceedings”); J.D. JACKSON and S.J. SUMMERS, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*, Cambridge, Cambridge University Press, 2012, p. 279.

investigations preceding the laying of charges.”²⁴² At least one distinguished commentator has argued that the HRC should adopt a similar autonomous interpretation of “criminal charge” as the ECtHR.²⁴³

In *Imbrioscia*, the ECtHR further confirmed that the right to a fair trial has some relevance at the pre-trial stage.²⁴⁴ The provisions of Article 6 are already relevant “if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them”.²⁴⁵ As noted by the Court, its task is “to ascertain whether the proceedings *as a whole*, including the way in which evidence was taken, were fair”.²⁴⁶ Thus, the Court uses a backward-looking approach. This entails that in order to determine whether or not a trial was fair, the trial is considered ‘as a whole’. It follows that shortcomings during the investigation phase, *may* be cured at a later stage, during trial. Conversely, the cumulated effect of individual shortcomings during the proceedings may well be to compromise a person’s right to a fair trial. Thus, whereas it follows from the ‘overall fairness’ approach that illegalities during the investigation phase may still be resolved during the trial phase, the right to a fair trial may already be irreparably damaged during the investigation phase. From there, the importance is understood that the actors which are involved in the investigation already anticipate the rights under Article 6 ECHR.

²⁴² CCPR, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, 23 August 2007, par. 31.

²⁴³ M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR commentary (2nd edition), Kehl am Rein, Engel, 2005, pp. 318 – 319 (referring to “the date on which State activities substantially affect the situation of the person concerned.” “This is usually the first official notification of a specific accusation, but in certain cases, this may also be as early as the arrest”).

²⁴⁴ ECtHR, *Imbrioscia v. Switzerland*, Application No. 13972/88, Series A, No. 275, 24 November 1993, par. 36 (the government had argued that Article 6 (1) and (3) did not apply to preliminary investigations). However, it is surprising that the investigation phase is absent from the wording of Article 6 ECHR. For a critical assessment, see S.J. SUMMERS, *Fair Trials: the European Criminal Procedural Tradition and the European Court of Human Rights*, Oxford, Hart Publishing, 2007, pp. 163 – 166 (the author refers to the “investigation phase lacuna”).

²⁴⁵ See e.g. ECtHR, *Imbrioscia v. Switzerland*, Application No. 13972/88, Series A, No. 275, 24 November 1993, par. 36 (emphasis added); ECtHR, *Murray v. the United Kingdom*, Application No. 14310/88, Series A, No. 300-A, Judgment of 28 October 1994, par. 62; ECtHR, *Shabelnik v Ukraine*, Application No. 16404/03, Judgment of 19 February 2009, par. 52.

²⁴⁶ ECtHR, *Teixeira de Castro v. Portugal*, Application No. 25829/94, Reports 1998-IV, Judgment of 9 June 1998, par. 34; ECtHR, *Khan v. the United Kingdom*, Application No. 35394/97, Reports 2000-V, Judgment of 12 May 2000, par. 34; ECtHR, *Bykov v. Russia*, Application No. 4378/02, Judgment (Grand Chamber) of 10 March 2009, par. 89; ECtHR, *P.G. and J.H. v. The United Kingdom*, Application No. 44787/98, Judgment of 25 September 2001, par. 76; ECtHR, *Allan v. United Kingdom*, App. No. 48539/99, Reports 2002-IX, Judgment of 5 November 2001, par. 42; ECtHR, *Schenk v. Switzerland*, Judgment, Application No. 10862/84, 12 July 1988, par. 45 – 46.

The benefit of the above interpretation of the right to a fair trial is that it does not conceive of the investigation as a distinct, separated phase in the criminal process.²⁴⁷ Underlying this interpretation is the understanding that there exists a *de facto* continuum from investigation to trial: the regulation of the investigation is an important aspect of the regulation of the trial process.²⁴⁸ Hence, one cannot pretend that the trial process was fair unless the investigative actions are also conducted in accordance with those fair trial norms.²⁴⁹

Considering the fragmented character of international criminal investigations, it is important to also examine to what extent states, which cooperate with the international criminal tribunals, can be held responsible for violations of the right to a fair trial when they execute certain actions at the behest of these tribunals. For example, can a state which is requested to ‘transfer’ a suspect or an accused person later be held responsible for a violation of that person’s right to a fair trial? For now, it can be noted that it seems that the ECtHR only accepts such argumentation in limited instances. With regard to extradition decisions (or expulsion orders), it held that Article 6 may be violated in circumstances where the fugitive had suffered or risked suffering a ‘flagrant denial of a justice’ in the requesting country.²⁵⁰ This requires a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein.²⁵¹ More precisely, “a breach of the principles of fair trial

²⁴⁷ J.D. JACKSON and S.J. SUMMERS, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*, Cambridge, Cambridge University Press, 2012, p. 97.

²⁴⁸ E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN, *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, Intersentia, Oxford, 2007, p. 8.

²⁴⁹ *Ibid.*, p. 8. This was also the view held by a minority of judges in the *Gäfgen* case before the ECtHR, where they held that “criminal proceedings form an organic and inter-connected whole. An event that occurs at one stage may influence and, at times, determine what transpires at another.” They criticised the majority who, “[i]nstead of viewing the proceedings as an organic whole”, sought to “compartmentalise, parse and analyse the various stages of the criminal trial, separately, in order to conclude that the terminus arrived at was not affected by the route taken.” They added that “[s]uch an approach [...] is not only formalistic; it is unrealistic since it fails altogether to have regard to the practical context in which criminal trials are conducted and to the dynamics operative in any given set of criminal proceedings.” See ECtHR, *Gäfgen v. Germany*, Application No. 22978/05, Reports 2010, Judgment (Grand Chamber) of 1 June 2010, Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power, par. 5-6.

²⁵⁰ ECtHR, *Soering v. The United Kingdom*, Application No.14038/88, Series A, No. 161, Judgment of 7 July 1989, par. 113; ECtHR, *Mamatkulov and Askarov*, Application Nos. 46827/99 and 46951/99, Reports 2005-I, Judgment (Grand Chamber) of 4 February 2005, par. 88; ECtHR, *Al-Saadoon and Mufdhi v. UK*, Application No. 61498/08, Reports 2010, Judgment of 2 March 2010, par. 149; ECtHR, *Othman (Abu Qatada) v. United Kingdom*, Application No. 8139/09, Reports 2012, Judgment of 17 January 2012, par. 258.

²⁵¹ ECtHR, *Othman (Abu Qatada) v. United Kingdom*, Application No. 8139/09, Reports 2012, Judgment of 17 January 2012, par. 259. From the case law of the Court, several examples can be derived: (i) a conviction in absentia with no possibility subsequently to obtain a fresh determination of the merits of the charge; (ii) a trial which is summary in nature and conducted with a total disregard for the rights of the defence; (iii) detention without any access to an independent and impartial tribunal to have the legality of the detention reviewed; (iv) deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country and (v) when evidence obtained by torture is admitted in the proceedings.

guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.”²⁵² It follows that this entails “a stringent test of unfairness” which “goes beyond mere irregularities or lack of safeguards in the trial procedures.”²⁵³ Such a risk of a flagrant denial of justice in the country of destination must, according to the Court, in the first place, be assessed “by reference to the facts which the Contracting State knew or should have known when it extradited the persons concerned.”²⁵⁴ However, only in two cases (*Soering* and *Abu-Qatada*), the Court found an extradition decision to violate Article 6. The risk of unfair trial upon expulsion also came up in *Alzery v. Sweden* before the HRC but the issue was not addressed by the Committee.²⁵⁵

III.5. Contextualisation of human rights norms

While it was concluded above that the international(ised) criminal tribunals are bound by international human rights norms, the application of international human rights norms is not without difficulties. Firstly, human rights instruments have been designed with states in mind.²⁵⁶ Consequently, the human rights system is based on state responsibility.²⁵⁷ This is not to say that the application of human rights to international organisations is not conceivable, as the forthcoming accession of the EU to the ECHR will prove.²⁵⁸ Secondly, human rights norms that are relevant to criminal proceedings have been designed with municipal criminal trials in mind.²⁵⁹ In order to respond to the specific needs and unique characteristics of international criminal proceedings, most commentators are in agreement that these human

²⁵² *Ibid.*, par. 260.

²⁵³ *Ibid.*, par. 259.

²⁵⁴ ECtHR, *Mamatkulov and Askarov*, Application Nos. 46827/99 and 46951/99, Reports 2005-I, Judgment (Grand Chamber) of 4 February 2005, par. 90.

²⁵⁵ HRC, *Mohammed Alzery v. Sweden*, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005, 10 November 2006, par. 4.16 and 9.11.

²⁵⁶ One of the consequences thereof is that the applicable enforcement mechanism targets states.

²⁵⁷ See e.g. E. MØSE, Impact of Human Rights Convention on the two *ad hoc* Tribunals, in M. BERGSMO (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide*, Leiden, Martinus Nijhoff Publishers, 2003, p. 181; G. MCINTYRE, Defining Human Rights, in G. BOAS and W.A. SCHABAS (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Brill Academic Publishers, Leiden, 2003, p. 200.

²⁵⁸ See the Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, annexed to CoE, Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights: Final Report to the CDDH, 5 April 2013.

²⁵⁹ G. MCINTYRE, Defining Human Rights, in G. BOAS and W.A. SCHABAS (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Brill Academic Publishers, Leiden, 2003, p. 200.

rights should be applied taking into consideration the specific characteristics and exigencies of international criminal proceedings.²⁶⁰ For example, MCINTYRE argues that:

“[...] [I]f it is accepted that human rights only have meaning in context, the tribunal is entitled, by reference to the human rights regime, to develop its own set of human rights standards in light of its context as an international criminal court dealing with crimes committed in times of war. The real issue of concern then is not whether the tribunal adheres to existing interpretations of universal human rights principles, but whether the

²⁶⁰ L. GRADONI, *International Criminal Courts and Tribunals: Bound by Human Rights Norms...or Tied Down?*, in «Leiden Journal of International Law», Vol. 19, 2006, p. 855 (Hence, “[n]eedless to say, the applicability of general international law does not prevent international criminal jurisdictions from developing, through interpretation and taking account of their specific situation and exigencies, their own human rights judicial policy”); M. FEDOROVA and G. SLUITER, *Human Rights as Minimum Standards in International Criminal Proceedings*, in «Human Rights & International Legal Discourse», Vol. 3, 2009, p. 31 (labelling the ‘re-orientation’ of human rights “perfectly defensible”); D. SHEPPARD, *The International Criminal Court and “Internationally Recognized Human Rights”: Understanding Article 21 (3) of the Rome Statute*, in «Journal of International Criminal Justice», Vol. 10, 2010, p. 70 (noting that “the ICC might [...] owing to the unique nature of the Court, implement a right in a different way than before the national jurisdiction”); A. CASSESE, *The Influence of the European Court of Human Rights on International Criminal Tribunals – Some Methodological Remarks*, in M. BERGSMO (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide*, Leiden, Martinus Nijhoff Publishers, 2003, p. 26 (“The Tribunals in question are well aware of the limits of reliance on the case law of the European Court (and more generally on that of all national and international courts). They understand perfectly the need to take the specificity of international criminal justice into consideration” (emphasis in original)); E. MØSE, *Impact of Human Rights Convention on the two ad hoc Tribunals*, in M. BERGSMO (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide*, Leiden, Martinus Nijhoff Publishers, 2003, p. 208 (“the ICTR and the ICTY have adapted human rights case law to the specific circumstances of the Tribunals and even deviated from it, for instance because international tribunals are in a different situation than national courts”); V. DIMITRIJEVIĆ and M. MILANOVIĆ, *Human Rights before International Criminal Courts*, in J. GRIMHEDEN and R. RING (eds.), *Human Rights Law, From Dissemination to Application: Essays in Honour of Göran Melander*, Leiden, Martinus Nijhoff Publishers, 2006, p. 150 (“These distinct features of international criminal proceedings make it impossible to simply transpose to them the human rights standards developed in the context of domestic criminal procedure”); *ibid.*, p. 167 (“The Statutes and the rules of the international criminal courts and tribunals are in general conformity with the body of international human rights law, though with certain qualifications. It is sometimes not possible to apply these standards in the same manner as municipal and international criminal proceedings”); M. DAMAŠKA, *Reflections on Fairness in International Criminal Justice*, in «Journal of International Criminal Justice», Vol. 10, 2012, p. 611 (“it is inevitable ‘procedural fairness’ is to be contextually assessed”); C. DEPPEZ, *Extent of Applicability of Human Rights Standards to Proceedings before the International Criminal Court: On Possible Reductive Factors*, in «International Criminal Law Review», Vol. 12, 2012, p. 721 (“the exact scope of applicability of human rights can only be addressed by referring to the specific characteristics (both of the Court and the international criminal system as a whole) that could possibly bear a reductive impact on that scope”) and *ibid.*, pp. 723, 741; G. HAFNER and C. BINDER, *The Interpretation of Article 21 (3) ICC Statute: Opinion Reviewed*, in «Austrian Review of International and European Law», Vol. 9, 2004, pp. 171 – 172 (“the ICC will, however, have to take into account the unique characteristics of its Statute having the object and purpose “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured [...]”); F. MÉGRET, *Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure*, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, p. 76 (“Due process in international criminal procedure is less a matter of imposing a ready-made model on international trials than it is one of re-interrogating the tradition of due process in light of the particular exigencies of international criminal justice”); P.L. ROBINSON, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, in «European Journal of European Law», Vol. 11, 2000, p. 573 (“the concept of universality and non-relativity of human rights is different from, and does not stand in the way of, the principle of contextual interpretation”).

standards it is setting are proper international standards so that it could be said the tribunal does conform to the rule of law.”²⁶¹

From this understanding, it follows that the adherence of international criminal tribunals to existing human rights norms should be assessed on its own merits. One commentator describes this contextual application as “the transposition of the normative propositions identified as relevant and valid in human rights law [...] into the unique legal and institutional context of the tribunals, subject to the necessary and appropriate modifications.”²⁶² The need for adjustment is easily understood. For example, the derogation clauses, often found in human rights instruments, do not apply to international criminal tribunals.²⁶³ Moreover, it will be argued in chapters to come that it is difficult to see how the legality requirement (‘prescribed by law’) which is commonly found in limitation clauses of human rights instruments, is to be translated to the context of international criminal tribunals, where a detailed regulation of investigative measures is often lacking.²⁶⁴

To some extent, such a contextual application finds support in the case law of the international criminal tribunals.²⁶⁵ An early example thereof is found in the ‘Tadić protective measures decision’, which was critically reviewed above. The Trial Chamber held that Article 14 of the ICCPR “must be interpreted within the context of the ‘object and purpose’ and

²⁶¹ G. MCINTYRE, *Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY*, in G. BOAS and W.A. SCHABAS (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Leiden, Martinus Nijhoff Publishers, 2003, p. 194 (original footnotes have been omitted).

²⁶² S. VASILIEV, *Fairness and Its Metric in International Criminal Procedure*, 2013, (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2253177, last visited 14 February 2014), p. 48. The author adds that as long as no contextualization is undertaken, the implementation of human rights protection will not be meaningful (*ibid.*, p. 50).

²⁶³ Consider e.g. C. DEFRANCIA, *Due Process in International Criminal Courts*, in «Virginia Law Review», Vol. 87, 2001, p. 1394 (“international criminal courts could not avail themselves of the ICCPR public emergency exception”).

²⁶⁴ See *infra*, Chapter 2, VI. It has been suggested that one of the defining features of international criminal tribunals, its dependence on national states for the execution of certain investigative acts, may make certain detailed regulations at the international level superfluous. See M. FEDOROVA and G. SLUITER, *Human Rights as Minimum Standards in International Criminal Proceedings*, in «Human Rights & International Legal Discourse», Vol. 3, 2009, p. 43.

²⁶⁵ See Annex I (‘Discussion of the Decision on the Final System of Disclosure’) to ICC, *Decision on the Final System of Disclosure and the Establishment of the Timetable, Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-102, PTC I, 15 May 2006, par. 4 (“Furthermore, the single judge considers that the need to safeguard the uniqueness of the criminal procedure of the International Criminal Court (“the Court”) is one of the primary considerations in contextual interpretation of the relevant provisions. It can be met by addressing “possible tensions among those provisions so as to ensure consistency, and full expression to the meaning of each”).

unique characteristics of the Statute.”²⁶⁶ In particular, the Judges held that the procedural framework of the ICTY required the Judges to take the obligation to protect witnesses and victims into consideration.²⁶⁷ In turn, neither Article 14 ICCPR nor Article 6 ECHR includes the protection of victims and witnesses as relevant considerations. The Trial Chamber added that the case law of the HRC and the ECtHR (and ECommHR) “is only of limited relevance in applying the provisions of the Statute and Rules of the International Tribunal, as these bodies interpret their provisions in the context of their legal framework, which do not contain the same considerations.”²⁶⁸ Therefore, “[i]n interpreting the provisions which are applicable to the International Tribunal and determining where the balance lies between the accused’s right to a fair and public trial and the protection of victims and witnesses, the Judges of the International Tribunal must do so within the context of its own unique legal framework.”²⁶⁹ According to the Trial Chamber, further ‘unique features’ warranting contextual interpretation, include the fact that the tribunal operates in an ongoing conflict; that it does not possess its own police force or witness protection programme; that it is required to rely on cooperation by states and/or international bodies and, more controversial, that the interpretation of Article 6 by the ECtHR is meant to apply to ordinary criminal adjudications, not to crimes warranting universal jurisdiction.²⁷⁰

Several human rights provisions have been given a contextual interpretation in the case law of the international criminal tribunals. An early and often quoted example is the autonomous (or ‘contextualised’) interpretation of the principle of ‘equality of arms’ by the ICTY Appeals Chamber. It follows from international jurisprudence that equality of arms requires that none of the parties in the proceedings is placed at a disadvantage *vis-à-vis* the other party.²⁷¹

²⁶⁶ ICTY, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadić*, Case No. IT-94-1, T. Ch., 10 August 1995, par. 26

²⁶⁷ *Ibid.*, par. 26 -27.

²⁶⁸ *Ibid.*, par. 27. Hence, the Trial Chamber did not consider the jurisprudence of the human rights supervisory bodies to be necessarily relevant. See *ibid.*, par. 30 (“While the jurisprudence of other international judicial bodies is relevant when examining the meaning of concepts such as “fair trial”, whether or not the proper balance is met depends on the context of the legal system in which the concepts are being applied”).

²⁶⁹ *Ibid.*, par. 27.

²⁷⁰ *Ibid.*, par. 28. On the application of Article 6 to crimes warranting universal jurisdiction, see *supra* fn. 235, 236 and accompanying text.

²⁷¹ Consider e.g. ECtHR, *Dombo Beheer B.V. v. The Netherlands*, Application No. 14448/88, Series A, No. 274, Judgment of 27 October 1993, par. 33 (““equality of arms” implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent”); ECtHR, *Bulut v. Austria*, Application No. 17358/90, Reports 1996-II, Judgment of 22 February 1996, par. 47. Consider also HRC, *Dudko v. Australia*, Communication No. 1347/2005, U.N. Doc. CCPR/C/90/D/1347/2005, 23 July 2007, par. 7.4. Note that at least some case law of the ECommHR seems to go further in not only demanding formal equality between the parties, but also, in light of

However, the ICTY Appeals Chamber then argued that since the tribunal must rely on state cooperation, and having no power to compel states to cooperate, the principle does not have the same scope in international criminal proceedings as before national courts.²⁷² Rather, the principle of equality of arms *should be given a more liberal interpretation in international criminal procedural law* than it is given in proceedings before domestic courts.²⁷³ The parties should be equal before the Trial Chamber and be provided with “every practicable facility [the Trial Chamber] is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case.”²⁷⁴ Thus, the autonomous interpretation of the right leads to ‘more liberal’ interpretation of the equality of arms principle in international criminal proceedings.²⁷⁵ It follows that when assistance offered by Judges is not effective this does not necessarily make the trial unfair. Nevertheless, the Appeals Chamber conceded that there could be situations when a fair trial is no longer possible if witnesses central to the defence case cannot appear because of lack of cooperation

the unequal resources available to the Defence and the Prosecution, that Article 6 (3) (b) includes the right of the accused to have all relevant information at his disposal that has been or could have been collected by the competent authorities. See ECommHR, *Jespers v. Belgium*, Application No. 8403/78, Report of 14 December 1981, par. 58.

²⁷² ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-95-1-A, A. Ch., 15 July 1999, par. 51 (“In the context of international criminal procedure, the principle implies that the Judges must satisfy the requests of the parties to the extent possible. The case law mentioned so far relates to civil or criminal proceedings before domestic courts. These courts have the capacity, if not directly, at least through the extensive enforcement powers of the State, to control matters that could materially affect the fairness of a trial. It is a different matter for the International Tribunal. The dilemma faced by this Tribunal is that, to hold trials, it must rely upon the cooperation of States without having the power to compel them to cooperate through enforcement measures. The Tribunal must rely on the cooperation of States because evidence is often in the custody of a State and States can impede efforts made by counsel to find that evidence. Moreover, without a police force, indictees can only be arrested or transferred to the International Tribunal through the cooperation of States or, pursuant to Sub-rule 59bis, through action by the Prosecution or the appropriate international bodies. Lacking independent means of enforcement, the ultimate recourse available to the International Tribunal in the event of failure by a State to cooperate, in violation of its obligations under Article 29 of the Statute, is to report the non-compliance to the Security Council”). Consider additionally: ICTR, Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, T. Ch. I, 5 June 2003.

²⁷³ ICTY, Judgment, *Prosecutor v. Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, par. 52. Consider also ICTR, Judgement (Reasons), *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, A. Ch., 1 June 2001, par. 69.

²⁷⁴ ICTY, Judgment, *Prosecutor v. Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, par. 52.

²⁷⁵ Critical of this more liberal approach, consider M. FEDOROVA and G. SLUITER, Human Rights as *Minimum Standards in International Criminal Proceedings*, in «Human Rights & International Legal Discourse», Vol. 3, 2009, pp. 50 – 51. *Contra*, consider G.-J. KNOOPS, The Duality of State Cooperation within International and National Criminal Cases, in «Fordham International Law Journal», Vol. 30, 2007, p. 270 (“it is not unreasonable to interpret equality of arms more extensively within international criminal procedures when it concerns the position of the accused with respect to both procedural and substantive law”). Consider also R. CRYER, H. FRIMAN, D. ROBINSON and E. WILMSHURST, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2010, p. 435 (“The Tribunals argue a broad interpretation but also establish limitations”).

by the State.²⁷⁶ Also on other occasions, the international criminal tribunals have sought to explain deviations from human rights jurisprudence by referring to their specific characteristics. An additional example (of contextual interpretation by the case law) is the autonomous interpretation of the ‘tribunal established by law’ requirement by the ICTY Appeals Chamber.²⁷⁷

It is argued here that any reference to the special characteristics of international criminal proceedings (including the complexity of proceedings, the gravity of the crimes, the specific goals of international criminal justice, reliance on cooperation by states and international organisations or the lack of a police force) should be treated with caution.²⁷⁸ In most cases, the specific characteristics of international criminal proceedings are relied upon as justifying a reductive impact on the scope of applicability of human rights standards.²⁷⁹

In addition, some specific characteristics which have been presented in the literature as having a potentially diminishing impact on human rights protection are dubious. Among others, DEPRez presents a number of factors which could have a diminishing impact upon the protection of human rights norms.²⁸⁰ His argumentation regarding at least a number of these

²⁷⁶ ICTY, Judgment, *Prosecutor v. Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, par. 55 (the Appeals Chamber notes that, after exhausting other measures, the Defence in such situation has the option of submitting a motion for a stay of proceedings).

²⁷⁷ ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić*, Case No. IT-94-1, A. Ch., 2 October 1995, par. 42 – 45 (holding that different interpretations are possible with regard to the “established by law” requirement. It could mean “established by a legislature”, an interpretation favoured by the case law of the ECtHR. However, where the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to international organisations, the Trial Chamber preferred an autonomous interpretation and understood the ‘established by law’ requirement as to require that the establishment of the tribunal must be in accordance with the rule of law. According to the Appeals Chamber, “[t]his appears to be the most sensible and most likely meaning of the term in the context of international law. For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and evenhandedness, in full conformity with internationally recognized human rights instruments”).

²⁷⁸ Confirming, see S. VASILIEV, *Fairness and Its Metric in International Criminal Procedure*, 2013 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2253177, last visited 14 February 2014), p. 49 (“Admittedly, any references by the tribunals to special subject-matter jurisdiction, inordinate practical hurdles, and the lack of enforcement capacity as supposed grounds that warrant the adoption of a non-ambitious approach to human rights protection, must be treated with utmost caution. They may be occasioned by unprincipled considerations such as the falsely perceived interests of expediency and by the insufficient attention to the rights of defendants. Far from all of the aspirations and practical challenges should influence the due level of fundamental rights protection, and some might even argue in favour of elevating the thresholds of protection”).

²⁷⁹ C. DEPRez, *Extent of Applicability of Human Rights Standards to Proceedings before the International Criminal Court: On Possible Reductive Factors*, in «International Criminal Law Review», Vol. 12, 2012, p. 723.

²⁸⁰ *Ibid.*, pp. 723 – 724 (the factors considered were the mixed nature of international criminal procedure; the role of the hierarchy of norms, the non-state nature of the Court; its ‘universal’ character; the gravity of the offences dealt with; the fragmentation of international criminal proceedings and the impact of politics).

factors cannot convince. For example, the author concludes that the ‘hybrid nature of the law’ of international criminal procedure (in the sense of it being a mix of inquisitorial and accusatorial elements), is “detrimental” to the general level of individual protection that is granted before the Court.²⁸¹ In particular, the author refers to the ‘regime of evidence’ as an example how this mixed nature of proceedings leads to a reduced level of protection. The author holds that “as the Office of the Prosecutor is part of the Court and can rely on a large staff, it benefits from a clear structural advantage in terms of investigative resources, which would normally require a strict ban on unchallenged statements collected before trial (*i.e.* hearsay evidence) in order to maintain the equality of arms.”²⁸² Hence, there exists a mismatch with the flexible rules on the admissibility of evidence before the ICC which, it is argued, threatens the integrity of the law of evidence and the right to a fair trial.²⁸³ Nevertheless, while it may rightly be argued that the law of evidence and the procedural design more broadly is incoherent, the author fails to explain *how and to what extent* this mismatch results in a reduction of the level of human rights protection (the author’s hypothesis). In other words, such an example does not support the author’s conclusion that the mixed nature of the procedure before the ICC “can –at least in part- have a reductive impact on the scope of human rights protection”.²⁸⁴ This conclusion requires an explanation as to the reasons why this evidentiary system fails to uphold human rights norms. For example, it should be assessed whether and to what extent this procedural design conflicts with the traditional ‘hands-off’ approach of the case law of the ECtHR with regard to the admissibility of evidence.²⁸⁵ In addition, it should be assessed in how far such procedural set-up can be reconciled with the requirement that each party is afforded a reasonable opportunity to present his case, under conditions that do not place him at a (substantial) disadvantage *vis-à-vis* of his opponent.²⁸⁶

²⁸¹ *Ibid.*, p. 726.

²⁸² *Ibid.*, p. 726.

²⁸³ *Ibid.*, pp. 726 - 727. The author also provides a second example, to know the *non bis in idem* – double jeopardy principle. Nevertheless, in a similar vein, whereas the author points out the different understanding of this principle in common law and civil law criminal justice systems, it is unclear where this leaves us in terms of the “reductive impact on the scope of human rights protection”.

²⁸⁴ *Ibid.*, p. 727.

²⁸⁵ Consider e.g.: ECtHR, *Schenk v. Switzerland*, Judgment, Application No. 10862/84, 12 July 1988, par. 46: “While Article 6 [...] of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. The Court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr. Schenk’s trial as a whole was fair.”

²⁸⁶ See discussion *supra*, fn. 274 and accompanying text.

Similarly unconvincing is the conclusion reached that the seriousness of the crimes allegedly committed negatively affects the level of human rights protection.²⁸⁷ According to DEPRez, this is evidenced, among others, by the tribunals' pre-trial detention regime. He argues that the ICC's relevant procedural provisions on pre-trial detention evidence that pre-trial detention is the rule and liberty the exception.²⁸⁸ From there, the author concludes that such diminishing of the level of human rights protection "can in particular be explained (though not justified) by the gravity of the crimes at hand."²⁸⁹ This cursory argumentation can by no means uphold the conclusion reached (that the seriousness of the crimes alleged is responsible for the reduction of human rights protection). It fails to consider other factors which, as will be explained in Chapter 8, may (and do) at least partly explain the different procedural presumption with regard to pre-trial detention (e.g. the difficulties in finding a host state willing to receive the person provisionally released on its territory or the fact that these tribunals lack their own police force). Furthermore, it will be shown how the gravity of the crimes is often a factor which is considered by the international criminal courts in deciding on provisional detention/release, but not in isolation. It will be concluded that such jurisprudence does not *per se* violate human rights law.²⁹⁰

Also examples given by commentators on the contextualised application of human rights are often unconvincing. For example, MCINTYRE argues that *the right to be informed, at the time of the arrest, of the reasons thereof* may need to be construed differently in the context of international criminal proceedings, since such information duty is difficult to satisfy within proceedings before international criminal tribunals, because of the complexity of the alleged offences and the number of crimes.²⁹¹ As will be explained further in Chapter 7, the main (arguably not only) rationale of this right is to ensure the effective realisation of the suspect's right to challenge his or her detention. Among others, the author refers to a decision of the

²⁸⁷ C. DEPRez, Extent of Applicability of Human Rights Standards to Proceedings before the International Criminal Court: On Possible Reductive Factors, in «International Criminal Law Review», Vol. 12, 2012, p. 736.

²⁸⁸ *Ibid.*, p. 735.

²⁸⁹ *Ibid.*, p. 735.

²⁹⁰ See *infra*, Chapter 8, II.2.6.1.

²⁹¹ G. MCINTYRE, Defining Human Rights, in G. BOAS and W.A. SCHABAS (eds.), International Criminal Law Developments in the Case Law of the ICTY, Brill Academic Publishers, Leiden, 2003, p. 204. It is clear that the author conflates two distinct rights: (i) the right to be informed, *at the time of arrest*, of the reasons for his arrest and to be promptly informed of any charges against him and (ii) the right of anyone charged with a criminal offence to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him. See *ibid.*, p. 202: "A fundamental universally recognized right of any person accused of a criminal offence is the right to be informed *at the time of the arrest* of the "nature and cause" of the charges against him or her. This right is enshrined in Article 21(4) of the Statute of the Tribunal, which mirrors Article 14(3)(a) of the ICCPR and Article 5(2) of the ECHR" (emphasis added).

Appeals Chamber in *Kovačević* where it relied on human rights jurisprudence in determining whether a person has been promptly informed of the reasons of his or her arrest, and concluded that the authorities cited by the Defence alleging a breach of Article 9 (2) ICCPR did not concern the situation where an arrest was based on an indictment which was subsequently sought to be amended to add new charges.²⁹² This leads the author to argue that the reliance on human rights authorities “*may be misplaced*”, considering the different context in which the ICTY operates.²⁹³ However, it will be explained how the case law of human rights monitoring bodies in this regard *allows for flexibility*. For example, the right to be informed, at the time of the arrest, of the reasons thereof only requires that general information should be conveyed, enabling the person to exercise his or her right to challenge its lawfulness.²⁹⁴ Furthermore, it follows from this jurisprudence that the degree of specificity needed depends on the particularities of the case.²⁹⁵ Further, when a person is arrested by national authorities at the behest of an international criminal court, the information which should be conveyed may even be less precise.

The same can be said about many human rights norms. They are flexible enough *not* to require any adjustment or re-orientation. For example, as will be discussed in detail further on (Chapter 8), it follows from human rights jurisprudence that in assessing the reasonableness of the length of pre-trial detention, the complexity of the case (rather than the seriousness of the crime alleged) may allow for prolonged periods of detention.²⁹⁶ Notably, on several occasions, the ECommHR dealt with the issue of the reasonableness of the length of pre-trial detention regarding crimes against humanity.²⁹⁷ Many of the factors considered in the jurisprudence of the ECommHR equally apply to the context of international criminal

²⁹² ICTY, Decision Stating Reasons for the Appeals Chamber’s Order of 29 May 1998, *Prosecutor v. Kovačević*, Case No. IT-97-24-AR73, A. Ch., 2 July 1998, par. 35 - 36.

²⁹³ G. MCINTYRE, Defining Human Rights, in G. BOAS and W.A. SCHABAS (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Brill Academic Publishers, Leiden, 2003, p. 204 (emphasis added). The author clarifies that “[t]he context in which the human rights regime has determined that the right of an accused to be informed of the charges at the time of arrest will only be violated where no reasons are given for that arrest at all, is one in which an individual is arrested within a domestic jurisdiction to answer charges alleged to have been committed within that jurisdiction. This is a very different situation to arrests by the Tribunal. Accused who appear before the Tribunal are arrested in their country of residence and then removed, thousands of miles from that place of arrest, to be prosecuted at The Hague”.

²⁹⁴ See *infra*, Chapter 7, V.2.1.

²⁹⁵ See *infra*, Chapter 7, V.2.1.

²⁹⁶ Consider e.g. ECtHR, *Van der Tang v. Spain*, Application No. 19382/92, Judgment of 13 July 1995, par. 75.

²⁹⁷ Consider in particular ECommHR, *Jentsch v. Germany*, Application No. 2604/65, 14 YB (1971), 876, Report of 30 November 1970 and ECommHR, *W. R. v. The Federal Republic of Germany*, Application No. 3376/67, Collection 29, pp. 31 - 49, Decision of 4 February 1969 and the discussion thereof, *infra*, Chapter 8, II.2.10.

proceedings, such as (1) the fact that crimes happened long time ago, (2) the fact that numerous victims were involved and the necessity “to clarify the whole historical complex” to make a proper assessment of the individuals involved and their degree of participation and guilt, (3) the number of witnesses and suspects, (4) the fact that witnesses are scattered and need to be interviewed abroad or (5) the fact that the crime scene was abroad. Thus, the specific nature of the crimes within the ambit of the jurisdiction of the international criminal tribunals already allows for extended pre-trial detention.

From the above, it emerges that in contextualising international human rights norms, a careful consideration of the principles developed by other judicial and/or monitoring bodies is required and a precise showing how the procedure chosen is justified by the needs and the context of international criminal proceedings.²⁹⁸ A danger is visible if the contextualisation process allows self-validation by the international criminal tribunals of their human rights framework.²⁹⁹ The situation where the contextualisation would result in a reduction of the level of protection offered by human rights should be treated with suspicion.³⁰⁰ This leads some authors to contend that contextual application cannot be used to lower the protection offered by human rights norms.³⁰¹ They suggest that one cannot refer to the special nature and characteristics of these tribunals to allow for the derogation from and limitations to human rights and fair trial rights. Rather, these particularities legitimise the need for increased attention to the observance thereof, since special jurisdictions more easily trample such rights.³⁰² Also, it was held that “[a] person who is accused before the ICTR cannot have a more limited protection of his human rights only because his trial is conducted by an

²⁹⁸ G. MCINTYRE, *Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY*, in G. BOAS and W.A. SCHABAS (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Leiden, Martinus Nijhoff Publishers, 2003, p. 214.

²⁹⁹ D. SHEPPARD, *The International Criminal Court and “Internationally Recognized Human Rights”*: Understanding Article 21 (3) of the Rome Statute, in «*Journal of International Criminal Justice*», Vol. 10, 2010, p. 71 (speaking of “contextual inapplicability”).

³⁰⁰ M. FEDOROVA and G. SLUITER, *Human Rights as Minimum Standards in International Criminal Proceedings*, in «*Human Rights & International Legal Discourse*», Vol. 3, 2009, pp. 46 – 47 (“Contextual interpretation and application of human rights conceals a significant risk of stretching their limits and resulting in a reduction of individual protection”).

³⁰¹ See e.g. *ibid.*, p. 34 (“contextual interpretation of the ICTs’ provisions in light of their object and purpose should not be used in effect to diminish the minimum protection of individuals offered by internationally recognized human rights”).

³⁰² F. POCAR and L. CARTER, *The Challenge of Shaping Procedures in International Criminal Courts*, in L. CARTER and F. POCAR (eds.), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, Cheltenham, Edward Elgar Publishing, 2013, p. 8. Consider also HRC, General Comment No. 13, Article 14, U.N. Doc. HRI/GEN/1/Rev.1, 1994, par. 4 (“The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized”).

international criminal tribunal instead of a national one.³⁰³ In a similar vein, distinctions in the level of human rights protection made on the basis of the nature of the crimes adjudicated by these courts should be dismissed. It is in the most difficult circumstances, including the prosecution of serious crime, that human rights protection should be at its strongest.³⁰⁴ However, admittedly, the understanding that international criminal tribunals should strive for the 'highest standards' is rooted in policy considerations.³⁰⁵

As stated above, it is important to appreciate the *flexibility* of human rights norms as well as the limitations to the interpretative function of decisions offered by its monitoring bodies.³⁰⁶ One can agree that such flexibility is evidenced by the ECtHR's margin of appreciation doctrine as well as by the principle of subsidiarity, from which it originates.³⁰⁷ Furthermore, the weighing (against each other) or the balancing of different interests at stake is central to the interpretations given by monitoring bodies. This method could allow for the factoring in of at least some of the characteristics of international criminal proceedings. Hence, it is only logical to assume that the peculiar goals and context of international criminal proceedings would be considered by human rights supervisory bodies. This is what is probably meant by GRADONI when he mentions that human rights norms possess an "inbuilt situational,

³⁰³ W. SCHOMBURG and J.C. NEMITZ, The Protection of Human Rights of the Accused Before the International Criminal Tribunal for Rwanda, in E. DECAUX, A. DIENG and M. SOW (eds.), *From Human Rights to International Criminal Law: Studies in Honour of an African Jurist, the Late Judge Laïty Kama*, Leiden / Boston, Martinus Nijhoff Publishers, 2007, p. 91.

³⁰⁴ This finds some recognition in the case law of the ECtHR, see e.g. ECtHR, *Gäfgen v. Germany*, Application No. 22978/05, Judgment (Grand Chamber) of 1 June 2010, Reports 2010, par. 87 (on the absolute prohibition of torture, the Court notes that the nature of the alleged offence is irrelevant for the purposes of Article 3 ECHR); ECtHR, *Saadi v. the United Kingdom*, Application No. 13229/03, Judgment (Grand Chamber) of 28 January 2008, par. 127.

³⁰⁵ J.K. COGAN, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, in «Yale Journal of International Law», Vol. 27, 2002, pp. 117 - 118 (explaining that it would be inconceivable that an international tribunal (especially one trying serious crimes) would be held less stringently to human rights norms than national legal systems). It also needs to be emphasised that a requirement of a 'fair trial' is not the same as a 'perfect trial'. See e.g. ICTY, Separate Opinion of Judge Mohammed Shahabuddeen Appended to the Appeals Chamber Decision on Admissibility of Evidence-in-Chief in the Form of Written Statements, *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR 73.4, A. Ch., 30 September 2003, par. 16 ("as it has been repeatedly remarked, the fairness of a trial need not require perfection in every detail. The essential question is whether the accused has had a fair chance of dealing with the allegations against him").

³⁰⁶ Consider e.g. G. MCINTYRE, *Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY*, in G. BOAS and W.A. SCHABAS (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Leiden, Martinus Nijhoff Publishers, 2003, p. 200 (noting that the states parties to human rights instruments are accorded "a measure of flexibility in their adherence").

³⁰⁷ ECtHR, *Handyside v. The United Kingdom*, Application No. 5493/72, Series A, No. 24, Judgment of 7 December 1976, par. 48 - 49. Arguably, this margin of appreciation doctrine has become "generally applicable in several areas of international law". See F. MÉGRET, *Beyond "Fairness": Understanding the Determinants of International Criminal Procedure*, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, p. 54.

normative, and interpretative flexibility.”³⁰⁸ In turn, the procedural frameworks of the international(ised) criminal tribunals bear witness of this relative flexibility of human rights norms.³⁰⁹

It follows that international criminal procedure, in considering its specific characteristics as well as the goals it is meant to serve, should not be bound by human rights standards which are ‘identical’ or ‘higher’ than those at the national level.³¹⁰ Standards offered may be ‘lower’ in comparison with national criminal justice systems and still be in conformity with international human rights norms, because of the latter’s in-built flexibility. If so considered, one could agree with the, admittedly provocative, argument by DAMAŠKA for a ‘fair enough’ standard of fairness in international criminal justice.³¹¹ His proposition is that international criminal tribunals should not strive to surpass or even meet³¹² the most demanding standards set by *national* criminal justice systems.³¹³ He argues that:

“[c]riteria for evaluating fairness in international criminal justice should [...] be crafted with an eye to the specific position of international criminal courts and the peculiar difficulties they face. Given their innate weakness, the complexity of crimes they process, and the

³⁰⁸ L. GRADONI, *International Criminal Courts and Tribunals: Bound by Human Rights Norms...or Tied Down?*, in «Leiden Journal of International Law», Vol. 19, 2006, p. 873.

³⁰⁹ F. MÉGRET, *Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure*, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, pp. 75 - 76 (“In terms of human rights protections, international criminal procedure is testimony to the relative flexibility of international human rights law, and its legally plural tolerance of a diversity of models”).

³¹⁰ *Ibid.*, p. 76.

³¹¹ M. DAMAŠKA, *Reflections on Fairness in International Criminal Justice*, in «Journal of International Criminal Justice», Vol. 10, 2012, p. 616. One of the examples provided by the author is that “what is speedy enough is not assessed by the same yardstick in national and international contexts.” Compare with A. TROTTER, *Pre-Conviction Detention in International Criminal Trials*, in «Journal of International Criminal Justice», Vol. 11, 2013, pp. 360 – 361 (the author suggests to strive for the highest standard of fairness with regard to deprivation of liberty while lowering the bar of fairness on other procedural questions including the right to self-incrimination, or the admission of evidence).

³¹² Here, the author refers to the extension of fairness in international criminal justice to actors other than the defendant. On this issue, consider: Y. MCDERMOTT, *Rights in Reverse: A Critical Analysis of Fair trial Rights under International Criminal Law*, in W.A. SCHABAS, *The Ashgate Research Companion to International Criminal Law*, Farnham, Ashgate, 2013, pp. 165 – 180; M. DAMAŠKA, *The Competing Visions of Fairness: The Basic Choices for International Criminal Tribunals*, in «North Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2010 – 2011, pp. 378 – 381; S. TRECHSEL, *Rights in Criminal Proceedings under the ECHR and the ICTY Statute—A Precarious Comparison*, in B. SWART, A. ZAHAR and G. SLUITER (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford, Oxford University Press, 2011, pp. 154 – 156.

³¹³ M. DAMAŠKA, *Reflections on Fairness in International Criminal Justice*, in «Journal of International Criminal Justice», Vol. 10, 2012, pp. 614, 618; M. DAMAŠKA, *Should National and International Justice be Subjected to the same Evaluative Framework?*, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 1418.

multiplicity of their goals, some departures from domestic conceptions of fairness should be expected and accepted.”³¹⁴

DAMAŠKA is convinced that “international criminal courts cannot successfully pursue their manifold objectives by strictly abiding by most demanding domestic rules of procedure.”³¹⁵ While he holds that fair trial rights apply to international and national criminal justice systems, these rights are couched in broad terms and allow for different procedural designs.³¹⁶ Therefore, they leave sufficient room for different procedural arrangements and for adjustments to the unique context of international criminal tribunals and courts.³¹⁷ Thus, deviations of the most demanding domestic standards of criminal justice must be allowed for insofar as they are justified by the specific needs of international criminal justice. One could argue that such proposition is nothing more than an illustration of the in-built flexibility of human rights norms. However, that is *not* the case. By making the argument for a ‘fair enough’ standard, DAMAŠKA effectively raises the bar. Indeed, since fair trial rights do allow for different procedural arrangements and allow national criminal justice systems some flexibility, the ‘fair enough’ approach takes this flexibility away by requiring that a deviation from the most demanding domestic standards of criminal justice be justified by the specific needs of the international criminal courts.³¹⁸

More controversial is the argument that international criminal tribunals, as international organisations (or subsidiary organs thereof), should be required to provide human rights protection which is ‘equivalent’ (not ‘identical’) to the protection offered by states. It borrows from the ‘equivalent protection doctrine’ (or *Bosphorus* test) (which originates from the

³¹⁴ *Ibid.*, p. 612.

³¹⁵ *Ibid.*, p. 612.

³¹⁶ M. DAMAŠKA, The Competing Visions of Fairness: The Basic Choices for International Criminal Tribunals, in «North Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2010 – 2011, pp. 380 – 381.

³¹⁷ M. DAMAŠKA, Reflections on Fairness in International Criminal Justice, in «Journal of International Criminal Justice», Vol. 10, 2012, p. 615.

³¹⁸ *Ibid.*, p. 615 (“If [international criminal courts] were then to depart from the most demanding standards of fairness, these departures per se would not present a problem, *provided, of course, that they are justified by the special needs of international criminal justice*” (emphasis added)). Similarly, consider M. DAMAŠKA, The Competing Visions of Fairness: The Basic Choices for International Criminal Tribunals, in «North Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2010 – 2011, p. 380 (“some departures by international criminal tribunals *from domestic standards of fairness* can be justified, given their *sui generis* goals, the complexity and the atrocity of crimes they process, and the innate weaknesses of these tribunals” (emphasis added)).

Solange II case³¹⁹) which was developed in the ECtHR's case law in the context of the relationship between the ECtHR and the EU and which demands for equivalent (rather than identical) protection of human rights by international organisations.³²⁰ It implies that once the ECtHR has established such 'equivalent protection', a presumption follows that the state acted in conformity with the ECHR when it did nothing more than complying with obligations that followed from its membership to that international organisation.³²¹ Transposing this equivalent protection doctrine to international criminal procedure, if at all possible, is unwelcome. It lacks the sufficient clarity to be a useful tool in the contextualisation process of human rights norms to international criminal tribunals. What *is* clear is that 'equivalent protection' means something different than 'identical protection'.³²² The presumption that it installs places a tremendous duty on the person alleging that the action was a breach of human rights.³²³ It can be rebutted, in the event that the protection offered is "manifestly deficient" in the particular circumstances of the case.³²⁴ It remains unclear, however, as to what that exactly means.³²⁵ It provides for a low bar of protection which may be at odds with the idea that rights should be practical and effective.

³¹⁹ BVerfGE 73, 339 2 BvR 197/83, 22 October 1986 (*Solange II*).

³²⁰ ECtHR, *Bosphorus v. Ireland*, Application No. 45036/98, Reports 2005-VI, Judgment (Grand Chamber) of 30 June 2005, par. 165 (finding that the level of human rights protection in the EU is 'equivalent' to that of the ECHR and the ECtHR after assessing the substantive guarantees that exist within the European Union as well as the mechanisms which are in place to ensure the observance of these fundamental rights).

³²¹ *Ibid.*, par. 156; ECtHR, *Waite and Kennedy*, Application No. 26083/94, Reports 1999-I, Judgment of 18 February 1999, par. 66.

³²² ECtHR, *Bosphorus v. Ireland*, Application No. 45036/98, Reports 2005-VI, Judgment (Grand Chamber) of 30 June 2005, par. 156.

³²³ J. PHELPS, Reflections on Bosphorus and Human Rights in Europe, in «Tulane Law Review», Vol. 81, 2006, p. 272.

³²⁴ ECtHR, *Bosphorus v. Ireland*, Application No. 45036/98, Reports 2005-VI, Judgment (Grand Chamber) of 30 June 2005, par. 156 (the Grand Chamber adds that "[i]n such cases, the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights"). The application of the doctrine is limited: in case the act of a state falls outside a strict international obligation, the state remains "fully responsible". See ECtHR, *Bosphorus v. Ireland*, Application No. 45036/98, Reports 2005-VI, Judgment (Grand Chamber) of 30 June 2005, par. 157; ECtHR, *Waite and Kennedy*, Application No. 26083/94, Reports 1999-I, Judgment of 18 February 1999, par. 66; ECtHR, *Matthews v. UK*, Application No. 24833/94, Reports 1999-I, Judgment (Grand Chamber) of 21 January 1999, par. 33. Furthermore, the doctrine was limited to the then 'first pillar' of EU law (See ECtHR, *Bosphorus v. Ireland*, Application No. 45036/98, Reports 2005-VI, Judgment (Grand Chamber) of 30 June 2005, par. 72; ECtHR, *M.S.S v. Belgium and Greece*, Application No. 30696/09, Reports 2011, Judgment (Grand Chamber) of 21 January 2011, par. 338).

³²⁵ See e.g. P. DE HERT and F. KORENICA, The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights, in «German Law Journal», Vol. 13, 2012, pp. 888 (concluding that it is hard to anticipate the outcome of the application of the test and assuming that such threshold will be low); J. PHELPS, Reflections on Bosphorus and Human Rights in Europe, in «Tulane Law Review», Vol. 81, 2006, p. 274 (criticising the Bosphorus judgment for not providing further guidance as to the facts required to successfully rebut the presumption). Some hints can be found in Bosphorus. See in particular ECtHR, *Bosphorus v. Ireland*, Application No. 45036/98, Reports 2005-VI, Judgment (Grand Chamber) of 30 June 2005, par. 166 ("The Court has had regard to the nature of the

IV. THE DICHOTOMY BETWEEN ADVERSARIAL AND INQUISITORIAL PROCEDURES: BRIDGING THE GAP?

It is the purpose of this research to compare the procedural constellations of the different courts and tribunals under review in order to determine the law of international criminal procedure. In this regard, it is legitimate to ask how far the common law and civil law models of criminal justice may be useful explanatory tools for better understanding the differences between the procedural frameworks of the included jurisdictions and to better understand the nature of international criminal procedure. It is clear that many commentators have sought to describe international criminal law in common law and civil law terms.³²⁶ They either sought to deconstruct international criminal procedure in these terms³²⁷ or to explain the dynamics of international criminal procedure as a ‘debate’³²⁸ a ‘conflict’ or a ‘competition’³²⁹ between two ‘systems’ or ‘styles of proceedings’.³³⁰ In turn, it is widely acknowledged that blending the

interference, to the general interest pursued by the impoundment and by the sanctions regime and to the ruling of the ECJ (in the light of the opinion of the Advocate General), a ruling with which the Supreme Court was obliged to and did comply. It considers it clear that there was no dysfunction of the mechanisms of control of the observance of Convention rights”).

³²⁶ Or inquisitorial and adversarial criminal justice systems. However, the term ‘inquisitorial’ may be unfortunate. Consider e.g. K. AMBOS, *International Criminal Procedure: “Adversarial”, “Inquisitorial” or Mixed?*, in «*International Criminal Law Review*», Vol. 3, 2003, pp. 2 - 3 (“it reminds us of the darkest times of the middle ages when the prosecution and adjudication of a case was concentrated in one institution”). Other authors have moved beyond the traditional common law – civil law taxonomy. Consider e.g. DAMAŠKA, who distinguishes between four ideal-types of criminal justice, created by two sets of parameters: ‘conflict-solving’ and ‘policy implementing’ as far as the function of the government is concerned and ‘hierarchical officialdom’ and ‘coordinate officialdom’ as far as the structure of the government is concerned (See M.R. DAMAŠKA, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, New Haven and London, Yale University Press, 1986); Packer, who distinguishes between ‘due process’ and ‘crime control’ (see H.L. Packer, *Two Models of the Criminal Process*, in «*University of Pennsylvania Law Review*», 1964, pp. 1 – 68); and Vögler, who distinguishes between the methods of inquisitorialism, adversarialism and popular justice (see R. VÖGLER, *A World View of Criminal Justice*, Aldershot, Ashgate, 2005).

³²⁷ Consider e.g. C. SCHUON, *International Criminal Procedure: A Clash of Legal Cultures*, The Hague, T.M.C. Asser Press, 2010; A. ORIE, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC*, in A. CASSESE et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, pp. 1439 - 1495; M. FAIRLIE, *The Marriage of Common and Continental Law at the ICTY*, in «*International Criminal Law Review*», Vol. 4, 2004, pp. 243 – 316; P.C. KEEN, *Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals*, in «*Leiden Journal of International Law*», Vol. 17, 2004, pp. 767 – 814; D.A. MUNDIS, *From ‘Common Law’ Towards ‘Civil Law’: The Evolution of the ICTY Rules of Procedure and Evidence*, in «*Leiden Journal of International Law*», Vol. 14, 2001, pp. 367 - 382.

³²⁸ C. SCHUON, *International Criminal Procedure: A Clash of Legal Cultures*, The Hague, T.M.C. Asser Press, 2010, pp. 3, 4, 5, 7 (“the aim of this study is to contribute to the resolution of the above-mentioned *debate* between civil and common law lawyers about the hybrid nature of international criminal procedure, in which elements of these two legal systems co-exist, and sometimes clash” (emphasis added)).

³²⁹ M. LANGER, *The Rise of Managerial Judging in International Criminal Law*, in «*American Journal of Comparative Law*», Vol. 53, 2005, pp. 847 – 848.

³³⁰ The terms ‘common law’ and ‘civil law’ are used here to refer to models or ideal-types and should be understood as such. In practice, no ‘pure’ common law or civil law models are to be found.

features of these two systems in international criminal procedure has led to the development of a ‘*sui generis*’ system.³³¹ Its *sui generis* character refers to the fact that in transposing a feature from one particular system to the realm of international criminal procedure, it undergoes a transformation, whereby it is adapted to the specific needs and context of international criminal tribunals.³³²

Most scholars would agree that in international criminal procedure, the adversarial model prevails.³³³ To add some nuance to this pronouncement, it must be noted that while international criminal procedure was very close to the adversarial style of proceedings at first, it has moved significantly in the direction of the civil law style of proceedings.³³⁴ This prevalence can clearly be seen in the way that the proceedings of the *ad hoc* tribunals have taken shape.³³⁵ While this certainly holds true for its RPE,³³⁶ it is clear that the choice for

³³¹ See e.g. K. AMBOS, International Criminal Procedure: “Adversarial”, “Inquisitorial” or Mixed?, in «International Criminal Law Review», Vol. 3, 2003, pp. 1 - 37; K. AMBOS and S. BOCK, Procedural Regimes, in L. REYDAMS, J. WOUTERS and C. REYNGAERT (eds.), International Prosecutors, Oxford, Oxford University Press, 2012, p. 541; F. BENSOUDA, The ICC Statute – An Insider’s Perspective on a Sui Generis System for Global Justice, in «North-Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2010 - 2011, p. 279; P.C. KEEN, Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals, in «Leiden Journal of International Law», Vol. 17, 2004, p. 811; F. MÉGRET, Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, p. 40.

³³² P.L. ROBINSON, Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia, in «European Journal of European Law», Vol. 11, 2000, p. 580.

³³³ Consider e.g. A. ESER, The “Adversarial” Procedure: A Model Superior to Other Trial Systems in International Criminal Justice? Reflexions of a Judge, in T. KREUSMANN (ed.), ICTY: Towards a Fair Trial?, Antwerp, Intersentia, 2009, p. 207; G. SLUITER, The Law of International Criminal Procedure and Domestic War Crimes Trials, in «International Criminal Law Review», Vol. 6, 2006, p. 614; G. BOAS, J.L. BISCHOFF, N.L. REID and B. DON TAYLOR III, International Criminal Law Practitioner Library, Vol. III: International Criminal Procedure, Cambridge, Cambridge University Press, 2011, p. 15; R. DIXON, Developing International Rules of Evidence for the Yugoslav and Rwandan Tribunals, in «Transitional Law & Contemporary Problems», Vol. 7, 1997, p. 98; S. KIRSCH, Finding the Truth at International Criminal Tribunals, in T. KREUSMANN (ed.), ICTY: Towards a Fair Trial?, Antwerp, Intersentia, 2009, p. 52.

³³⁴ F. MÉGRET, Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, p. 39; D.A. MUNDIS, From ‘Common Law’ Towards ‘Civil Law’: The Evolution of the ICTY Rules of Procedure and Evidence, in «Leiden Journal of International Law», Vol. 14, 2001, p. 368; R. VÖGLER, A World View of Criminal Justice, Aldershot, Ashgate, 2005, p. 278.

³³⁵ Consider the First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/49/342-S/1994/1007, 29 August 1994, par. 71 (“Based on the limited precedent of the Nürnberg and Tokyo trials, the statute of the Tribunal has adopted a largely adversarial approach to its procedures, rather than the inquisitorial system prevailing in continental Europe and elsewhere”). It is known that the first version of the ICTY RPE was to a large extent based on the U.S. federal law of criminal procedure. This can be explained by the fact that the US administration submitted a report with a set of procedural rules which was to a large extent modelled upon the U.S. law, the fact that the ABA supported this report and made some comments thereto, as well as by the fact that the majority of judges favoured the adversarial system. See V. MORRIS and M.P. SCHARF, An Insider Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis (Vol. I), Ardsley, Transnational Publishers, 1995, p. 177. In a

such adversarial proceedings was already predetermined by the respective Statutes of the ICTY and the ICTR.³³⁷ For example, the Statute provides the Prosecutor with full responsibility over the investigation and prosecution.³³⁸ However, civil law elements have gradually been adopted by the *ad hoc* tribunals to allow, among other things, much greater judicial control over the pre-trial stage (*sensu stricto*).³³⁹ Today, one can speak of a mixed or ‘*sui generis*’ procedure.³⁴⁰

similar vein: M. LANGER, The Rise of Managerial Judging in International Criminal Law, in «American Journal of Comparative Law», Vol. 53, 2005, pp. 857 – 858; M. FAIRLIE, The Marriage of Common and Continental Law at the ICTY, in «International Criminal Law Review», Vol. 4, 2004, p. 245; R. VÖGLER, A World View of Criminal Justice, Aldershot, Ashgate, 2005, p. 279; W.A. SCHABAS, Common law, «Civil Law», et droit pénal international: tango (le dernier?) à La Haye, in «Revue Québécoise de droit international» Vol. 13, 2000, p. 296.

³³⁶ Note that the *ad hoc* tribunals were mandated to adopt their own RPE (Article 15 ICTY Statute, Article 14 ICTR Statute). See e.g. M. LANGER, The Rise of Managerial Judging in International Criminal Law, in «American Journal of Comparative Law», Vol. 53, 2005, p. 858; G. SLUITER, The Law of International Criminal Procedure and Domestic War Crimes Trials, in «International Criminal Law Review», Vol. 6, 2006, p. 616; J. JACKSON, Finding the Best Epistemic Fit for International Criminal Tribunals, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 24; J.D. JACKSON and S.J. SUMMERS, The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions, Cambridge, Cambridge University Press, 2012, p. 122; M. FAIRLIE, The Marriage of Common and Continental Law at the ICTY, in «International Criminal Law Review», Vol. 4, 2004, p. 243; P.C. KEEN, Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals, in «Leiden Journal of International Law», Vol. 17, 2004, p. 767; V. TOCHILOVSKY, International Criminal Justice: “Strangers in the Foreign System”, in «Criminal Law Forum», Vol. 15, 2004, p. 322.

³³⁷ G. BOAS, Creating Laws of Evidence for International Criminal Law: the ICTY and the Principle of Flexibility, in «Criminal Law Forum», Vol. 12, 2001, p. 66; M. FAIRLIE, The Marriage of Common and Continental Law at the ICTY, in «International Criminal Law Review», Vol. 4, 2004, p. 268; D.A. MUNDIS, From ‘Common Law’ Towards ‘Civil Law’: The Evolution of the ICTY Rules of Procedure and Evidence, in «Leiden Journal of International Law», Vol. 14, 2001, p. 368. *Contra*, see A. ESER, ‘The “Adversarial” Procedure: A Model Superior to Other Trial Systems in International Criminal Justice? Reflections of a Judge’, in T. KREUSMANN (ed.), ICTY: Towards a Fair Trial?, Antwerp, Intersentia, 2009, p. 220 (“when reading it [the ICTY Statute] without being prejudiced by certain assumptions, one will hardly find any cogent indications of a one-sided preference for the adversarial system”).

³³⁸ Article 16 (1) ICTY Statute and Article 15 (1) ICTR Statute.

³³⁹ These civil law amendments were to a large extent based on the report of the expert group which was tasked with reviewing the operation and functioning of the ICTY and ICTR. See U.N., Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, U.N. Doc. A/54/634, 22 November 1999. As an example, this report pleaded for a more interventionist role for the Pre-Trial Judge (par. 83). This led to several amendments, including the possibility, under Rule 65*ter* ICTY RPE, for the delegation of powers by the Pre-Trial Judge to a senior legal officer. See U.N., Comprehensive Report on the Results of the Implementation of the Recommendations of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, U.N. Doc. A/56/853, 4 March 2002, par. 36. Further amendments were proposed in the Report of the ICTY Working Group on Speeding Up Trials of February 2006. See U.N., Letter Dated 29 May 2006 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, U.N. Doc. S/2006/353, 31 May 2006, par. 19. Note that neither the RPE of the SCSL nor the RPE of the ICTR formally include a Pre-Trial Judge but the powers under Rule 73*bis* and 73*ter* RPE can be exercised by a Single Judge. Consider further C. SCHUON, International Criminal Procedure: A Clash of Legal Cultures, The Hague, T.M.C. Asser Press, 2010, p. 307 (concluding specifically with regard to the ICTY’s rules on disclosure, evidence rules and the role of the judge that these have all evolved towards a civil law model of criminal procedure, as this has proven to accommodate the specific needs and tasks of international criminal

In a similar vein, the first draft of the ICC Statute was largely inspired by the adversarial system. The consensus that was reached contains elements of both traditions.³⁴¹ It is held to be more civil law oriented than the *ad hoc* tribunals, while the adversarial style still prevails.³⁴² Important civil law features, which will be discussed in the subsequent chapters, include the principle of objectivity or the judicial overview by the Pre-Trial Chamber over prosecutorial discretion.³⁴³ It must be emphasised that the decision of choosing the adversarial model was, of course, largely political.³⁴⁴ It was not based on any agreement regarding the theory that should actually underlie international criminal procedure.³⁴⁵

It is undeniable that certain risks are involved when features of different criminal justice systems are blended together.³⁴⁶ Domestic solutions should be adjusted to ensure coherence

proceedings. At the same time, the author identifies one element, guilty pleas, which has developed in the common law direction); F. POCAR and L. CARTER, *The Challenge of Shaping Procedures in International Criminal Courts*, in L. CARTER and F. POCAR (eds.), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, Cheltenham, Edward Elgar Publishing, 2013, pp. 12 - 13 (noting that the number of exceptions to the adversarial approach increased over the years through the adjustment by the Judges of the rules to the exigencies of the Court).

³⁴⁰ K. AMBOS, *International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?*, in «International Criminal Law Review», Vol. 3, 2003, p. 6; P.L. ROBINSON, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, in «European Journal of European Law», Vol. 11, 2000, p. 588; J. JACKSON, *Finding the Best Epistemic Fit for International Criminal Tribunals*, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 34.

³⁴¹ S.A.F. DE GURMENDI, *International Criminal Law Procedures, the Process of Negotiations*, in S. LEE (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, The Hague, Kluwer Law International, 1999, p. 220 (recalling that there was an understanding at the Rome conference that a universal court should reflect the main criminal justice systems of the world).

³⁴² See e.g. C. SCHUON, *International Criminal Procedure: A Clash of Legal Cultures*, The Hague, T.M.C. Asser Press, 2010, p. 308 (noting that there are many ambiguities where the procedural framework leaves open the question whether a civil law or a common law approach is to be followed). Compare F. POCAR and L. CARTER, *The Challenge of Shaping Procedures in International Criminal Courts*, in L. CARTER and F. POCAR (eds.), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, Cheltenham, Edward Elgar Publishing, 2013, p. 13 (noting that "they essentially adopt[ed] an adversarial system with exceptions inspired by civil law systems"); G. SLUITER, *The Law of International Criminal Procedure and Domestic War Crimes Trials*, in «International Criminal Law Review», Vol. 6, 2006, p. 616.

³⁴³ See *infra*, Chapter 3, II.4 and III.

³⁴⁴ F. MÉGRET, *Beyond "Fairness": Understanding the Determinants of International Criminal Procedure*, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, pp. 68 – 69; M. LANGER, *The Rise of Managerial Judging in International Criminal Law*, in «American Journal of Comparative Law», Vol. 53, 2005, p. 837 (arguing that the "initial predominance of common law actors" may partly explain why the ICTY originally adopted an adversarial system); J. JACKSON, *Finding the Best Epistemic Fit for International Criminal Tribunals*, in «Journal of International Criminal Justice», Vol. 7, 2009, pp. 18 - 19 (noting that "[t]o some extent, it was inevitable that the political drive for the creation of international criminal tribunals would mean that the synthesis achieved would be more the result of 'compromise and pragmatism' than of any movement towards a 'new, fused procedural tradition'").

³⁴⁵ P.C. KEEN, *Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals*, in «Leiden Journal of International Law», Vol. 17, 2004, p. 812.

³⁴⁶ Consider M. DAMAŠKA, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, in «The American Journal of Comparative Law», Vol. 45, 1997, pp. 839 – 852 (noting that lawyers should be aware of the context of a procedural regulation). DAMAŠKA concludes that "it is perhaps natural for

and fairness.³⁴⁷ Hence, tribunals should adopt a cautionary approach when they borrow from domestic law and practice, otherwise, mismatches are possible.³⁴⁸ The blending could result in a system that fails to adequately protect the accused's rights.³⁴⁹ Therefore, it is important that attention be paid to the relationship between a procedural rule and the procedural context in which it is embedded (interdependence of rules).³⁵⁰ Some authors even doubt whether or not the blending of common law and civil law systems into a workable international criminal procedure would ever be possible.³⁵¹

While international criminal procedure consists of a blend of common law and civil law elements, the *internationalised* criminal tribunals, as discussed above, are often to a large extent based on the specific domestic system they are embedded in.³⁵² The underlying rationale is consistency; to deviate as little as necessary from the ordinary criminal procedural framework.³⁵³ The same does not seem to hold true in cases where the hybrid tribunal was established by international authorities having full control over a country's legal system. In this situation, there seems to be more latitude in adopting a procedural framework.³⁵⁴ For example, the SPSC combined an adversarial system with an Investigative Judge whose role

lawyers to go browsing in a foreign law boutique. But it is an illusion to think that this is a boutique in which one is always free to purchase some items and reject others" (*ibid.*, p. 852). Consider also G. SLUITER, *The Law of International Criminal Procedure and Domestic War Crimes Trials*, in «*International Criminal Law Review*», Vol. 6, 2006, p. 615 (noting that any mixture of the common law and civil law system is "a delicate and potentially highly damaging exercise").

³⁴⁷ P.L. ROBINSON, *Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY*, in «*Journal of International Criminal Justice*», Vol. 3, 2005, p. 1056; N. WEISBORD and M.A. SMITH, *The Reason Behind the Rules: From Description to Normativity in International Criminal Procedure*, in «*North-Carolina Journal of International Law and Commercial Regulation*», Vol. 36, 2011, p. 258.

³⁴⁸ J. JACKSON, *Finding the Best Epistemic Fit for International Criminal Tribunals*, in «*Journal of International Criminal Justice*», Vol. 7, 2009, p. 34 (noting that a hybrid procedure which seeks to satisfy both dominant legal traditions may result in a "skewed procedure"); N. WEISBORD and M.A. SMITH, *The Reason Behind the Rules: From Description to Normativity in International Criminal Procedure*, in «*North-Carolina Journal of International Law and Commercial Regulation*», Vol. 36, 2011, p. 258.

³⁴⁹ R. SKILBECK, *Frankenstein's Monster: Creating a New International Procedure*, in «*Journal of International Criminal Justice*», Vol. 8, 2010, p. 452.

³⁵⁰ C. SCHUON, *International Criminal Procedure: A Clash of Legal Cultures*, The Hague, T.M.C. Asser Press, 2010, p. 7.

³⁵¹ W. PIZZI, *Overcoming Logistical and Structural Barriers to Fair Trials at International Tribunals*, in «*International Commentary on Evidence*», Vol. 4, 2006, p. 2 ("we have assumed, and continue to assume, that talented lawyers and judges from the two main western legal traditions [...] can be blended into a pre-trial and trial system that incorporates features of both legal traditions? But the International Criminal Tribunal for the former Yugoslavia (ICTY) has shown us that convergence among western trial systems is more myth than reality").

³⁵² Article 28 (2) STL Statute or Article 12 ECCC Agreement. See also Article 20 new, 23 new, 33 new and 37 new ECCC Law as well as Rule 2 ECCC IR.

³⁵³ F. POCAR and L. CARTER, *The Challenge of Shaping Procedures in International Criminal Courts*, in L. CARTER and F. POCAR (eds.), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, Cheltenham, Edward Elgar Publishing, 2013, p. 13.

³⁵⁴ *Ibid.*, pp. 10 – 11.

was to respect the rights of every person subject to a criminal investigation and those of alleged victims of the crimes under investigation.³⁵⁵ In general, while the procedural frameworks of the internationalised criminal courts are less informative for determining the ideal organisation of international criminal proceedings, they offer examples of alternative solutions on how proceedings should be designed for the crimes within the jurisdiction of these tribunals.

Several commentators have challenged the utility of this common law – civil law typology in assessing international criminal procedure.³⁵⁶ Some commentators suggest that the reflex to refer back to the common law and civil law criminal models betrays the uncertainty surrounding this branch of law.³⁵⁷ The observation that international criminal procedure

³⁵⁵ Section 9.1 TRCP. However, the inclusion of an investigative judge may well be an example of a ‘mismatch’. No institution of an investigating judge was known to Indonesian criminal procedure. See e.g. C. REIGER and M. WIERDA, *The Serious Crimes Process in Timor-Leste: In Retrospect*, International Center for Transnational Justice, 2006, p. 25.

³⁵⁶ Consider e.g. J. JACKSON and Y. M’BOGE, *The effect of Legal Culture on the Development of International Evidentiary Practice: From the “Robbing Room” to the “Melting Pot”*, in «Leiden Journal of International Law», Vol. 26, 2013, p. 950 (“It seems that the debate as to the optimal procedures needs to shift away from common law – civil law debates towards what practices have been developed and should be developed to deal with the evidentiary problems faced by the international criminal institutions”); N. WEISBORD and M.A. SMITH, *The Reason Behind the Rules: From Description to Normativity in International Criminal Procedure*, in «North-Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2011, pp. 255 – 256 (noting that international criminal procedure challenged the utility of the common law – civil law typology and arguing that the question should rather be what procedural rules are best suited for the unique context in which international criminal tribunals operate); P.L. ROBINSON, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, in «European Journal of European Law», Vol. 11, 2000, pp. 579 – 580 (the author notes, on the ICTY, that “[w]hether the Tribunal has an inquisitorial or accusatorial system is, in the end, an unproductive and unnecessary debate, since in interpreting a provision that reflects a feature of a particular system, it would be incorrect to import that feature wholesale into the Tribunal without first testing whether this would promote the object and purpose of a fair and expeditious trial in the international setting of the Tribunal.” “Even if a feature remains unchanged, it is inappropriate to describe it by its domestic origin as either inquisitorial or accusatorial, or even an amalgam of both. Once adopted, it belongs and is peculiar to the tribunal”); C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, p. 58; K. AMBOS, *International Criminal Procedure: “Adversarial”, “Inquisitorial” or Mixed?*, in «International Criminal Law Review», Vol. 3, 2003, pp. 1, 35 (“It is no longer important whether a rule is either “adversarial” or “inquisitorial” but whether it assists the Tribunals in accomplishing their tasks and whether it complies with fundamental fair trial standards”); K. AMBOS and S. BOCK, *Procedural Regimes*, in L. REYDAMS, J. WOUTERS and C. REYNGAERT (eds.), *International Prosecutors*, Oxford, Oxford University Press, 2012, p. 489 (noting that labelling a procedure ‘civil law’ or ‘common law’ is “inevitably imprecise and ignores the differences between systems even belonging to the same legal tradition.” However, the author concedes that it may be a useful classification tool and may simplify complex procedural questions). Additionally, consider J. D. OHLIN, *A Meta-Theory of International Criminal Procedure, Vindicating the Rule of Law*, in «UCLA Journal of International Law and Foreign Affairs», Vol. 14, 2009, p. 81 (arguing that scholarship on international criminal procedure is “moving beyond the common law-civil law dichotomy towards a more functional analysis of international criminal procedure. It does not longer take the traditional common law civil law dichotomy as its points of departure but conceives of international criminal procedure as *sui generis*”).

³⁵⁷ G. BOAS, J.L. BISCHOFF, N.L. REID and B. DON TAYLOR III, *International Criminal Law Practitioner Library, Vol. III: International Criminal Procedure*, Cambridge, Cambridge University Press, 2011, pp. 16 – 17

combines civil law and common law elements has been said to be merely ‘trivial’. Provided that there are common law and civil law systems in the world, it is only logical that international criminal procedure, like international law in general, will show the influences of both of these systems.³⁵⁸ Nevertheless, this observation is not as straightforward as it may seem to be at first.³⁵⁹ For example, rather than blending elements of these styles of proceedings, in theory, nothing stopped the drafters of the Statutes of the *ad hoc* tribunals from adopting the procedural framework of the state where the accused is alleged to have committed the crimes. However, it seems that such an option was never considered.³⁶⁰

Questioning the utility of the common law – civil law dichotomy is not limited to the field of international criminal procedure. This dissatisfaction equally applies to the current state of comparative criminal justice studies.³⁶¹ SUMMERS also rejected the utility of the common law – civil law dichotomy in describing national criminal processes.³⁶² To a large extent, this

(“This sense that the legitimacy of rules of international criminal procedure can only be established by reference to their existence in the common law or civil law systems (or both) reveals the uncertain status of this area of law. The hybrid paradigm, and its relationship with the fair trial norm, was critically important in the early years of development of modern international criminal law. But international criminal procedure, as developed in the rules and jurisprudence of international criminal tribunals, has outgrown this need; indeed it threatens to constrain the development of this still-fledgling area of international law”).

³⁵⁸ M.D. DUBBER, *Common Civility: The Culture of Alegality in International Criminal Law*, in «Leiden Journal of International Law», Vol. 24, 2011, p. 924.

³⁵⁹ As far as the ICC is concerned, it is evident that making the procedural framework depend on the situation concerned is unworkable.

³⁶⁰ B. SWART, *Damaška and the Face of International Criminal Justice*, in «Journal of International Criminal Justice», Vol. 6, 2008, p. 95; F. POCAR and L. CARTER, *The Challenge of Shaping Procedures in International Criminal Courts*, in L. CARTER and F. POCAR (eds.), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, Cheltenham, Edward Elgar Publishing, 2013, p. 9 (wondering why this idea never crossed the mind of the drafters of the RPE of the international criminal courts. The authors note that “at least the cooperation between the domestic courts and the ICTY [...] would have been facilitated and may have been hindered by the difficulty to understand and adapt to unfamiliar procedures”).

³⁶¹ R. VÖGLER, *A World View of Criminal Justice*, Aldershot, Ashgate, 2005, p. 2 (“the field of criminal procedure is largely undeveloped and continues to be dominated by sterile and a-theoretical debates over the supposed opposition between different ‘systems’ of justice. Without better and more sophisticated understanding of the working principles of criminal procedure, little progress can be made and national reform programmes will continue to be developed in isolation and without theoretical direction”).

³⁶² S.J. SUMMERS, *Fair Trials: the European Criminal Procedural Tradition and the European Court of Human Rights*, Oxford, Hart Publishing, 2007, pp. 3 - 10 (the author advances an approach whereby the focus is not on differences between European criminal justice systems, but on standards common to all European justice systems. She rejects the common law – civil law dichotomy not only because of descriptive shortcomings (*inter alia* because of lack of consensus on the meaning of the terms and problems of classification), but also because of its lack of normative force. “[T]he comparative criminal procedure law scholarship has been preoccupied with the descriptive classification of systems. This has not only served to cast doubt on the merits of comparative criminal procedure law as a legitimate discipline, but has also meant that the merging case law and principles of the ECHR in the field of criminal procedure have not properly been evaluated” (*ibid.*, pp. 3 - 4). “The problematic nature of this approach is confounded by the fact that the methodology dictates the nature of the conclusions which are to be reached. Consequently, the determination of whether the system can be classed as ‘accusatorial’ or ‘inquisitorial’, or as moving towards one or the other of the procedural forms, often becomes the goal of the study. This is in spite of recognition of the fact that it is highly unlikely that a legal system will

dissatisfaction with applying the common law – civil law dichotomy to international criminal procedure stems from the belief that scholarly writing should move away from a *descriptive* to a *normative* approach (what international criminal procedure ‘ought to be’) to international criminal procedure. Thereby, the focus should be to identify the procedural constellation best suited to the unique context and the specific goals that international criminal tribunals are intended to serve.³⁶³

One can easily subscribe to such a plea for a focus on building an overall theory of international criminal procedure. It was already noted above that in developing international criminal procedure, and in the transposition of features of the common law and civil law style of proceedings, the specific characteristics, realities and goals of these tribunals should be taken into consideration.³⁶⁴ Not all of these features should be replicated at the international level without there being a filtering process that inquires into whether or not these aspects ‘fit’.³⁶⁵ However, such does not render the common law – civil law typology useless.³⁶⁶

fulfil all the attributes of either form. [...] As a consequence the issue of whether there are actually significant differences between the systems is left unaddressed. The problems of specific and particular differences are swallowed up by the desire to generalize” (*ibid.*, p. 8). For a forceful rejection of this arguments, consider: S. FIELD, Fair Trials and Procedural Tradition in Europe, in «Oxford Journal of Legal Studies», Vol. 29, 2009, pp. 374 - 375 (“I am happy to accept that normative thinking about criminal process is underdeveloped and that it is an essentially different enterprise even to culturally rich comparative description of criminal process [...]. But Summers does not explain why emphasizing differences in the description of comparative practices (identifying two European procedural traditions) is any more or less obstructive to effective normative reasoning than emphasizing descriptive similarities (such as by identifying a single European tradition).”

³⁶³ Consider in this sense e.g. D.M. GROOME, Re-Evaluating the Theoretical Basis and Methodology of International Criminal Trials, in «Pennsylvania State International Law Review», Vol. 25, 2007, p. 793 (“We have had these trials in sufficient numbers and under sufficient circumstances that we can now begin to re-evaluate the theoretical basis of these trials. To define what we are trying to accomplish through them with precision and then develop the best procedures to implement those goals. [...] The future of international criminal justice must spring from its own theoretical basis—and depart from being a process that has been cobbled together from the adversarial and inquisitorial systems designed to achieve different aims”). Consider also N. WEISBORD and M.A. SMITH, The Reason Behind the Rules: From Description to Normativity in International Criminal Procedure, in «North-Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2011, p. 256. The authors add that that there is “no dominant paradigm from which to evaluate the procedural jurisprudence of international tribunals [...]. As a result, the question of which procedures are best and why remains a live one for scholars and, even more significantly, for the ICC Judges” (*ibid.*, p. 269)); K. AMBOS and S. BOCK, Procedural Regimes, in L. REYDAMS, J. WOUTERS and C. REYNGAERT (eds.), International Prosecutors, Oxford, Oxford University Press, 2012, p. 541.

³⁶⁴ See *supra*, Chapter 2, II, fn. 60 and accompanying text. Consider F. MÉGRET, Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, p. 58 (in this regard the author refers to what he calls a constant process of “becoming international”, which implies that “the driving force behind the development of international criminal procedure is an attempt to develop a procedure that is uniquely suited to the reality and the values of the tribunals’ international nature while simultaneously drawing from domestic traditions and seeking to respect the right to a fair trial”).

³⁶⁵ *Ibid.*, p. 63.

³⁶⁶ Compare P.C. KEEN, Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals, in «Leiden Journal of International Law», Vol. 17, 2004, p. 768 (to understand international

Scholars who reject the use of this typology fail to clarify why the categorisation or deconstruction of international criminal procedure in common law – civil law terms hinders or obstructs such a normative evaluation. After all, if the normative assessment should be concerned with the question of what procedural set-up is best suited for international criminal procedure, it is legitimate to inquire whether, more generally, an investigation shaped as an official inquest or an investigation by the parties themselves, and thus a common law or civil law procedure, stands to be preferred.³⁶⁷ Provided that the law of international criminal procedure borrows a lot from the common law and civil law styles of proceedings, these two styles may assist in describing international criminal procedure (i.e. the explanatory force of this dichotomy). The common law – civil law dichotomy may still be of assistance for a better understanding of international criminal procedure.³⁶⁸ In addition, it may assist in discovering ‘systemic tensions’ in international criminal procedure.³⁶⁹ Since international criminal procedure is far from static, references to these families may also help to explain the evolution of international criminal procedure.³⁷⁰ As a caveat, it is important for one to consider that domestic criminal justice systems were developed in response to a certain socio-political climate. For this reason, one must consider the different context and goals of international criminal procedure in applying common law – civil law terminology.

This is also the extent to which this dichotomy will be utilised in this dissertation. In addition, attention will be given to the important contribution by the ECtHR’s jurisprudence in developing a “common grammar” of principles that can be accommodated by both

criminal procedure, “[u]nderstanding domestic criminal theory is a prerequisite”). Similarly: M. FAIRLIE, *The Marriage of Common and Continental Law at the ICTY*, in «International Criminal Law Review», Vol. 4, 2004, p. 247 (holding that without an understanding of the manner in which a system protects the rights of the accused, it would not be possible to appreciate the effect transplanting a feature of one particular system would have on the fairness of international criminal procedure).

³⁶⁷ As an example for such undertaking, consider A. ESER, *The “Adversarial” Procedure: A Model Superior to Other Trial Systems in International Criminal Justice? Reflections of a Judge*, in T. KREUSMANN (ed.), *ICTY: Towards a Fair Trial?*, Antwerp, Intersentia, 2009, p. 208.

³⁶⁸ G. SLUITER, *The Law of International Criminal Procedure and Domestic War Crimes Trials*, in «International Criminal Law Review», Vol. 6, 2006, p. 611 (but the author agrees that certain risks are inherent in its use: oversimplification, or the downplaying of the societal and cultural aspect of these models). Conversely, some authors have sought to criticize international criminal procedure scholarship for not engaging in a dialogue with national criminal law scholarship. See S. BIBAS and W.W. BURKE-WHITE, *International Idealism Meets Domestic-Criminal Procedure Realism*, in «Duke Law Journal», 2010, p. 641 (“international criminal procedure [scholarship] has largely overlooked the structural, institutional, and political lessons it could glean from domestic-criminal-procedure scholarship”).

³⁶⁹ Consider in general P.L. ROBINSON, *Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY*, in «Journal of International Criminal Justice», Vol. 3, 2005, pp. 1037 - 1058.

³⁷⁰ M. LANGER, *The Rise of Managerial Judging in International Criminal Law*, in «American Journal of Comparative Law», Vol. 53, 2005, p. 840.

traditions.³⁷¹ Among others, these include broader concepts such as the principle of equality of arms or of adversarial proceedings. So conceived, these principles may offer a better measure for a normative assessment of international criminal procedure. The question then becomes to what extent international criminal procedure is in agreement with these 'neutral' principles.³⁷² The extent to which the international(ised) criminal tribunals are bound by international human rights was discussed above.³⁷³

There are important differences between the conduct of investigations in the 'common law' and 'civil law' types of criminal proceedings. The inquisitorial ideal-type investigation is structured as an official inquest, involving detached and impartial investigators, who act as 'organs of justice'.³⁷⁴ The rationale for the involvement of state officials in the preliminary investigation is the idea that optimal investigative strategies require an independent viewpoint, instead of a narrow partisan perspective.³⁷⁵ This is based on the belief that the 'objective truth' can only be established when the investigation is assigned to non-partisan investigators.³⁷⁶ Where parties may have reasons to conceal the truth, this investigation is best left in the hands of state officials.³⁷⁷ Hence, the role of the Defence is traditionally limited.³⁷⁸

³⁷¹ J. JACKSON, Finding the Best Epistemic Fit for International Criminal Tribunals, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 23.

³⁷² *Ibid.*, pp. 23 – 24.

³⁷³ See *supra*, Chapter 2, III.

³⁷⁴ N. JÖRG, S. FIELDS and C. BRANTS, Are Inquisitorial and Adversarial Systems Converging?, in P. FENNELL, C. HARDING, N. JÖRG and B. SWART (eds.), *Criminal Justice in Europe, a Comparative Study*, Oxford, Clarendon Press, 1995, p. 47; M. LANGER, The Rise of Managerial Judging in International Criminal Law, in «American Journal of Comparative Law», Vol. 53, 2005, pp. 839, 842.

³⁷⁵ M.R. DAMAŠKA, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, New Haven and London, Yale University Press, 1986, pp. 161- 162 (DAMAŠKA adds that "officials in charge of the proceedings will refuse to rely exclusively, or even principally, upon informational channels carved by persons whose interests are affected by the prospective decision").

³⁷⁶ Underlying the concept of 'objective truth' lies the belief that an objective construction of the reality is possible. Consider GRANDE, who speaks in this regard of the 'ontological truth' (which is distinguished from the 'interpretive truth', based on the belief that "a truly non-partisan approach in searching for the truth is unachievable in the human world"). See E. GRANDE, *Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth*, in J. JACKSON, M. LANGER and P. TILLERS (eds.), *Crime, Procedure and Evidence in a Comparative and International Context. Essays in Honour of Professor Mirjam Damaška*, Oxford and Portland, Oregon, Hart Publishing, 2008, p. 147.

³⁷⁷ N. JÖRG, S. FIELDS and C. BRANTS, Are Inquisitorial and Adversarial Systems Converging?, in P. FENNELL, C. HARDING, N. JÖRG and B. SWART (eds.), *Criminal Justice in Europe, a Comparative Study*, Oxford, Clarendon Press, 1995, p. 43.

³⁷⁸ But consider on Germany: T. WEIGEND and F. SALDITT, The Investigative Stage of the Criminal Process in Germany, in E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN (eds.), *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, Antwerpen – Oxford, Intersentia, 2007, p. 91 (noting that, although the criminal code is silent on this issue, the Defence is not prevented from conducting its own investigations, may interview witnesses before trial or summon them at trial. Where compulsory measures are required, the Defence may request the *Ermittlungsrichter* or the Prosecutor to take evidence).

Rather than expecting the Defence to organise a full-fledged investigation, the Defence's role during the investigation is restricted to safeguarding the interests of the suspect or accused person and checking whether state officials stick to these rules. Often, the Defence can request the Prosecutor or Investigating Judge to conduct a particular investigative act.³⁷⁹ Whereas the defendant only represents his or her own personal interest, the Prosecutor represents the public interest.³⁸⁰ The Prosecutor fulfils a leading role in the investigation as well as in the prosecution of the crimes.³⁸¹ Some criminal justice systems reserve a role for an investigating magistrate for the most serious crimes. However, when the investigating magistrate takes the lead over the investigation, he or she often does not participate from the very beginning of the investigation. Likewise, the judicial investigation is normally preceded by a preliminary investigation.³⁸² Overall, in civil law criminal justice systems, the pre-trial investigative process is considered the best way to discover the truth.³⁸³ A written dossier connects the officials working on the case and documents all stages of the proceedings.³⁸⁴

It will be shown in Chapter 3 how aspects of this model can be most clearly discerned in the ECCC's investigation scheme.³⁸⁵ There is some question as to the aptness of this style of proceedings---with a protracted judicial investigation and a shorter trial---for the mass criminality the international(ised) criminal courts and tribunals are dealing with. Regarding the ECCC, some commentators argue that the huge emphasis on the judicial investigation leads to "bottle-neck problems", and places an immense burden on the Co-Investigating

³⁷⁹ M. LANGER, *The Rise of Managerial Judging in International Criminal Law*, in «American Journal of Comparative Law», Vol. 53, 2005, p. 840; N. JÖRG, S. FIELDS and C. BRANTS, *Are Inquisitorial and Adversarial Systems Converging?*, in P. FENNELL, C. HARDING, N. JÖRG and B. SWART (eds.), *Criminal Justice in Europe, a Comparative Study*, Oxford, Clarendon Press, 1995, p. 47. For Belgium, consider Article 61*quinquies* of the *Code d'instruction criminelle – Wetboek van Strafvordering (Sv.)* (right of the suspect and the *partie civile* (burgerlijke partij) to request additional investigative actions); for France, consider Articles 81-9 of the C.P.P.

³⁸⁰ On Belgium, consider Constitutional Court, Decision 58/98, 27 May 1998, B.3. (According to the Constitutional Court, this difference justifies the specific prerogatives enjoyed by the Prosecutor in the course of the investigation); Constitutional Court, Decision No. 82/94, 1 December 1994, B.4. On France, consider V. DERVIEUX, *The French System*, in M. DELMAS-MARTY and J.R. SPENCER (eds.), *European Criminal Procedure*, Cambridge, Cambridge University Press, 2002, p. 223.

³⁸¹ For example, with regard to Germany, consider §152 (1) StPO (according to which the Prosecutor should file criminal accusations) and §161 (1) StPO (obligation incumbent on the Prosecutor's office to investigate where it has learnt of a suspicion that a crime has been committed). The conduct of investigative acts is often delegated to the police (§161 (1) StPO).

³⁸² S. FIELD and A. WEST, *Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pre-Trial Criminal Law Process*, in «Criminal Law Forum», Vol. 14, 2003, p. 263.

³⁸³ P.C. KEEN, *Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals*, in «Leiden Journal of International Law», Vol. 17, 2004, p. 772.

³⁸⁴ M. LANGER, *The Rise of Managerial Judging in International Criminal Law*, in «American Journal of Comparative Law», Vol. 53, 2005, p. 847.

³⁸⁵ See *infra*, Chapter 3, I.3.3.

Judges.³⁸⁶ In addition, the confidential character of the judicial investigation prevents the public from observing and learning from the proceedings.³⁸⁷ Furthermore, it is alleged that such a style of proceedings is not suitable because of the political dimension involved in the cases these international institutions are dealing with.³⁸⁸

Conversely, in adversarial criminal justice systems, proceedings are shaped as a party-controlled contest, and the parties are required to gather their own evidence.³⁸⁹ These systems adopt the view that there is no ‘objective truth’. Therefore, the regulation of the pre-trial process is limited.³⁹⁰ The common law model traditionally encompasses a partisan prosecutor, who investigates his or her own case and a defence having procedurally equal investigative tools in order to enable it to autonomously investigate the case.³⁹¹ The police traditionally independently bear the responsibility for conducting investigations without supervision.³⁹² In England and Wales, for example, the Prosecutor (the Crown Prosecution Service (‘CPS’)) only plays a limited role during the investigation phase.³⁹³ While prosecutors have no

³⁸⁶ J.D. CIORCIARI and A. HEINDEL, Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal, June 2013, pp. 9 - 10 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=22699 25, last visited 10 February 2014).

³⁸⁷ Rule 56 (1) ECCC IR. *Ibid.*, pp. 9, 23; A. BATES, Transitional Justice in Cambodia, Analytical Report, 2010, p. 46 (http://projetatlas.univ-paris1.fr/IMG/pdf/ATLAS_Cambodia_Report_FINAL_EDITS_Feb2011.pdf, last visited 10 February 2014).

³⁸⁸ Interview with a Defence Counsel at the SCSL, SCSL-04, Freetown, 19-20 October 2009, pp. 8-9 (“Because I did not grow up with it, I do not necessarily understand why people think that it would be fair, when it seems to hinge very much on the Co-Investigating Judges. I would be unwilling to trust an Investigating Judge, because the truth is, as you can see from the Special Court, that Judges do have bents to them”).

³⁸⁹ N. JÖRG, S. FIELDS and C. BRANTS, Are Inquisitorial and Adversarial Systems Converging?, in P. FENNEL, C. HARDING, N. JÖRG and B. SWART (eds.), Criminal Justice in Europe, a Comparative Study, Oxford, Clarendon Press, 1995, p. 48; M. LANGER, The Rise of Managerial Judging in International Criminal Law, in «American Journal of Comparative Law», Vol. 53, 2005, pp. 839, 842, 851.

³⁹⁰ N. JÖRG, S. FIELDS and C. BRANTS, Are Inquisitorial and Adversarial Systems Converging?, in P. FENNEL, C. HARDING, N. JÖRG and B. SWART (eds.), Criminal Justice in Europe, a Comparative Study, Oxford, Clarendon Press, 1995, p. 48. Nevertheless, the regulation of the pre-trial phase is increasing, both to obstruct the police’s capacity to construct its case and to assist the suspects and accused persons in building theirs (*ibid.*, p. 49).

³⁹¹ As far as defence investigations are concerned, it should be noted that the ‘expectation’ that the defence conducts a separate investigation, does not mean that such corresponds to the actual practice. Consider in that regard: S. FIELD and A. WEST, Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pre-Trial Criminal Law Process, in «Criminal Law Forum», Vol. 14, 2003, pp. 261 – 262 (referring to research conducted in England showing a failure by defence counsel “to play the extensive, autonomous investigative role the adversarial system demanded of them”). See M. MCCONVILLE, J. HODGSON, L. BRIDGES and A. PAVLOVIC, Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain, Oxford, Clarendon Press, 1994.

³⁹² M. FAIRLIE, The Marriage of Common and Continental Law at the ICTY, in «International Criminal Law Review», Vol. 4, 2004, p. 250; P.C. KEEN, Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals, in «Leiden Journal of International Law», Vol. 17, 2004, p. 771.

³⁹³ Consider E. CAPE and J. HODGSON, The Investigative Stage of the Criminal Process in England and Wales, in E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN (eds.), Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union, Antwerpen – Oxford,

investigative powers and, in general, do not have authority over the police investigations, they may suggest or advise certain lines of investigation.³⁹⁴ In turn, investigative powers for the defence are nowhere explicitly provided for. While the defence holds the power to conduct its own investigations, corresponding formal powers are lacking and public funding is limited.³⁹⁵ Judicial intervention only takes place at the pre-trial stage when the person's interests cannot be protected in another way.³⁹⁶ Foremost, the judge intervenes when coercive measures are needed in the course of the investigation.³⁹⁷ No judicial control is exercised over the quality of the evidence gathered at the pre-trial stage.³⁹⁸

V. A MYRIAD OF PROFESSED GOALS

In order to better understand and define international criminal procedure, it is necessary to address the ends that it is intended to serve.³⁹⁹ Furthermore, normatively, any inquiry on what international criminal procedure should look like should take the goals of such an order into consideration.⁴⁰⁰ Therefore, it is appropriate to provide a brief consideration of the goals of

Intersentia, 2007, p. 59. The conduct of investigations is regulated by the Police and Evidence Act (PACE) of 1984 and the Codes of Conduct supplementing it.

³⁹⁴ *Ibid.*, p. 61.

³⁹⁵ *Ibid.*, p. 76 (noting that defence investigations are normally limited to the interviewing of witnesses who are willing to cooperate); J.R. SPENCER, Evidence, in M. DELMAS-MARTY and J.R. SPENCER (eds.), *European Criminal Procedure*, Cambridge, Cambridge University Press, 2002, p. 626 (in referring to the position of the defence in English criminal proceedings, the author notes that “[i]n theory the two parties, the police and defence, are able to dig out their own evidence; but in reality it is only the police who have any spades with which to dig.” SPENCER adds that “[i]n the great majority of cases the defence have too little money to carry out their own investigations, even if they obtain legal aid.” “The truth, unfortunately, is that in England the duty to look for evidence for the defence belongs to nobody.” The author notes that the creation of a public defender may resolve the inequality between the parties in the conduct of investigations). In a similar vein, P.C. KEEN, *Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals*, in «*Leiden Journal of International Law*», Vol. 17, 2004, p. 771.

³⁹⁶ S. GLESS, Functions and Constitution of the Court at the Pre-Trial and Trial Phase, in ESER and RABENSTEIN (eds.), *Strafjustiz im Spannungsfeld von Effizienz und Fairness*, Berlin, Dunker & Humblot, 2004, p. 345.

³⁹⁷ Although a judicial authorisation is not always required for coercive measures, *e.g.* under English law, obtaining a judicial authorisation is normally a requirement for the execution of searches. However, there are many exceptions to that rule, for example section 17 PACE 1984 (arrestable offences), section 18 PACE 1984 or section 32 (2) (b) PACE 1984.

³⁹⁸ However, arguably, indirect control exists by the application by judges of evidence rules in preparation of the trial or at trial. Consider S. GLESS, Functions and Constitution of the Court at the Pre-Trial and Trial Phase, in ESER and RABENSTEIN (eds.), *Strafjustiz im Spannungsfeld von Effizienz und Fairness*, Berlin, Dunker & Humblot, 2004, p. 346.

³⁹⁹ As argued by SWART, Damaška's 'Faces of Justice' may be instructive in this regard where it argues that a “direct and reciprocal relationship is posited to exist between ends and means in the conflict-solving and policy implementing ideals types of proceedings.” See B. SWART, Damaška and the Face of International Criminal Justice, in «*Journal of International Criminal Justice*», Vol. 6, 2008, p. 99.

⁴⁰⁰ F. MÉGRET, Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure, in «*UCLA Journal of International Law & Foreign Affairs*», Vol. 37, 2009, p. 76.

international criminal procedure. The intended objectives of international criminal justice and international criminal procedure are discussed below; *not* how these objectives ought to be considered by the Judges or other actors in the interpretation and application of the law.⁴⁰¹ The exact goals that international criminal justice is intended to serve remain open to debate.⁴⁰² While the official documents of international criminal courts only contain limited references to the goals of these institutions, long lists of goals that these courts are expected to fulfil can be found elsewhere.⁴⁰³

At the outset, it is clear that international criminal tribunals pursue a plethora of goals. One commentator even refers to an ‘overabundance’ of goals.⁴⁰⁴ One can agree with ESER who, in

⁴⁰¹ Compare M. KLAMBERG, What are the Objectives of International Criminal Procedure? – Reflections on the Fragmentation of a Legal Regime, in «Nordic Journal of International Law», Vol. 79, 2010, pp. 283, 293 (and following) (suggesting that the judge should undertake three steps in interpreting and applying a rule; to know (1) an inventory of the objectives which press for recognition; (2) the identification of whether and to what extent any or all of the objectives are recognized by the applicable law and (3) the weighing and balancing of competing interests).

⁴⁰² Consider e.g. J. JACKSON, Finding the Best Epistemic Fit for International Criminal Tribunals, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 22.

⁴⁰³ For the ICTY, consider e.g. U.N. Security Council Resolution 808 (1993), U.N. Doc. S/RES/808, 3 May 1993, par. 8 – 9 (referring to the aim to ‘end the crimes committed and bring persons responsible to justice’, and to ‘contribute to the restoring and maintaining peace’); U.N. Security Council Resolution 827 (1993), U.N. Doc. S/RES/827, 25 May 1993, par. 5 – 7 (adding the goal of “ensuring that such violations are halted and effectively redressed”); U.N. Security Council Resolution 955 (1994), U.N. Doc. S/RES/955, 8 November 1994, par. 6 – 7 (which, in addition to the aforementioned goals, also refers to the goal to ‘contribute to the process of national reconciliation’); First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/49/342-S/1994/1007, 29 August 1994, par. 12 – 16 (including the goals of bringing to justice the persons who are responsible for crimes perpetrated in the former Yugoslavia; to contribute to ensuring that such violations of international humanitarian law are halted and effectively redressed; to restore the rule of law and to contribute to the restoration and maintenance of peace as well as promoting reconciliation and restoring true peace. Consider also U.N., Secretary-General, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General, U.N. Doc. S/2004/616, 23 August 2004, par. 38 (“The United Nations has established or contributed to the establishment of a wide range of special criminal tribunals. In doing so, it has sought to advance a number of objectives, among which are bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace”). Also the ICC Statute does not offer much guidance on the goals the ICC should achieve. Only one reference can be found in preambular paragraph 6 of the ICC Statute ‘to put an end to impunity for the perpetrators of [war crimes, crimes against humanity, genocide, and aggression] and thus to contribute to the prevention of such crimes’. Consider additionally M.M. DEGUZMAN, Choosing to Prosecute: Expressive Selection at the International Criminal Court, in «Michigan Journal of International Law», Vol. 33, 2012, p. 267 (“The ICC’s core selectivity problem is that the Court lacks sufficiently clear goals and priorities to justify its decisions”).

⁴⁰⁴ M. DAMAŠKA, What is the Point of International Criminal Justice, in «Chicago-Kent Law Review», Vol. 83, 2008, p. 331 (who contends that “[u]nlike Atlas, international criminal courts are not bodies of titanic strength, capable of carrying on their shoulders the burden of so many tasks”); M. DAMAŠKA, The International Criminal Court between Aspiration and Achievement, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, p. 22 (referring to the “almost grandiose” ambitions of international criminal law). For a long list of goals pursued by the ICTY, see M. SCHRAG, Lessons Learned from ICTY Experience,

relation to the ICTY's procedural legacy, questioned the scarcity of scholarly evaluations of the ICTY's procedures in light of the purposes of international criminal justice.⁴⁰⁵ It is argued here that the answer to this question lies in the evaluative shortcomings of these goals. Indeed, the usefulness of these goals of international criminal justice as a measure to evaluate international criminal procedure and the extent to which the procedural lay-out fits the objectives of these tribunals is limited. Therefore, these goals do not allow us to say much regarding the form that the proceedings *should* take in order to serve these goals. They also don't allow us to make firm choices regarding the procedural design of international criminal proceedings.⁴⁰⁶

These shortcomings are caused by the lack of any consensus on the (hierarchical) relationship between the goals pursued.⁴⁰⁷ Presently, it remains unresolved as to which objective(s) take precedent over others.⁴⁰⁸ Indeed, while it may be possible, on the basis of individual goals of international criminal justice, to say something meaningful on the manner that proceedings should be structured and how ends and means should be matched, different goals require different procedures and pull in different directions. Moreover, it remains to be seen whether and how far the many goals of international criminal justice are compatible which each

in «Journal of International Criminal Justice», Vol. 2, 2004, p. 428 (listing not less than fifteen goals of international criminal tribunals like the ICTY or the ICC).

⁴⁰⁵ A. ESER, Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY, in B. SWART, A. ZAHAR and G. SLUITER (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford, Oxford University Press, 2011, p. 109.

⁴⁰⁶ In this regard, it was shown by ESER that reflections on the aims of international criminal tribunals did not influence the choice for an adversarial model at the ICTY. He argues that “as a matter of principle it was like a birth defect in the development of the ICTY procedure that, beyond the intrinsic procedural goal of bringing the case to an end, [it] paid no due attention to the more far-reaching aims of international criminal justice.” See A. ESER, Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY, in B. SWART, A. ZAHAR and G. SLUITER (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford, Oxford University Press, 2011, p. 120.

⁴⁰⁷ Consider M. DAMAŠKA, What is the Point of International Criminal Justice, in «Chicago-Kent Law Review», Vol. 83, 2008, p. 330 (“no single goal can be found around which other objectives can be rigorously organized.” Hence, “perplexing ambiguities about the proper mission of international criminal courts persist”); M. KLAMBERG, What are the Objectives of International Criminal Procedure? – Reflections on the Fragmentation of a Legal Regime, in «Nordic Journal of International Law», Vol. 79, 2010, p. 301 (suggesting that to end impunity or to establish the truth may be an “overarching goal” at the macro-level (however, the author does not seem to distinguish here between objectives of international criminal procedure and of international criminal law or justice)).

⁴⁰⁸ Consider e.g. J.D. OHLIN, Goals of International Criminal Justice and International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 56 (“There is disagreement over which goal or goals should be primary and over the inclusion of some objectives on the list, although there is probably broad agreement over the outer contours of the list. The disagreement shows up primarily when one attempts to place a certain objective at the top of the list as the central objective of international criminal law”).

other.⁴⁰⁹ The different aims may well all require distinct procedural constellations.⁴¹⁰ A clear ranking order and understanding on the compatibility of different goals would facilitate the tailoring of the courts' procedural set-up to match the most important goals these courts are set to achieve.⁴¹¹ To further complicate matters, the objectives may even vary according to the stage of the proceedings.⁴¹²

⁴⁰⁹ M. DAMAŠKA, What is the Point of International Criminal Justice, in «Chicago-Kent Law Review», Vol. 83, 2008, p. 331 - 333 (who argues that the professed goals do not constitute a “harmonious whole”, but pull in different directions, diminishing each other’s power and creating tensions. Such tensions exist for example between the goal of ending the conflict and that of ending impunity or between the aim of producing an accurate historical record and that of individualising guilt or between the desire to be solicitous of accused procedural rights and providing satisfaction to the victim of the crime (*ibid.*, p. 333); M. SCHRAG, Lessons Learned from ICTY Experience, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 428 (referring to the inherent tension between some of these goals); A. ESER, Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY, in B. SWART, A. ZAHAR and G. SLUITER (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford, Oxford University Press, 2011, p. 117 (holding that ‘goals’, ‘means’ and ‘modes’ of international criminal justice may conflict); J. GALBRAITH, The Pace of International Criminal Justice, in «Michigan Journal of International Law», Vol. 31, 2009, p. 95 (noting that “there is uncertainty over whether the means of achieving the various aims of international criminal justice complement each other”); C. STEPHEN, International Criminal Law: Wielding the Sword of Universal Criminal Justice, in «International Criminal Law Quarterly», Vol. 61, 2012, pp. 62 – 63 (the author refers to the conflicting goals of international criminal law, which are ambitious but also contradictory).

⁴¹⁰ Consider e.g. J. GALBRAITH, The Pace of International Criminal Justice, in «Michigan Journal of International Law», Vol. 31, 2009, p. 83 (the author notes on the expeditiousness of proceedings that “[t]he different aims of international criminal justice also give rise to very different—and often directly contrary—suggestions on how to speed up international criminal justice. Thus, scholars and practitioners who emphasize the domestic criminal law strand call for speeding up international criminal justice by abandoning any conscious emphasis on historical record-building or helping transitioning societies achieve peace”).

⁴¹¹ A. ESER, Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY, in B. SWART, A. ZAHAR and G. SLUITER (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford, Oxford University Press, 2011, pp. 111, 148 (in referring to the ICTY, the author holds that “instead of choosing a model of domestic criminal justice of this or that provenience and trying here and there to make it fit to the special needs of international criminal justice, one should, without feeling bound to a certain traditional system, be keen enough to construct a procedure top-down, from the aims international criminal justice has to pursue”); F. MÉGRET, Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, p. 59 (holding that the international criminal tribunals should *first* indicate the goals of international criminal trials and *then* construe the methods to fit these, rather than the other way around); M. DAMAŠKA, What is the Point of International Criminal Justice, in «Chicago-Kent Law Review», Vol. 83, 2008, p. 339. However, the author concedes that a clear ranking order of objectives does also not exist in domestic criminal justice systems (*ibid.*, p. 340).

⁴¹² M. KLAMBERG, What are the Objectives of International Criminal Procedure? – Reflections on the Fragmentation of a Legal Regime, in «Nordic Journal of International Law», Vol. 79, 2010, pp. 285, 294 - 296 (the author speaks of a “differential functional approach”, which implies that “[t]he relevant objective which may determine the outcome of a hard case var[ies] depending on the procedural stage, and in each procedural stage there is a structural bias towards one or several objectives.” He proposes a division between the collection of evidence, arrest proceedings, the proceedings prior to confirmation of the charges and the presentation of evidence. According to the author, “there is a structural bias for a certain objective in relation to a given procedural stage”).

Notwithstanding these various uncertainties related to the goals of international criminal justice---and while a deficit still remains to be filled⁴¹³---, it is comforting to see that scholarly writing has begun to address the relationship between goals and international criminal procedure.⁴¹⁴ Besides, several authors have attempted to structure these different goals. The benefit of such undertakings is in their structuring capacity.⁴¹⁵ Firstly, many commentators distinguish between those goals that international criminal justice has in common with domestic criminal justice systems and those goals that are peculiar to international criminal justice.⁴¹⁶ The former category includes the goals of holding the perpetrator accountable, retribution,⁴¹⁷ deterrence (special and general),⁴¹⁸ and rehabilitation.⁴¹⁹ Since these traditional goals are shared by virtually all national criminal justice systems, they do not allow us to say much on how international criminal investigations and proceedings should be designed. Among others, they do not allow us to choose between a civil law or common law style of proceedings.⁴²⁰

The latter category of objectives is of greater interest.⁴²¹ These goals are far more ambitious. While there is no agreement as to what goals are to be included in this category, it includes the goals of changing a culture of impunity, re-establishing the rule of law⁴²², contributing to

⁴¹³ Confirming, consider e.g. D.S. KOLLER, The Faith of the International Criminal Lawyer, in «International Law and Politics», Vol. 40, 2008, p. 1020 (“to date there has been little exploration, empirical or theoretical, of either the ultimate goals of international criminal law or the ability of courts and the tribunals to achieve these goals”).

⁴¹⁴ See the references in the footnotes of this section.

⁴¹⁵ A. ESER, Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY, in B. SWART, A. ZAHAR and G. SLUITER (eds.), The Legacy of the International Criminal Tribunal for the Former Yugoslavia, Oxford, Oxford University Press, 2011, p. 115.

⁴¹⁶ Consider e.g. D.S. KOLLER, The Faith of the International Criminal Lawyer, in «International Law and Politics», Vol. 40, 2008, p. 1024 (noting that such should not surprise where international criminal justice is intended to complement national criminal law); B. SWART, International Criminal Justice and Models of the Judicial Process, in G. SLUITER and S. VASILIEV (eds.), International Criminal Procedure: Towards a Coherent Body of Law, London, Cameron May, 2009, p. 102.

⁴¹⁷ Consider e.g. ICTY, Judgment, *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, T. Ch. II, 14 January 2000, par. 848.

⁴¹⁸ See e.g. ICTY, Judgement, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, A. Ch., 24 March 2000, par. 185 (referring to general deterrence and retribution in relation to sentencing); ICTY, Judgment, *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, T. Ch. II, 14 January 2000, par. 848.

⁴¹⁹ See e.g. ICTY, Judgment, *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, T. Ch. II, 14 January 2000, par. 849.

⁴²⁰ B. SWART, Damaška and the Face of International Criminal Justice, in «Journal of International Criminal Justice», Vol. 6, 2008, p. 101.

⁴²¹ J. GALBRAITH, The Pace of International Criminal Justice, in «Michigan Journal of International Law», Vol. 31, 2009, p. 88; B. SWART, Damaška and the Face of International Criminal Justice, in «Journal of International Criminal Justice», Vol. 6, 2008, p. 101.

⁴²² Consider e.g. ICTY, Sentencing Judgement, *Prosecutor v. Nikolić*, Case No. IT-02-60/1-S, T. Ch. I (Section A), 2 December 2003, par. 89 (“it is hoped that the Tribunal and other international courts are bringing about the

the restoration and maintenance of (international) peace and security⁴²³, providing a complete historical record⁴²⁴, promoting (national) reconciliation⁴²⁵, giving a voice to the victims⁴²⁶,

development of a culture of *respect* for the rule of law and not simply the *fear* of the consequences of breaking the law, and thereby deterring the commission of crimes”). See also X, The Promises of International Prosecution, in «Harvard Law Review», Vol. 114, 2001, p. 1966.

⁴²³ Consider e.g. ICTY, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v. Blaškić*, Case No. IT-95-14, A. Ch., 29 October 1997, par. 18; ICTY, Dissenting Opinion of Judge Rodrigues, Presiding Judge of the Trial Chamber, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, T. Ch. I, 25 June 1999, par. 54 (noting that the duty of the Judges is to contribute to reconciliation and the restoration of the peace in the former Yugoslavia); ICTY, Sentencing Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-Tbis-R117, T. Ch. II, 11 November 1999, par. 7 (considering this factor in sentencing); ICTY, Sentencing Judgement, *Prosecutor v. M. Nikolić*, Case No. IT-02-60/1-S, T. Ch. I (Section A), 2 December 2003, par. 60.

⁴²⁴ This goal was emphasised, e.g., in ICTY, Sentencing Judgement, *Prosecutor v. M. Nikolić*, Case No. IT-02-60/1-S, T. Ch. I (Section A), 2 December 2003, par. 60. However, as far as the ICTY is concerned, various procedural amendments which were later adopted in the context of the completion strategy, have reduced the possibilities for such history-recording (consider, for example, the power for the ICTY Trial Chamber under Rule 73bis (D) and (E) to direct the Prosecutor to select the counts in the indictment on which to proceed, as required by a ‘fair and expeditious trial’ or to invite the Prosecutor to narrow the number of crime sites or incidents under one charge. Many commentators have affirmed this role of creating a complete historical record. Consider e.g. M. DAMAŠKA, The International Criminal Court between Aspiration and Achievement, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, p. 22; M. MARKOVIC, The ICC Prosecutor’s Missing Code of Conduct, in «Texas International Law Journal», Vol. 47, 2011 – 2012, p. 209; J. JACKSON, Finding the Best Epistemic Fit for International Criminal Tribunals, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 21 (noting that this goal is connected to the goal of achieving reconciliation); I. BONOMOY, The Reality of Conducting a War Crimes Trial, in «Journal of International Criminal Justice», Vol. 5, 2007, p. 353; M. FAIRLIE, The Marriage of Common and Continental Law at the ICTY, in «International Criminal Law Review», Vol. 4, 2004, p. 299; N. JAIN, Between the Scylla and Charybdis of Prosecution and Reconciliation: the Khmer Rouge Trials and the Promise of International Criminal Justice, in «Duke Journal of Comparative & International Law», Vol. 20, 2010, p. 267 (noting that some opponents of international criminal prosecutions have noted that “[m]echanisms such as truth commissions are seen as being able to provide a more accurate historical account of the causes and consequences of mass violence that would be difficult within the narrow confines of the traditional model of an adversarial criminal trial”); R. MAY and M. WIERDA, International Criminal Evidence, Ardsley, Transnational Publishers, 2002, p. 12; D. JOYCE, The Historical Function of International Criminal Trials, in «Nordic Journal of International Law», Vol. 73, 2004, pp. 461 - 484.

⁴²⁵ ICTY, Sentencing Judgement, *Prosecutor v. Erdemović*, Case No. IT-96-22-Tbis, T. Ch. II, 5 March 1998, par. 21 (the Trial Chamber refers to the duty of the tribunal “through its judicial functions, to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia. Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process”); ICTY, Judgement, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, T. Ch., 16 November 1998, par. 1203 (“Whenever the evidence demonstrates the possibility of reconciliation, it is the obligation of the Trial Chamber to accentuate such factors and give effect to them”); ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24, T. Ch. II, 31 July 2003, par. 940 (“The Trial Chamber opines that its broader mandate of promoting peace and reconciliation in the former Yugoslavia is best served by providing a full and accurate record, on the basis of the evidence, of the individuals who became victims of the crimes committed in Prijedor in 1992”). Consider also. M. DAMAŠKA, The International Criminal Court between Aspiration and Achievement, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, p. 23; J. D. OHLIN, A Meta-Theory of International Criminal Procedure, Vindicating the Rule of Law, in «UCLA Journal of International Law and Foreign Affairs», Vol. 14, 2009, p. 85; I. BONOMOY, The Reality of Conducting a War Crimes Trial, in «Journal of International Criminal Justice», Vol. 5, 2007, p. 353; J. JACKSON, Finding the Best Epistemic Fit for International Criminal Tribunals, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 21; A. ESER, Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY, in B. SWART, A. ZAHAR and G. SLUITER (eds.), The Legacy of the International Criminal Tribunal for the Former Yugoslavia, Oxford, Oxford University Press, 2011, p. 145 (suggesting that the ICTY procedural

and even serving an educational purpose,⁴²⁷ including propagating respect for human rights, also to national systems.⁴²⁸ It is doubtful whether these goals are observed in every trial.⁴²⁹

This brings us to a second useful distinction, made by SWART, between goals of international criminal justice pursued at the ‘macro level’ and those pursued at the ‘micro level’.⁴³⁰ The micro level refers to the question of whether and to what extent the goals of international criminal justice are pursued in individual proceedings. In turn, the macro level refers to the extent to which the system of international criminal justice is able to achieve these goals at the general level. This depends on such factors as, among others, the general ability to investigate or the public’s confidence in the tribunal. SWART argues that it is mainly at the former level that the question of the relationship between the goals pursued and the shape of the proceedings becomes relevant.⁴³¹

More recently, commentators have sought to distinguish between the goals of international criminal justice and the goals of international criminal *procedure*.⁴³² While these two categories of goals are naturally linked to each other, it would be wrong to assume that they

framework contains some features which may impair or interfere with its goal to facilitate reconciliation); S. BOURGON, *Procedural Problems Hindering Expeditious and Fair Justice*, in «Journal of International Criminal Justice», Vol. 2, 2004, pp. 527, 532 (noting with regard to the ICTY that “[d]uring this period, the Tribunal has failed to produce the desired results, especially with respect to *reconciliation*”).

⁴²⁶ Consider e.g. C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, p. 69; M. SCHRAG, *Lessons Learned from ICTY Experience*, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 429.

⁴²⁷ See e.g. ICTY, *Judgement, Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, A. Ch., 24 March 2000, par. 185 (the Appeals Chamber holds that the sentence should show “that the international community was not ready to tolerate serious violations of international humanitarian law and human rights”).

⁴²⁸ Y. MCDERMOTT, *Rights in Reverse: A Critical Analysis of Fair trial Rights under International Criminal Law*, p. 15 (“international criminal procedure has enormous potential to lead by example, in setting the highest possible standards for the fair conduct of proceedings domestically”); J.I. TURNER, *Policing International Prosecutors*, in «International Law and Politics», Vol. 45, 2013, pp. 205, 334.

⁴²⁹ A. ESER, *The “Adversarial” Procedure: A Model Superior to Other Trial Systems in International Criminal Justice? Reflections of a Judge*, in T. KREUSMANN (ed.), *ICTY: Towards a Fair Trial?*, Antwerp, Intersentia, 2009, p. 210.

⁴³⁰ B. SWART, *International Criminal Justice and Models of the Judicial Process*, in G. SLUITER and S. VASILIEV (eds.), *International Criminal Procedure: Towards a Coherent Body of Law*, London, Cameron May, 2009, p. 103. These are probably also the goals KOLLER refers to where he discerns more recent justifications for international criminal law, which the author labels “effects arguments” and which “seek to direct our attention to the broader consequences of trials.” See D.S. KOLLER, *The Faith of the International Criminal Lawyer*, in «International Law and Politics», Vol. 40, 2008, p. 1029 (the author includes peace and national reconciliation, delivery of justice to the victims, the establishment of a historical record or the isolation and marginalisation of leaders and other political actors).

⁴³¹ B. SWART, *International Criminal Justice and Models of the Judicial Process*, in G. SLUITER and S. VASILIEV (eds.), *International Criminal Procedure: Towards a Coherent Body of Law*, London, Cameron May, 2009, p. 103.

⁴³² J.D. OHLIN, *A Meta-Theory of International Criminal Procedure, Vindicating the Rule of Law*, in «UCLA Journal of International Law and Foreign Affairs», Vol. 14, 2009, p. 81.

are identical.⁴³³ Clearly, the goals of international criminal procedure should be well-suited for the goals of international criminal justice.⁴³⁴ Besides, and contrary to national criminal procedure where the purpose of criminal procedure lays in the execution of substantive criminal law, the goals of international criminal procedure surpass its purely instrumental function.⁴³⁵ While its *instrumental* value depends on the extent to which it serves the achievement of the goals of international criminal justice, the *intrinsic* value of international procedure refers to “benefits” of international criminal procedures that are “purely inherent and more or less independent of the larger goals of international criminal law”.⁴³⁶ These objectives may be particularly useful as indicators of how international criminal proceedings should be designed, insofar as they can assist in choosing the most appropriate structure for international criminal investigations and for proceedings in general.⁴³⁷ OHLIN distinguishes between two subcategories: (i) those that are instrumental and serve the objectives of international criminal justice (‘direct procedural aims’⁴³⁸) and (ii) those that refer to the intrinsic value of international criminal proceedings. The former category has been said to include such goals as the instrumental value of the procedure in determining the guilt or

⁴³³ *Ibid.*, p. 83; N. WEISBORD and M.A. SMITH, The Reason Behind the Rules: From Description to Normativity in International Criminal Procedure, in «North-Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2011, p. 2067 (“It makes intuitive sense that the purposes of international criminal procedure should be derivable from the purposes of international criminal justice”). See also the distinction made by SAFFERLING between purposes of international criminal *substantive* law and purposes of international criminal *procedure*: C. SAFFERLING, International Criminal Procedure, Oxford, Oxford University Press, 2012, pp. 64 – 80. Note that not all authors make such distinction. Consider e.g. M. DAMAŠKA, What is the Point of International Criminal Justice, in «Chicago-Kent Law Review», Vol. 83, 2008, pp. 331 – 339 (the author argues that the reconsideration of the goals of international criminal justice as a whole is required, rather than the goals of international criminal procedure more specific).

⁴³⁴ H. TAKEMURA, Prosecutorial Discretion in International Criminal Justice: Between Fragmentation and Unification, in L. VAN DEN HERIK and C. STAHN (eds.), The Diversification and Fragmentation of International Criminal Law, Leiden, Martinus Nijhoff Publishers, 2012, p. 634.

⁴³⁵ Consider OHLIN, who argues that a purely instrumental view to international criminal procedure is too narrow and downplays its ‘rule of law’ aspect. See J.D. OHLIN, A Meta-Theory of International Criminal Procedure, Vindicating the Rule of Law, in «UCLA Journal of International Law and Foreign Affairs», Vol. 14, 2009, p. 81; J.D. OHLIN, Goals of International Criminal Justice and International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), International Criminal Procedure: Principles and Rules, Oxford, Oxford University Press, 2013, p. 55. Compare C. SAFFERLING, International Criminal Procedure, Oxford, Oxford University Press, 2012, p. 64 (“It would be wrong to presume [...] that its [procedural law] only meaning lies in the mere execution of the substantive law”).

⁴³⁶ J.D. OHLIN, Goals of International Criminal Justice and International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), International Criminal Procedure: Principles and Rules, Oxford, Oxford University Press, 2013, p. 55.

⁴³⁷ J. JACKSON, Finding the Best Epistemic Fit for International Criminal Tribunals, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 20 (“In the absence of international structures of government that might assist in the choice of procedure, one has to develop structures that accord best with the objectives that have been set by the international community for international criminal justice”).

⁴³⁸ Compare C. SAFFERLING, International Criminal Procedure, Oxford, Oxford University Press, 2012, p. 74.

innocence through a fair procedure⁴³⁹, historical truth finding⁴⁴⁰, due process protection⁴⁴¹, structured victim participation⁴⁴² and standard setting for national jurisdictions.⁴⁴³ It has been said to even include such rights as the right to an efficient trial,⁴⁴⁴ to expeditious proceedings,⁴⁴⁵ or state sovereignty.⁴⁴⁶ In turn, the latter category refers to the re-establishment of the rule of law by ending impunity and reaffirming human rights norms.⁴⁴⁷ This reaffirmation of respect for the rule of law is closely related to the establishment of a historical record or any didactic function of international criminal justice.⁴⁴⁸

However, it is doubtful as to whether all of the goals enumerated above can firmly be established as goals. For example, the goal of a fair, expeditious and efficient trial is informative as to the manner in which proceedings are to be organised to achieve the goals set forward but this hardly qualifies as a goal itself.⁴⁴⁹ In this regard, the distinction made by

⁴³⁹ J.D. OHLIN, Goals of International Criminal Justice and International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 61.

⁴⁴⁰ *Ibid.*, p. 62.

⁴⁴¹ *Ibid.*, p. 63. Compare N. WEISBORD and M.A. SMITH, The Reason Behind the Rules: From Description to Normativity in International Criminal Procedure, in «North-Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2011, pp. 257 – 259 (labelling ‘defence rights’ to be the first normative principle of international criminal procedure).

⁴⁴² According to OHLIN, where “victim participation, qua witness participation is unassailable as an essential and necessary element of the trial proceedings [...] it is possible to speak of structured victim participation as a universally accepted goal of international criminal procedure”). See J.D. OHLIN, Goals of International Criminal Justice and International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 64; Compare C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, p. 76.

⁴⁴³ J.D. OHLIN, Goals of International Criminal Justice and International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 66 (this now constitutes a core goal, which remains unrealized considering the nascent stage of international criminal procedure).

⁴⁴⁴ *Ibid.*, p. 66.

⁴⁴⁵ M. KLAMBERG, What are the Objectives of International Criminal Procedure? – Reflections on the Fragmentation of a Legal Regime, in «Nordic Journal of International Law», Vol. 79, 2010, p. 289 (which, as defined by the author, is broader than the right to be tried without undue delay and hearing within a reasonable time, but is also a guarantee of procedural economy and a guarantee for the victims).

⁴⁴⁶ *Ibid.*, p. 292.

⁴⁴⁷ J.D. OHLIN, Goals of International Criminal Justice and International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 66; C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, p. 76. In this regard, DRUMBL refers to the ‘expressive function’ of trials. See M. DRUMBL, *Atrocity, Punishment, and International Law*, Cambridge, Cambridge University Press, 2007, p. 173.

⁴⁴⁸ *Ibid.*, p. 173.

⁴⁴⁹ A. ESER, Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY, in B. SWART, A. ZAHAR and G. SLUITER (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford, Oxford University Press, 2011, pp. 111, 132 (“fairness and expediency are merely the modes in which the proceedings are conducted and not their true aims. Trials are not performed for the sake of

ESER may be useful. He distinguishes between aims (ends for which international criminal tribunals are established), means (measures and instruments by which these goals are to be reached) and modes (the way this is to be done).⁴⁵⁰

More problematically, it is unclear as to whether the individual trial is a proper vehicle for the realisation of at least some of these peculiar goals of international criminal justice outlined above. Some commentators in the past have expressed doubts about the extent to which international criminal tribunals can realise them.⁴⁵¹ Besides, it has been argued that some of these goals risk interfering with the fairness of criminal proceedings.⁴⁵² For example, it has been argued that these trials are not suitable for history-recording.⁴⁵³ However, this is not the

providing a public platform for the judicial demonstration of fairness and expeditiousness”). However, admittedly, OHLIN labels the goal of conducting proceedings efficiently a ‘background goal’, which services other, substantive, goals. See J.D. OHLIN, *Goals of International Criminal Justice and International Criminal Procedure*, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 66.

⁴⁵⁰ A. ESER, *Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY*, in B. SWART, A. ZAHAR and G. SLUITER (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford, Oxford University Press, 2011, p. 115. Examples of means are the search for the truth and giving a voice to the victims. Examples of modes are fairness, efficiency, expediency, impartiality, transparency and public scrutiny (*ibid.*, pp. 116 – 117).

⁴⁵¹ A. CASSESE, *The ICTY, a Living and Vital Reality*, in «*Journal of International Criminal Justice*», Vol. 2, 2004, pp. 596 – 597 (“Nor has [the ICTY] significantly contributed to restoring peace or to reconciling the opposing ethnic and religious groups”); S. BOURGON, *Procedural Problems Hindering Expeditious and Fair Justice*, in «*Journal of International Criminal Justice*», Vol. 2, 2004, pp. 527, 532 (“During this period, the Tribunal has failed to produce the desired results, especially with respect to *reconciliation*”).

⁴⁵² K. BÁRD, *The Difficulties of Writing the Past Through Law – Historical Trials Revisited at the European Court of Human Rights*, in «*International Review of Penal Law*», Vol. 81, 2010, p. 36 (on historic trials); J. JACKSON, *Finding the Best Epistemic Fit for International Criminal Tribunals*, in «*Journal of International Criminal Justice*», Vol. 7, 2009, p. 22 (noting that “[t]he broader aims of truth-telling, reconciliation and establishing a historical record that have been proposed for international criminal justice would seem to clash with the need to deal swiftly with perpetrators to put an end to ongoing violence and conflict”).

⁴⁵³ See R.A. WILSON, *Judging History: The Historical Record of the International Tribunal for the Former Yugoslavia*, in «*Human Rights Quarterly*», Vol. 27, 2005, pp. 908 – 942; H. ARENDT, *Eichmann in Jerusalem: A Report on the Banality of Evil*, London, Penguin Books, 1994, p. 253 (“The purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes – “the making of a record of the Hitler regime which would withstand the test of history,” as Robert G. Storey, executive trial counsel at Nuremberg, formulated the supposed higher aims of the Nuremberg Trials—can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgement, and to mete out due punishment”). Consider also B. SWART, *Damaška and the Face of International Criminal Justice*, in «*Journal of International Criminal Justice*», Vol. 6, 2008, p. 102; C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, p. 79 (“the truth, which is being pursued in a criminal trial, is different from the historical truth in the sense of an accurate record of the conflict [...] the scope of the trial is limited as the presentation of the evidence mirrors the charges and the individual guilt of the accused and is not directed towards establishing historic facts”); S. BIBAS and W.W. BURKE-WHITE, *International Idealism Meets Domestic-Criminal Procedure Realism*, in «*Duke Law Journal*», 2010, p. 653 (“trials cannot create comprehensive historical records; historians, truth commissions, and commissions of inquiry are far better at that”). The findings of research by COMBS, suggesting that more than 50% of the prosecution witnesses testified in a manner inconsistent with their pre-trial witness statements may call into doubt the aptness of these proceedings for history recording. See N.A. COMBS, *Fact-Finding Without Facts. The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge, Cambridge University Press, 2010.

place to discuss this issue in detail. Suffice to say that the recording of the history can only be a by-product of the criminal proceedings.⁴⁵⁴ In general, some of the peculiar goals of international criminal justice, such as that of giving a voice to the victims, risk mixing retributive and restorative justice principles which do not fit well together.⁴⁵⁵

For the reasons outlined above, it has been argued that the number of goals pursued should be reduced.⁴⁵⁶ Simultaneously, some commentators have sought to single out one of these goals to put on top. For example, while DAMAŠKA agrees that providing a hierarchical order is impossible, he contends that the didactic function (or socio-pedagogical function) should be the highest goal.⁴⁵⁷ Tribunals “should aim their denunciatory judgments at strengthening a sense of accountability for international crime by exposure and stigmatization of these extreme forms of inhumanity.”⁴⁵⁸ However, DAMAŠKA cautions that positing the didactic function as the central aim of international criminal justice requires the attenuation of the bipolar organisation of proceedings.⁴⁵⁹ Alternatively, it could be held that more emphasis

⁴⁵⁴ A. ESER, Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY, in B. SWART, A. ZAHAR and G. SLUITER (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford, Oxford University Press, 2011, pp. 111, 147; D. OHLIN, Goals of International Criminal Justice and International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, pp. 62-63.

⁴⁵⁵ M. DAMAŠKA, What is the Point of International Criminal Justice, in «Chicago-Kent Law Review», Vol. 83, 2008, p. 343.

⁴⁵⁶ *Ibid.*, p. 340. Note that the author refers to the reduction of the goals of international criminal justice, rather than the more specific goals of international criminal procedure. However, he admits “that such a radical scaling-down of the functions of international criminal justice is presently not in the realm of the feasible.”; M. DAMAŠKA, The International Criminal Court between Aspiration and Achievement, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, p. 33. Consider additionally M. DAMAŠKA, The Competing Visions of Fairness: The Basic Choices for International Criminal Tribunals, in «North Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2010 – 2011, p. 376.

⁴⁵⁷ M. DAMAŠKA, What is the Point of International Criminal Justice, in «Chicago-Kent Law Review», Vol. 83, 2008, p. 343 and following; M. DAMAŠKA, The Competing Visions of Fairness: The Basic Choices for International Criminal Tribunals, in «North Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2010 – 2011, p. 377; M. DAMAŠKA, Should National and International Justice be Subjected to the same Evaluative Framework?, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 1419. Consider also M. SCHRAG, Lessons Learned from ICTY Experience, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 429 (who similarly argues that the didactic function should be given particular attention); C. DAVIDSON, May it Please the Court? The Role of Public Confidence, Public Order, and Public Opinion in Bail for International Criminal Defendants, in «Columbia Human Rights Law Review», Vol. 43, 2012, p. 406 (“teaching respect for human rights is one of international criminal justice’s primary functions”).

⁴⁵⁸ M. DAMAŠKA, What is the Point of International Criminal Justice, in «Chicago-Kent Law Review», Vol. 83, 2008, p. 345. At the same time, DAMAŠKA points to a number of challenges to such didactic function. For example, while a pronouncement may assist in advancing human rights at the global level, it may have negative effects in the state where the crimes were committed, which, in turn, may lead to fragmentation (*ibid.*, p. 347 - 349).

⁴⁵⁹ *Ibid.*, p. 357. Among others, allowing the Defence to mount its own case may weaken the didactic message and offers plenty of possibilities (in case of *pro se* defence) to mount ideas contrary to human rights. Besides, the

should be placed on creating an accurate historical record.⁴⁶⁰ Nevertheless, it has been indicated that even if such a goal has value in itself, “the record’s greater value lies in its importance for achieving other goals of the tribunal.”⁴⁶¹ For example, it may help reconciliation and peace and security by preventing future conflicts.⁴⁶² The other goals benefit from a process that can establish the historical truth as accurately as possible.⁴⁶³

From the above, it can be concluded that the evaluative potential of the goals of international criminal procedure is limited which is highly regrettable. In the substantive chapters to follow, it will be shown how the design of the procedural framework of international criminal investigations, every aspect of it, should be informed by the goals of international criminal justice.⁴⁶⁴ Nevertheless, as stated, this presupposes agreement on these goals and the hierarchy that exists between them. These shortcomings can be partly resolved if one were to consider the added goals of international criminal justice in isolation. These peculiar goals of international criminal justice have a strong policy-implementing character and may be better

didactic function prefers a situation whereby the human rights violations are exposed in open court, notwithstanding any confession of the accused.

⁴⁶⁰ Consider e.g. D. JOYCE, *The Historical Function of International Criminal Trials*, in «Nordic Journal of International Law», Vol. 73, 2004, pp. 461 - 484 (arguing that international criminal tribunals should understand the historic function underlying its trials). However, as noted above, some scholars are sceptic about any history-recording during trial. See *supra*, fn. 453 and accompanying text.

⁴⁶¹ G.A. MCCLELLAND, *A Non-Adversary Approach to International Criminal Tribunals*, in «Suffolk Transnational Law Review», Vol. 26, 2002, p. 5.

⁴⁶² M. DAMAŠKA, *What is the Point of International Criminal Justice*, in «Chicago-Kent Law Review», Vol. 83, 2008, p. 335.

⁴⁶³ B. SWART, *Damaška and the Face of International Criminal Justice*, in «Journal of International Criminal Justice», Vol. 6, 2008, p. 112.

⁴⁶⁴ This understanding is shared by a growing amount of scholarly writing. Consider e.g., in relation to the issue of provisional release: L. DAVIDSON, *No shortcuts on Human Rights: Bail and the International Criminal Trial*, in «American University Law Review», Vol. 60, 2010, p. 10 (“The law of provisional release at international criminal tribunals demonstrates the need to identify and prioritize achievable objectives of international criminal law. This decision on priorities should shape the provisional release regime used. If the primary objective of tribunals is to give victims a voice and to validate their suffering, then a very strict detention regime may be appropriate--the presumption of innocence and defendants' rights to liberty and a fair trial be damned. If human rights are the top priority, then the detention regime may look somewhat different”). Consider also, in general: J.I. TURNER, *Policing International Prosecutors*, in «International Law and Politics», Vol. 45, 2013, pp. 175 – 258 (on the procedural issue of how remedies and sanctions for prosecutorial misconduct should be adapted to the competing goals international criminal justice is intended to serve). More generally, consider N. WEISBORD and M.A. SMITH, *The Reason Behind the Rules: From Description to Normativity in International Criminal Procedure*, in «North-Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2011, p. 257 (“In order to avoid entangling the ICC in rules that are not tailored to fit its specific goals and institutional context, the normative purposes underlying procedural rules derived from domestic institutions should be re-examined. Where these premises do not match the specific situation of international tribunals, they and the rules based upon them should be discarded and replaced with new, deliberately defined premises and rules that owe their origins not to national systems, but to the dynamically evolving context of international criminal tribunals”).

served by an investigation shaped as an official inquest.⁴⁶⁵ If the investigation is left in the hands of the parties, they might want to conceal the truth.⁴⁶⁶ For example, when the parties gather evidence and identify and interview their witnesses, there is an inherent risk of 'evidence-selection' during the investigation phase in that unfavourable witness evidence is disregarded and no statement is recorded.⁴⁶⁷ As noted by DAMAŠKA, large and complex cases in particular are prone to such evidence-selection.⁴⁶⁸ If this is so, facts that are relevant from a historical perspective may remain unexamined.⁴⁶⁹ In this manner, the aim of history-recording may be hampered by a two-case approach since the truth might not always come out (because of incapability or unwillingness).⁴⁷⁰ As DAMAŠKA pointed out: "A legal process aimed at maximizing the goal of dispute resolution [as adversarial systems do] cannot simultaneously aspire to maximize accurate truth-finding." However, whether the above holds true for all of the peculiar goals of international criminal justice is open to discussion. For example, the aim of giving a voice to the victims may be better served by the oral presentation of evidence, which is more associated with the adversarial style of proceedings.⁴⁷¹

⁴⁶⁵ B. SWART, Damaška and the Face of International Criminal Justice, in «Journal of International Criminal Justice», Vol. 6, 2008, p. 107.

⁴⁶⁶ N. JÖRG, S. FIELDS and C. BRANTS, Are Inquisitorial and Adversarial Systems Converging?, in P. FENELL, C. HARDING, N. JÖRG and B. SWART (eds.), *Criminal Justice in Europe, a Comparative Study*, Oxford, Clarendon Press, 1995, p. 43.

⁴⁶⁷ A. ESER, Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY, in B. SWART, A. ZAHAR and G. SLUITER (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford, Oxford University Press, 2011, p. 123; Compare C. SCHUON, *International Criminal Procedure: A Clash of Legal Cultures*, The Hague, T.M.C. Asser Press, 2010, p. 9 (noting that civil law lawyers are critical about the fact that the ICTY's procedural framework may result in important witnesses not being called, or in important questions not being asked because the parties fear that such might discover facts which are not beneficial for their cases).

⁴⁶⁸ M. DAMAŠKA, What is the Point of International Criminal Justice, in «Chicago-Kent Law Review», Vol. 83, 2008, p. 337.

⁴⁶⁹ *Ibid.*, p. 337. DAMAŠKA notes that "the more complex the investigated question, the more partisan polarisation becomes a straightjacket to historians. This is because each party attempts to present and emphasize only evidence favorable to its claims, while playing down the rest. Now, as the pool of data of interest to a historian grows in size and complexity, so does the partisans' opportunity to select from the growing pool only data fitting their particular thesis."

⁴⁷⁰ M.R. DAMAŠKA, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, New Haven and London, Yale University Press, 1986, p. 22; J. JACKSON, Finding the Best Epistemic Fit for International Criminal Tribunals, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 22 (noting that it is not clear that the adversarial style would better serve the peculiar goals of international criminal justice).

⁴⁷¹ *Ibid.*, p. 21. Nevertheless, on the other hand, guilty pleas may lead to the voices of the victims being left out. Similarly, the chance to tell their story may be hampered by the rules of examination and cross-examination (*ibid.*, p. 22).

VI. VAGUENESS, BROAD POWERS AND THE PROCEDURAL PRINCIPLE OF LEGALITY

A recurrent theme throughout this dissertation will be the broad and vague formulation of the investigative powers of the Prosecution and the Defence.⁴⁷² As an example, reference can be made to the investigative powers of the Prosecutors of the *ad hoc* tribunals under their respective Statutes (Article 18 (2) ICTY Statute and Article 17 (2) ICTR Statute) which are ‘generic’ at best, and to the absence of expressly attributed investigative powers for the Defence.⁴⁷³ This raises the question as to whether, and if so, to what extent, a procedural principle of legality applies to international criminal procedure. It appears that most academic writings on investigations by international(ised) criminal tribunals or on international criminal procedure more broadly disregard this question. Discussions of the principle of legality are normally limited to the *nullum crimen sine lege* and *nullum poena sine lege* maxims. However, the third form of legality, ‘*nullum iudicium sine lege*’, or the procedural principle of legality, is mostly overlooked. It entails that the procedural rules should be established by law. In turn, this principle should be distinguished from and should not be confused with the procedural principle of legality in investigating and prosecuting cases (principle of mandatory prosecution).⁴⁷⁴

The procedural principle of legality is relevant to the legal basis and the degree of regulation required for investigative and prosecutorial powers.⁴⁷⁵ Typically associated with civil law criminal justice systems, where investigations are first and foremost considered to be the exercise of state authority, the procedural principle of legality demands that all investigative

⁴⁷² See e.g. Chapter 5, V.1.1.; Chapter 6, II.1. A tendency towards more detailed regulation can be noted.

⁴⁷³ For example, the power of the Prosecutor, pursuant to Rule 39 (ii) to ‘undertake such other matters as may appear necessary for completing the investigation’ seems rather to broaden the prosecutorial powers under Article 18 (2) ICTY Statute and 17 (2) ICTR Statute than to limit these and may even be referred to as “sweeping” (See L.C. VOHRAH, Pre-Trial Procedures and Practices, in G.K. MACDONALD and O.Q. SWAAK-GOLDMAN (eds.), *Substantive and Procedural Aspects of International Criminal Law: the Experience of International and National Courts*, Vol. I, The Hague, Kluwer Law International, 2000, p. 487). This is not to say that this problem would be unique to international criminal procedure. It shares the problem of under-regulation with international human rights law and with national criminal procedural law. It results in the overemphasising of efficiency over fairness in the investigative stage of proceedings. In this regard, fairness of trial phase follows from the unfairness of the investigation. See J.D. JACKSON and S.J. SUMMERS, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*, Cambridge, Cambridge University Press, 2012, pp. 100 – 101; S.J. SUMMERS, *Fair Trials: the European Criminal Procedural Tradition and the European Court of Human Rights*, Oxford, Hart Publishing, 2007, pp. 91 – 93.

⁴⁷⁴ Which will be discussed, *infra*, Chapter 3, II.

⁴⁷⁵ G. SLUITER, Trends in the Development of a Unified law of International Criminal Procedure, in C. STAHN and L. VAN DEN HERIK (eds.), *Future Perspectives on International Criminal Justice*, Cambridge, Cambridge University Press, 2010, p. 588.

activities have a strong and sufficiently precise legal basis.⁴⁷⁶ It is unknown to common law jurisdictions, which are characterised by less emphasis on codification and a greater role for ‘judge-made law’. Besides, in common law criminal justice systems, the trial phase is considered the most important phase of the proceedings with the investigation typically being unregulated. In these criminal justice systems, it is reasoned that a detailed legal framework is not always required for the protection of the rights and freedoms of individuals.⁴⁷⁷ Investigative methods that are not explicitly prohibited can be relied upon.⁴⁷⁸ However, it is clear that this picture needs a greater deal of nuance. For example, the *Strasbourg* jurisprudence led to the increased regulation of investigative powers in England and Wales.⁴⁷⁹

Even within civil law criminal justice systems, there is no uniform adherence to the procedural principle of legality. It can, for example, be found in the Dutch and the German criminal justice systems.⁴⁸⁰ It implies that criminal procedure can only be conducted in the manner provided by law.⁴⁸¹ It ensures legal certainty (by requiring the codification of investigative powers), equality before the law and serves to protect against the arbitrary exercise of power.⁴⁸² Under Dutch law, a statutory law enacted by an act of parliament is required. It follows that neither judges nor the executive are in a position to create procedural rules.⁴⁸³ Moreover, similar to the *lex certa* principle in substantive criminal law, it militates

⁴⁷⁶ *Ibid.*, p. 588.

⁴⁷⁷ E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN, *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, Intersentia, Oxford, 2007, pp. 66 - 67; B. DE SMET, *Internationale samenwerking in strafzaken tussen Angelsaksische en continentale landen*, Intersentia, Antwerpen – Groningen, 1999, p. 178. Consider the survey by BASSIOUNI: C. BASSIOUNI, *Human Rights in the Context of International Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, in «*Duke Journal of Comparative and International Law*», Vol. 3, 1993, pp. 272 – 273 (referring to 92 national constitutions containing “language guaranteeing procedures established by law.” The author notes that the requirement is often included together with the other aspects of the principle of legality. In other national constitutions, the right to pre-established procedures is only mentioned with regard to the deprivation of liberty).

⁴⁷⁸ G. SLUITER, *Trends in the Development of a Unified Law of International Criminal Procedure*, in C. STAHN and L. VAN DEN HERIK (eds.), *Future Perspectives on International Criminal Justice*, Cambridge, Cambridge University Press, 2010, p. 588.

⁴⁷⁹ See *infra*, Chapter 6, I.3.2.

⁴⁸⁰ In Dutch criminal procedure, the ‘principle of legality in criminal procedural law’ (‘or procedural principle of legality’) is to be found in Article 1 of the Dutch CCP.

⁴⁸¹ M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, p. 43.

⁴⁸² C.J.M. CORSTENS, *Het Nederlands Strafrechtsrecht*, Deventer, Kluwer, 2008, p. 15; P.A.M. MEVIS, *Capita Strafrecht*, Nijmegen, Ars Aequi, 2009, p. 20 (noting that some discretion should always be left to the judge, who has to apply the procedural rules to the particular case, and who should take into consideration different interests); M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, pp. 44, 46.

⁴⁸³ C.J.M. CORSTENS, *Het Nederlands Strafrechtsrecht*, Deventer, Kluwer, 2008, p. 15.

against vague, unclear and overly broad procedural regulations.⁴⁸⁴ It follows that a *qualitative* aspect is included in this notion. It requires a solid legal basis for all investigative powers which is sufficiently clear for individuals to know under what circumstances state authorities may use investigative powers against them.⁴⁸⁵ This includes, for example, a detailed regulation as to the officials empowered to conduct certain investigative measures, the duration thereof, etc.⁴⁸⁶ This principle is connected to the ‘codification principle’.⁴⁸⁷ Nevertheless, it has been noted that the principle has been given different interpretations in the literature and case law.⁴⁸⁸ HIRSCH BALLIN notes that, insofar as the Dutch principle of procedural legality reflects the rule of law by requiring a legal basis for government action that interferes with the rights and freedoms of individuals, it could be argued that only those governmental actions which interfere with rights and liberties are included.⁴⁸⁹ However, such a narrow conception entails, for example, that there would be no need to further define the investigative powers of the Defence or the participatory rights of victims during the investigation stage of proceedings. It is clear that in order to ensure legal protection and the integrity of the whole investigation phase, all aspects should have a legal basis.⁴⁹⁰

While this principle is often understood to be ‘fundamental’ to civil law criminal justice systems, the picture turns out to be more complicated. Several civil law countries do not embrace the procedural principle of legality. For example, French and Belgian criminal procedures are characterised by a *permissive rule*.⁴⁹¹ In these countries, it is reasoned that a detailed legal framework is not, in all instances, a prerequisite for the protection of the individuals’ rights and freedoms.⁴⁹² It follows that everything that has not been explicitly

⁴⁸⁴ *Ibid.*, p. 15.

⁴⁸⁵ M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, p. 46.

⁴⁸⁶ G. SLUITER, Trends in the Development of a Unified Law of International Criminal Procedure, in C. STAHN and L. VAN DEN HERIK (Eds.), *Future Perspectives on International Criminal Justice*, Cambridge, Cambridge University Press, 2010, p. 588.

⁴⁸⁷ P.A.M. MEVIS, *Capita Strafrecht*, Nijmegen, Ars Aequi, 2009, pp. 198, 200 (referring to the procedural principle of legality and the codification principle as the two important pillars underpinning the system of Dutch criminal procedure); M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, p. 44.

⁴⁸⁸ *Ibid.*, p. 45.

⁴⁸⁹ *Ibid.*, p. 45.

⁴⁹⁰ *Ibid.*, p. 45.

⁴⁹¹ B. DE SMET, *Internationale samenwerking in strafzaken tussen Angelsaksische en continentale landen*, Intersentia, Antwerpen – Groningen, 1999, p. 178 (in relation to the law of evidence, the author notes that this rule is linked to the flexible rules on evidence in these countries).

⁴⁹² *Ibid.*, p. 178.

prohibited is permitted.⁴⁹³ Hence, in investigating crimes and gathering evidence and information, law enforcement officials may, in principle, use all means that are not prohibited.⁴⁹⁴ As far as Belgian criminal procedure is concerned, there is a tension with Article 12 of the Belgian Constitution, according to which “[n]o one can be prosecuted except in the cases provided for by the law, *and in the form prescribed by the law.*”⁴⁹⁵ The notion is linked to the existence of implied powers. Such implied powers may encompass coercive measures. For example, the Belgian *Cour de cassation* held that the Prosecutor may trace a mobile phone by using geolocalisation in the absence of a judicial warrant and notwithstanding the absence of a legal basis to do so.⁴⁹⁶

However, this permissive rule in Belgian criminal procedural law is limited by other principles including principles of due administration of law (‘beginselen van behoorlijk strafprocesrecht’).⁴⁹⁷ Besides, Article 1 (3) of the Police Law (‘*Wet op het politieambt*’ – ‘*Loi sur la fonction de police*’) stipulates that the police can only use coercive measures as they have been defined by law. Furthermore, the jurisprudence of the *Strasbourg* Court should be interpreted as implying the abolition of the permissive rule regarding investigative powers insofar as they interfere with the rights and freedoms of individuals.⁴⁹⁸ Other authors even hold that a procedural principle of legality clearly emanates from the constitutional provisions outlined above and from the Police Law.⁴⁹⁹ In this regard, GOOSSENS pleads for the abolition of the permissive rule and the replacement thereof by a prohibiting rule.⁵⁰⁰

⁴⁹³ C. VAN DEN WYNGAERT, *Strafrecht en strafprocesrecht*, Maklu, Antwerpen-Apeldoorn, 2009, p. 879; G. BOURDOUX, E. DE RAEDT, M. DE MESMAEKER and A. LINERS, *De wet op het politieambt. Handboek van de politiefunctie*, Brussel, Politeia, 2010, p. 281; P. TRAEST, *Hard bewijs, wanneer is de rechter overtuigd?*, in J.-P. BAUTHIER, D. FLORE, A. MASSET, P. TRAEST and G. VERMEULEN (eds.), *Bewijs in strafzaken*, Brugge, die Keure, 2011, p. 66, fn. 16 (considering the free rules on evidence and in the absence of an exhaustive list of admissible forms of evidence, the law refers to evidence that is not prohibited by law, which reflects the existence of a permissive rule).

⁴⁹⁴ C. VAN DEN WYNGAERT, *Strafrecht en strafprocesrecht*, Maklu, Antwerpen-Apeldoorn, 2009, p. 879.

⁴⁹⁵ Emphasis added. A principle of procedural legality can also be found in Article 15 of the Constitution (inviolability of homes) and Article 22 (protection of private and family life).

⁴⁹⁶ Cass., 10 November 2009, n. P.09.1584. F. SCHEURMANS, *Impliciete dwangbevoegdheden bij de uitvoering van de huiszoeking*, in «*Tijdschrift voor Strafrecht*», 2011-12, pp. 106 – 115.

⁴⁹⁷ Which, for example, prohibit the commission of crimes by the police to investigate crimes. See C. VAN DEN WYNGAERT, *Strafrecht en strafprocesrecht*, Maklu, Antwerpen-Apeldoorn, 2009, p. 879.

⁴⁹⁸ Consider e.g. M. BOCKSTAELE et al., *De zoeking onderzocht*, Antwerpen, Maklu, 2009, p. 221. *Contra*, consider F. SCHEURMANS, *Impliciete dwangbevoegdheden bij de uitvoering van de huiszoeking*, in «*Tijdschrift voor Strafrecht*», 2011-12, p. 112 (the author argues that the ‘substantive’ character of the legality principle in the jurisprudence of the ECtHR does not necessarily prohibit the existence of implied powers).

⁴⁹⁹ F. GOOSSENS, *Gevraagd: duidelijkheid voor de politie. Vijf samenhangende stellingen over de legaliteit van politioneel optreden en het bewaren ervan vanuit de Antigoonrechtspraak* in F. DERUYCK et al. (eds.), *De wet voorbij. Liber Amicorum Luc Huybrechts*, Intersentia, Mortsel, 2010, pp. 156 – 162; 168 – 171 (with regard to the investigative powers of the police); P. TRAEST, *Rechts(on)zekerheid in materieel en formeel strafrecht* en

It follows that there is no uniform approach towards the requirement of procedural legality within national criminal justice systems. However, in the absence of a clear guiding principle of procedural legality, a requirement that procedures are established by law follows from human rights law. This study will show how the lawfulness requirement under human rights law ('in accordance with the law') implies that there should be (i) legislation fulfilling certain conditions and (ii) an interference in accordance with this legislation if investigative activities infringe upon the rights of the individual(s) concerned. Human rights norms require sufficient procedural safeguards.⁵⁰¹ In requiring an adequate legal basis for investigative acts that infringe upon the rights and liberties of the affected individual(s) (e.g. the right to respect for private life), the lawfulness requirement under human rights law overlaps with the principle of procedural legality and shields against arbitrary interferences.⁵⁰² Additionally, on several occasions, the ECtHR referred to the requirement that procedural law is laid down by law ('*nullum iudicium sine lege*') which it labelled a 'general principle of law'. According to the Court, respect for the principle of procedural legality is required to ensure the right to a fair trial and equality of arms.⁵⁰³ Its primary purpose lays in the protection against the abuse of state authority.⁵⁰⁴

strafrechterlijk legaliteitsbeginsel, in «Rechtskundig Weekblad», 1993-94, pp. 1190, 1203 - 1204 (TRAEST supports such view and argues that this procedural principle of legality implies three things: (1) the prosecution should take place according to the law; (2) the law should define who possesses investigative powers and to whom these investigative powers can be delegated and (3) insofar as investigative powers infringe upon individual rights and freedoms (no absolute rights), the conditions for this infringement should be defined by law.

⁵⁰⁰ He underlines the many limitations of the permissive rule by (1) the exclusion of evidence and (2) the requirement that investigative measures which infringe upon fundamental or human rights under the Belgian Constitution or the ECHR require a legal basis (and a legitimate aim). See F. GOOSSENS, *Gevraagd: duidelijkheid voor de politie. Vijf samenhangende stellingen over de legaliteit van politieel optreden en het bewaren ervan vanuit de Antigoonrechtspraak*, in F. DERUYCK et al. (eds.), *De wet voorbij. Liber Amicorum Luc Huybrechts, Intersentia, Mortsel, 2010*, pp. 168 – 171.

⁵⁰¹ See *infra*, Chapter 6, I.3.1.

⁵⁰² M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, p. 46. However, differences are visible. For example, where the principle of procedural legality in Dutch criminal procedure requires statutory law established by an act of parliament, the lawfulness requirement under human rights law does not.

⁵⁰³ Critical is S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, p. 111 (holding that the issue is not so much one of 'equality of arms', where uncertainty affects both parties).

⁵⁰⁴ ECtHR, *Coëme and Others v. Belgium*, Judgement, Application Nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgment of 22 June 2000, par. 102 ("The Court reiterates that the principle that the rules of criminal procedure must be laid down by law is a general principle of law. It stands side by side with the requirement that the rules of substantive criminal law must likewise be established by law and is enshrined in the maxim '*nullum iudicium sine lege*'. It imposes certain specific requirements regarding the conduct of proceedings, with a view to guaranteeing a fair trial, which entails respect for equality of arms [...] The Court further observes that the primary purpose of procedural rules is to protect the defendant against any abuse of authority and it is therefore the defence which is the most likely to suffer from omissions and lack of clarity in such rules"). Note that the issue was examined under Article 6 (1) ECHR. See likewise: ECtHR, *Claes c.*

A quick glance at the procedural frameworks of the tribunals under review teaches us that no express principle of procedural legality can be found in international criminal procedure. In addition, the broad attribution of powers and the absence of detailed rules on the collection of evidence seem more in line with the common law approach outlined above ('what is not prohibited is permitted'). It should be noted that the question of how detailed the procedural part of the ICC Statute should be was occasionally raised during its drafting process. At the Prepcop, several delegations warned that the ICC Statute should not be overloaded "with extensive and detailed rules".⁵⁰⁵ According to these delegations, the goal of the ICC Statute should not be to replicate an exhaustive criminal code in the Statute.⁵⁰⁶ Some delegations suggested that the principle of procedural legality and its legal consequences should be firmly established in the Statute itself.⁵⁰⁷ In particular, the Dutch delegation took issue with the reference of the ICC draft Statute to national law on procedural matters, including the procedural roles of the Court and its organs. It held that it should not be possible to rely on other sources of law than the ICC Statute regarding procedural matters.⁵⁰⁸ The delegation unsuccessfully pleaded for the incorporation of an explicit principle of legality into the Statute which would imply that criminal procedure (including acts and competences) require a "firm and explicit basis in the Statute."⁵⁰⁹

True, there are certain advantages to a more permissive approach. The lack of detailed regulations may allow for more flexibility and leaves more room for discretion and good judgment by the participants in the investigations and proceedings.⁵¹⁰ Moreover, the broad nature of the investigative powers of the Prosecutors of international criminal tribunals and courts should be understood in light of the need to rely on state cooperation.⁵¹¹ On the other

Belgique, Application Nos. 46825/99, 47132/99, 47502/99, 49010/99, 49104/99, 49195/99 and 49716/99, Judgment of 2 June 2005, par. 34.

⁵⁰⁵ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I (Proceedings of the Preparatory Commission during March-April and August 2006), 2006, par. 182.

⁵⁰⁶ *Ibid.*, p. 45, par. 182.

⁵⁰⁷ *Ibid.*, p. 45, par. 185.

⁵⁰⁸ General Rules on Criminal Law: Contribution by the Dutch Representative, Prepcop., 2 April 1996, par. 5.4 – 5.5.

⁵⁰⁹ *Ibid.*, par. 5.4. The delegation underlined that it would not be incompatible with the stated principle for the Statute to provide "a certain competence of the Court to elaborate in detail the main procedural rules given in the Statute by way of additional regulations."

⁵¹⁰ R. KAREMAKER; B. DON TAYLOR III; T.W. PITTMAN, Witness Proofing in International Criminal Tribunals, in «Leiden Journal of International Law», Vol. 21, 2008, p. 921 (who argue that "to presume that a practice that is not expressly provided for is thereby prohibited would cripple practitioners and judges alike").

⁵¹¹ Interview with a member of the OTP, ICTR-10, Arusha, 21 May 2008, p. 6 ("I take the view that they are effective and sufficient, because they are couched in those general terms. I do not see limitations on what the Prosecutor can and cannot do. I think that the reality of the situation is that the Prosecutor has no authority in my

hand, there are important advantages attached to the incorporation of such a principle, not the least of which is the protection against arbitrariness and legal certainty.⁵¹² Besides, there are reasons why the absence of such a rule in international criminal procedure is particularly inapposite. In particular, it was described above how international criminal procedure, itself being *sui generis*, borrows from common law and civil law criminal justice systems. Additionally, it was pointed out how transformations may occur when features of common law or civil law are transplanted to international criminal procedure.⁵¹³ Therefore, to avoid any confusion regarding the content of a procedural rule borrowed from domestic criminal procedure and any incoherence in its application, it is important that these rules be sufficiently elaborated.⁵¹⁴

Notwithstanding the absence of a principle of procedural legality, the ICC proceeds as if such a principle were included in its procedural framework. A clear example is the decision of Pre-Trial Chamber I on witness familiarisation in the *Lubanga* case. The Court held that “*prior to undertaking the analysis required by article 21 (3) of the Statute, the Chamber must find a provision, rule or principle that, under article 21 (1) (a) to (c) of the Statute, could be applicable to the issue at hand.*”⁵¹⁵ Rather than inquiring into the possibility that the omission of a reference may have been ‘by design’, the Pre-Trial Chamber seems to search for a permissive rule and holds that a procedural action that has not explicitly or tacitly been authorised (by the Statute or extraneous sources) is prohibited.⁵¹⁶ Additionally, Trial Chamber

country, in his own country, in Kenya or Burundi, to simply walk in and investigate. Mr. Ocampo does not have the authority to walk into northern Uganda and investigate. So you can craft the best regulations about his work, and it would not be sufficient in the context of international criminal justice. That is where the problem lies”.

⁵¹² Compare S. VASILIEV, Proofing the Ban on ‘Witness Proofing’: Did the ICC get it right?, in «Criminal Law Forum», Vol. 20, 2009, p. 229 (“Ruling out procedural actions that are neither foreseen in nor inferable from the statutory framework and that are not covered by custom or general principles of law, *enhances the certainty of the ICC’s procedural law*”(emphasis added)).

⁵¹³ See *supra*, Chapter 2, IV.

⁵¹⁴ P.L. ROBINSON, Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY, in «Journal of International Criminal Justice», Vol. 3, 2005, p. 1057 (“a more important reason for elaborating express rules is that the imported procedure may not retain all of its common law ingredients in its application at the tribunal”).

⁵¹⁵ ICC, Decision on the Practices of Witness Familiarisation and Witness Proofing, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-679, PTC I, 8 November 2006, par. 10 (emphasis added).

⁵¹⁶ S. VASILIEV, Proofing the Ban on ‘Witness Proofing’: Did the ICC get it right?, in «Criminal Law Forum», Vol. 20, 2009, p. 229 (holding that it follows that the high density regulation renders the ICC Statute suitable for the adoption of the prohibitive rule. This would imply that the participants cannot resort to procedural course of action that has not explicitly or tacitly been authorised by the ICC’s procedural framework. The author adds that on today, the prohibitive approach has consistently been followed by the ICC). Critical, consider: R. KAREMAKER; B. DON TAYLOR III; T.W. PITTMAN, Witness Proofing in International Criminal Tribunals, in «Leiden Journal of International Law», Vol. 21, 2008, p. 921 (“The question is not whether proofing is only

IV acknowledged that the Court has to use its inherent powers sparingly, since “its proceedings are governed by an extensive legal framework of instruments in which the States Parties have spelt out the powers of the Court to a great degree of detail.”⁵¹⁷

This contrasts with the permissive approach followed by both the *ad hoc* tribunals and the SCSL (‘what is not prohibited is allowed’).⁵¹⁸ For example, when ICTY Trial Chamber I inquired in the *Haradinaj et al.* case as to what extent it could order the Prosecution to audio-record proofing sessions, the Chamber noted that “[t]he Prosecution did not refer to any provision in the Tribunal’s Rules or Statute that would *prevent* a Trial Chamber order to the Prosecution to audio-record proofing sessions.”⁵¹⁹ Hence, there is no rule prohibiting such an order. Even more clearly, when the Prosecution argued that there is no rule of customary international law supporting a general order to audio-record proofing sessions, or that such practice surpasses customary international law, the Trial Chamber argued that “[t]he Prosecution would need to show that there is *a rule against such a procedure* to be found in customary law.”⁵²⁰

VII. CHARACTERISTICS AND NATURE OF INVESTIGATIONS BEFORE INTERNATIONAL (ISED) CRIMINAL TRIBUNALS

Many commentators remark that in assessing what procedure is most fit for international criminal tribunals, its ‘uniqueness’ or its unique characteristics should be taken into consideration.⁵²¹ This can be agreed with and is why this introductory chapter would not be

possible where ‘provided for . . . in the governing law’, but whether it is *prohibited* in the governing law. Proofing – similar to many aspects of actual practice – is not provided for in the governing law of the *ad hoc* tribunals”). SLUITER rather recommends the adoption of a “broad assumption of legality” in international criminal procedural law, “which follows from rather broadly attributed (or non-attributed, namely inherent or implied) powers.” See G. SLUITER, Trends in the Development of a Unified Law of International Criminal Procedure, in C. STAHN and L. VAN DEN HERIK (eds.), *Future Perspectives on International Criminal Justice*, Cambridge, Cambridge University Press, 2010, p. 590.

⁵¹⁷ ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan*, Case No. ICC-02/05-03/09-410, T. Ch. IV, 26 October 2012, par. 78.

⁵¹⁸ ICTR, Decision on Interlocutory Appeal Regarding Witness Proofing, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.8, A. Ch., 11 May 2007, par. 11.

⁵¹⁹ ICTY, Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions, *Prosecutor v. Haradinaj et al.*, T. Ch. I, 23 May 2007, par. 11.

⁵²⁰ *Ibid.*, par. 16.

⁵²¹ Consider e.g. C. SCHUON, *International Criminal Procedure: A Clash of Legal Cultures*, The Hague, T.M.C. Asser Press, 2010, p. 7 (“We therefore propose that when assessing the suitability of a procedural element for international criminal trials, this unique setting should be taken into particular consideration”); P.L. ROBINSON,

complete without addressing the specific features of investigations by international(ised) criminal tribunals. Three of these characteristics will be addressed below: to know (i) the reliance on cooperation by states and other international actors, (ii) the fragmented character of investigations and (iii) the scope and complexity of these investigations. This list is, by no means, exhaustive.⁵²²

VII.1. Reliance on state cooperation

One of the most distinctive features of international criminal procedure is the absence of a police force or any other agency that could enforce decisions on the territory of states.⁵²³ The late Judge Cassese famously likened international criminal tribunals to “giants without legs”, that require “artificial limbs to walk and work”.⁵²⁴ Cooperation by states, acting individually or collectively, is crucial for any investigative efforts and in the arrest and transfer (or surrender) of individuals to these tribunals. This is a characteristic of international criminal investigations (and international criminal proceedings in general) which sets it apart from its historic predecessors. The signatory states of the IMT had full control over the territory of Germany. These tribunals had direct access to witnesses, evidence and other information. The cooperation of the defendants’ states, or of other states, in the investigation and collection of evidence, was not required.⁵²⁵ In a similar vein, this feature sets international criminal

Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia, in «European Journal of European Law», Vol. 11, 2000, p. 572 (noting that in transposing domestic legal practices to the ICTY, the specific context of the Tribunal should be considered).

⁵²² Additionally, as far as *international* criminal tribunals are concerned, one could refer to the great distance which normally exists between the headquarters of these tribunals and the place where the investigative activities are conducted; the limited access to the crimes sites; the fact that investigations normally take place long after the crimes have been committed or the fact that investigations take place in politically unstable environments.

⁵²³ Consider e.g. M. LANGER, The Rise of Managerial Judging in International Criminal Law, in «American Journal of Comparative Law», Vol. 53, 2005, p. 854. It was noted by DAMAŠKA that there is a paradox where international criminal courts lack inherent enforcement powers while they must process crimes of unusual complexity and must simultaneously realise goals additional to those of national states (which do possess enforcement powers). See M. DAMAŠKA, The International Criminal Court between Aspiration and Achievement, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, p. 20. The author adds that notwithstanding this shortcoming, the ICTY achieved important successes with outside assistance. However, such was a result of political changes in successor states and from external pressure (e.g. by the EU) (*ibid.*, p. 20).

⁵²⁴ A. CASSESE, On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law, in «European Journal of International Law», Vol. 9, 1998, p. 13.

⁵²⁵ R. MAY and M. WIERDA, International Criminal Evidence, Ardsley, Transnational Publishers, 2002, pp. 51 – 52; R. BANK, Cooperation with the International Criminal Tribunal for the Former Yugoslavia in the Production of Evidence, in «Max Planck Yearbook of United Nations Law», Vol. 4, 2000, p. 234. This is not to say that the Prosecution did not encounter great difficulties in gathering evidence. Consider e.g. G.

proceedings apart from their municipal equivalents.⁵²⁶ It is only logical to assume that international criminal procedure reflects this specific characteristic. Therefore, these obligations to cooperate will constitute a recurrent, cross-cutting theme throughout the subsequent chapters. While international criminal tribunals rely on different forms of legal cooperation, the discussion below is limited to cooperation in the gathering and production of evidence as well as the arrest (detention) and transfer of suspects and accused persons to the tribunals.⁵²⁷ It is easy to understand how this characteristic may seriously hamper the Prosecution's or the Defence's investigative efforts, in case the state or another actor from which cooperation is needed is unwilling to do so because it is itself implicated or has other reasons to not cooperate.⁵²⁸ This feature may also make these institutions vulnerable to political intrusions and pressure. It suffices to recall the Rwandese authorities' reaction to cease cooperation following the ICTR Appeals Chamber's decision to release Barayagwiza.⁵²⁹

GINSBURGS and V.N. KUDRIAVTSEV, *The Nuremberg Trial and International Law*, Dordrecht – Boston – London, Martinus Nijhoff Publishers, 1990, p. 73 (on the difficulties in gathering evidence to prove a Nazi conspiracy); K. AMBOS and S. BOCK, *Procedural Regimes*, in L. REYDAMS, J. WOUTERS and C. REYNGAERT (eds.), *International Prosecutors*, Oxford, Oxford University Press, 2012, p. 493 (noting that, among others, the IMT Prosecutor could rely on the results of the War Crimes Commission; intelligence information, gathered by the Allies as well as evidence that was gathered by national committees for the investigation of war crimes and tribunals); M.B. HARMON and F. GAYNOR, *Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings*, in «*Journal of International Criminal Justice*», Vol. 2, 2004, p. 404.

⁵²⁶ Meant here are purely domestic criminal proceedings, where no inter-state cooperation in criminal matters is required.

⁵²⁷ Excluded is the cooperation with respect to the enforcement of sentences.

⁵²⁸ M. DAMAŠKA, *The International Criminal Court between Aspiration and Achievement*, in «*UCLA Journal of International Law & Foreign Affairs*», Vol. 37, 2009, p. 21; B. DE SMET, *Internationale samenwerking in strafzaken tussen Angelsaksische en continentale landen*, Intersentia, Antwerpen – Groningen, 1999, p. 8. In this regard, consider also A. ALAMUDDIN, *Collection of Evidence*, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), *Principles of Evidence in International Criminal Justice*, Oxford, Oxford University Press, 2010, p. 260 (the author observes that the problems faced by the international criminal tribunals in the collection of evidence are not so much caused by the absence of a police force. Both the ICC Prosecutor and the Prosecutor of the *ad hoc* tribunals can to some extent avail themselves of police powers: the problem is rather “the inability to enforce the legal obligations of states to cooperate”).

⁵²⁹ See the discussion, *infra*, Chapter 7. Several Judges from the ICTR criticised the subsequent reconsideration by the Appeals Chamber of its decision. Consider e.g. Interview with Judge Weinberg de Roca of the ICTR, ICTR-01, Arusha, 19 May 2008, pp. 4 - 5 (“I always felt very badly for Barayagwiza because I thought, in a jurisdiction like my own, he would have had a right to be a free man, because he had an Appeals Chamber decision which said that his rights were violated, so he can go. To have the same Appeals Chamber, with a slightly different composition, review the decision and say, “oh no, we made a mistake,” does not do any honour to our Tribunal. I think we should have just accepted the consequences, whether right or wrong”). *Q. Rwanda threatened to stop cooperation with the tribunal if Barayagwiza was set free. How should the tribunals deal with such threats?* A. Just to accept it. The international community establishes a Tribunal because the country can or will not deal with the cases. If Rwanda does not cooperate, let it be transparent. The international community, if the politicians think it should be done, will put pressure on Rwanda or the Tribunal closes because of lack of cooperation. I think the Tribunal should be transparent. We should not just transform our cases to please a State”).

The relationship between international criminal courts and states, international organisations and individuals (including the extent to which states, international organisations and individuals are under an obligation to cooperate with the international criminal tribunals) is often described in ‘vertical’ vs. ‘horizontal’ (or ‘supra-state’ vs. ‘inter-state’) terms, as the ICTY Appeals Chamber did in the *Blaškić* case.⁵³⁰ Vertical cooperation sets the cooperation relationship between states and the tribunal apart from the voluntary cooperation relationship that exists between states (inter-state cooperation in criminal matters) and which respects the requested state’s sovereignty.⁵³¹ Several variables are considered to indicate the verticality or horizontality of the cooperation relationship including the presence (or lack thereof) of grounds to refuse cooperation, the reciprocity or non-reciprocity of the cooperation relationship, the possibility for the requesting party to unilaterally interpret and determine the content of the obligations to cooperate as well as the presence (or absence) of a compulsory dispute settlement mechanism.⁵³²

⁵³⁰ ICTY, *Prosecutor v. Blaškić*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14, A. Ch., 29 October 1997, par. 47, 54. Consider e.g. G. SLUITER, *International Criminal Adjudication and the Collection of Evidence*, Antwerp, Intersentia, 2002, pp. 82 – 89; H.-P. KAUL and C. KRESS, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises*, in «Yearbook of International Humanitarian Law», Vol. 2, 1999, pp. 158 – 161; B. SWART, *International Cooperation and Judicial Assistance: General Problems*, in A. CASSESE et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, pp. 1589 - 1606; G.-J. KNOOPS, *The Duality of State Cooperation Within International and National Criminal Cases*, in «Fordham International Law Journal», Vol. 30, 2007, pp. 263 – 264. Consider also F. MÉGRET, *In Search of the ‘Vertical’: Towards an Institutional Theory of International Criminal Justice’s Core*, in C. STAHN and L. VAN DEN HERIK (eds.), *Future Perspectives on International Criminal Justice*, Cambridge, Cambridge University Press, 2010, pp. 181 – 182 (where the author notes that verticality forms a constituent part of the identity of international criminal tribunals but lacks clear definition and is normally studied through its manifestations (including the cooperation regime)).

⁵³¹ H.-P. KAUL and C. KRESS, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises*, in «Yearbook of International Humanitarian Law», Vol. 2, 1999, p. 158. Where the *ad hoc* tribunals are subsidiary organs of the UN Security Council, their orders for cooperation may indirectly be regarded as decisions from the Security Council under Chapter VII. Consider in this regard the Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, par. 125 - 126 (“[a]n order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the United Nations”).

⁵³² G. SLUITER, *International Criminal Adjudication and the Collection of Evidence*, Antwerp, Intersentia, 2002, pp. 82 – 86; G. SLUITER, *Legal Assistance to Internationalized Courts and Tribunals*, in C.P.R. ROMANO, A. NOLLKAEMPER and J. KLEFFNER (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia*, Oxford, Oxford University Press, 2004, p. 382; C. KRESS, K. PROST and P. WILKITZKI, Part 9, *International Cooperation and Judicial Assistance: Preliminary Remarks*, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1507; A. REISINGER, *Cooperation from States and Other Entities*, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, pp. 96 – 98.

The ‘vertical’ cooperation regime, which can be seen at its strongest at the *ad hoc* tribunals, is based on “a clear hierarchy between the requesting and the requested state.”⁵³³ The general duty of states and international organisations to cooperate with the *ad hoc* tribunals can be found in Article 29 ICTY Statute and Article 28 ICTR Statute. Ultimately, it derives from resolutions of the Security Council acting under Chapter VII and the status of the *ad hoc* tribunals within the UN system.⁵³⁴ From this provision, it follows that obligations to cooperate for states are mandatory and all-encompassing.⁵³⁵ Among others, these obligations, which will be addressed in more detail in the chapters to come, include broad powers for the ICTY and the ICTR Prosecutor to conduct on-site investigations⁵³⁶ as well as the ancillary power of the *ad hoc* tribunals to subpoena witnesses⁵³⁷ or circumvent traditional obstacles to extraditions.⁵³⁸ Additionally, while states may invoke national security concerns for refusing to transmit evidence, the tribunal has the final say.⁵³⁹ KAUL and KRESS set forth the idea that the *rationale* for such a distinct cooperation scheme is that the horizontal approach would be “fundamentally inappropriate” for an international judicial body that is responsible for judging international core crimes. Far from pursuing the national interests of the state(s)

⁵³³ G. SLUITER, *International Criminal Adjudication and the Collection of Evidence*, Antwerp, Intersentia, 2002, p. 82; H.-P. KAUL and C. KRESS, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises*, in «Yearbook of International Humanitarian Law», Vol. 2, 1999, p. 158.

⁵³⁴ Consider Security Council Resolution 827 adopted on 25 May 1993 and Security Council Resolution 955 of 8 November 1994, adopted under Chapter VII of the UN Charter and Article 25 of the UN Charter. It follows from paragraph 4 of Security Council Resolution 827 and from paragraph 2 of Security Resolution 955 that “all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 [28] of the Statute” (emphasis added). As far as the ICTY is concerned, an additional basis for the obligation to cooperate for the entities of the Former Yugoslavia is found in Article IX of the Dayton Peace Agreement (General Framework Agreement for Peace in Bosnia and Herzegovina), Dayton, Ohio, 2 November 1995. While Article 29 ICTY Statute and Article 28 ICTR Statute do not refer to other international actors, it will be explained how the jurisprudence expanded these cooperation duties to international organisations. See *infra*, Chapter 7, II.3.1.

⁵³⁵ B. SWART, *International Cooperation and Judicial Assistance: General Problems*, in A. CASSESE et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, p. 1592.

⁵³⁶ See *infra*, Chapter 6, I.2.

⁵³⁷ See *infra*, Chapter 5, V.1.2 (the *ad hoc* tribunals) and V.2.2 (ICC).

⁵³⁸ See *infra*, Chapter 7, II.3.

⁵³⁹ ICTY, *Prosecutor v. Blaškić*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14, A. Ch., 29 October 1997, par. 61 – 69. Evidently, this sets the cooperation regimes of the *ad hoc* tribunals apart from inter-state cooperation in criminal matters. As noted by MÉGRET, “[I]n a horizontal context, [...] the willingness of states to engage in co-operative arrangements regarding criminal matters is limited by their unwillingness to compromise key national security matters”. See F. MÉGRET, *In Search of the ‘Vertical’: Towards an Institutional Theory of International Criminal Justice’s Core*, in C. STAHN and L. VAN DEN HERIK (eds.), *Future Perspectives on International Criminal Justice*, Cambridge, Cambridge University Press, 2010, p. 189 (the author refers to several examples of national mutual assistance treaties).

directly concerned with a crime, the prosecution of these core crimes serves a “community goal”.⁵⁴⁰

In turn, the cooperation regime of States Parties with the ICC is held to be a mixture of a horizontal and a vertical approach.⁵⁴¹ This was necessary in order to balance the opposing views that existed at the Rome conference. It is symptomatic that the ICC Statute does not speak of ‘orders’ but rather of ‘requests’.⁵⁴² The main distinction with the cooperation regime of the ICTY and the ICTR is that the obligations to cooperate of States Parties have been listed exhaustively and that obligations to cooperate, in principle, only apply to States Parties.⁵⁴³ The general obligation to cooperate under Article 86 does not create obligations over and above those expressly mentioned (in Part 9 or any other part of the Statute).⁵⁴⁴ As a caveat, reference should be had to Article 93 (1) (l) ICC Statute which creates an obligation for states to provide ‘any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court’.⁵⁴⁵ Furthermore, the Court ‘may invite any State not party to this Statute to provide assistance under this Part on the basis of an *ad hoc* arrangement, an

⁵⁴⁰ H.-P. KAUL and C. KRESS, Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises, in «Yearbook of International Humanitarian Law», Vol. 2, 1999, pp. 158 – 159.

⁵⁴¹ B. SWART, International Cooperation and Judicial Assistance: General Problems, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court: A Commentary, Oxford, Oxford University Press, 2002, p. 1594; R. RASTAN, Testing Co-operation: The International Criminal Court and National Authorities, in «Leiden Journal of International Law», Vol. 21, 2008, p. 432; G.-J. KNOOPS, The Duality of State Cooperation Within International and National Criminal Cases, in «Fordham International Law Journal», Vol. 30, 2007, p. 275. Consider also M. DAMAŠKA, The International Criminal Court between Aspiration and Achievement, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, p. 23 (noting that the ICC Statute “leaves substantially more room for governments to refuse, delay, or manipulate assistance with the court than the ICTY and the ICTR regimes”).

⁵⁴² B. SWART, International Cooperation and Judicial Assistance: General Problems, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court: A Commentary, Oxford, Oxford University Press, 2002, p. 1595; J.N. MAOGOTO, A Giant Without Limbs: The International Criminal Court’s State-Centric Cooperation Regime, in «University of Queensland Law Journal», Vol. 102, 2004, p. 110.

⁵⁴³ An important exception to the principle that obligations are only incumbent on States Parties are Security Council Resolutions under Chapter VII, which, in case of a Security Council referral pursuant to Article 13 (b) ICC Statute, may compel states not party to cooperate with the Court. Besides, where states not party accept the jurisdiction of the ICC with regard to a situation, it follows from Article 12 (3) ICC Statute that the cooperation regime under Part 9 fully applies. Besides, The Court may invite states not party to cooperate (Article 87 (5) ICC Statute).

⁵⁴⁴ B. SWART, International Cooperation and Judicial Assistance: General Problems, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court: A Commentary, Oxford, Oxford University Press, 2002, p. 1595.

⁵⁴⁵ It will be noted how a broad interpretation of this provision is highly problematic, especially with regard to requests to carry out coercive measures. See *infra*, Chapter 6, II.4.3.

agreement with such State or any other appropriate basis'.⁵⁴⁶ Among others, the limited powers of the Court to conduct on-site investigations⁵⁴⁷, the absence of an obligation of states to compel the appearance of witnesses⁵⁴⁸ or the lack of capacity to order cooperation in case of national security matters bear witness to the ICC's more horizontal nature.⁵⁴⁹ Furthermore, the complementary nature of ICC prosecutions contrasts with the primacy of prosecutions by the *ad hoc* tribunals over national prosecutions.⁵⁵⁰

The question of whether and to what extent the 'vertical' model of cooperation also applies to the internationalised criminal tribunals under review is more difficult.⁵⁵¹ It is evident that these tribunals also require legal assistance by states and other actors in order to fulfil their mandates. Some possible exceptions are those internationalised criminal tribunals that have been set up in UN-administered territories such as East-Timor. The SPSC benefited from having the assistance of a 'police force' capable of using coercive measures.⁵⁵² In general, it seems that a distinction needs to be drawn for internationalised criminal tribunals. On the one hand, there are far-reaching and all-encompassing obligations to cooperate for those states that are most concerned. To a large extent, these obligations mirror the vertical model.⁵⁵³ On the other hand, there are no straightforward obligations for third states to cooperate with these tribunals. As far as the SCSL and the ECCC are concerned, it follows from the *pacta tertiis*

⁵⁴⁶ Article 87 (5) (a) ICC Statute.

⁵⁴⁷ Consider Article 99 (4) ICC Statute, as will be discussed *infra*, Chapter 6, I.2.

⁵⁴⁸ Consider Articles 64 (6) (b) and 93 (1) (e) ICC Statute, as will be discussed *infra*, Chapter 5, V.2.2.

⁵⁴⁹ Consider Article 99 (4) ICC Statute; C. KRESS, K. PROST and P. WILKITZKI, Part 9, International Cooperation and Judicial Assistance: Preliminary Remarks, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, München, Verlag C.H. Beck, 2008, pp. 1508 – 1509.

⁵⁵⁰ M. DAMAŠKA, The International Criminal Court between Aspiration and Achievement, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, p. 23; G.-J. KNOOPS, The Duality of State Cooperation Within International and National Criminal Cases, in «Fordham International Law Journal», Vol. 30, 2007, p. 276.

⁵⁵¹ G. SLUITER, Legal Assistance to Internationalized Courts and Tribunals, in C.P.R. ROMANO, A. NOLLKAEMPER and J. KLEFFNER (eds.), Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia, Oxford, Oxford University Press, 2004, p. 383 (the author refers to a number of special features which may justify the vertical model and which international criminal tribunals do not necessarily share with the internationalised criminal tribunals. These include the subject matter jurisdiction of international criminal courts: internationalised criminal tribunals tend to have a broader jurisdiction and apart from serious crimes, have jurisdiction over other, albeit heinous, crimes.

⁵⁵² *Ibid.*, p. 389.

⁵⁵³ Consider Article 25 ECCC Agreement. The formulation of this provision ("shall comply without undue delay with any request for assistance") including the absence of grounds for refusal of cooperation clearly reflects the vertical model. A similar wording can be found in Article 17 SCSL Agreement (and Rule 8 (A) SCSL RPE) and Article 15 STL Agreement (which expressly refers to cooperation with the defence counsel). However, it has been argued by SLUITER that these cooperation schemes are not 'fully' vertical in nature where no compulsory dispute settlement mechanism is provided for. Consider Article 20 SCSL Agreement and Rule 8 (B) SCSL RPE; Article 29 ECCC Agreement; Article 18 STL Agreement.

nec nocent nec prosunt maxim that the bilateral agreements between the United Nations and these courts do not entail any obligations to cooperate for third states.⁵⁵⁴ Similarly, no obligations to cooperate for UN member states *vis-à-vis* the SPSC were included when the SPSC were set up by UNTAET.⁵⁵⁵ Also Security Council Resolution 1757 (2002), which established the STL, did not impose obligations to cooperate on third states.⁵⁵⁶ Rather, it will be for these internationalised criminal tribunals to conclude agreements or make *ad hoc* arrangements with third states.⁵⁵⁷ Besides, states may otherwise have an obligation to cooperate with these tribunals on the basis of other instruments.⁵⁵⁸ Furthermore, the UN Security Council has the ability to, on an *ad hoc* basis, oblige certain states or other actors to cooperate with these courts.⁵⁵⁹

From the foregoing, it is clearly not possible to determine one cooperation scheme in international criminal adjudication.⁵⁶⁰ Moreover, it emerges that different forms of cooperation exist. Although obligations to cooperate of states or other international actors may take different forms (they may be statutory, contractual or otherwise), it must be emphasised that cooperation does not need to be mandatory in nature and might as well be

⁵⁵⁴ While UN Security Council Resolution 1470 (2003) “urges” all States to “cooperate fully”, with the SCSL, and UN Security Council Resolution 1478 (2003) “calls” upon all states to “cooperate fully” with the Court, this seems to fall short from a clear-cut binding obligations incumbent on states to cooperate with the Court.

⁵⁵⁵ No obligations to cooperate for UN member states *vis-à-vis* the SPSC were provided for. No clear-cut obligation to cooperate with UNTAET was to be found in UN Security Council Resolution 1272 (1999) establishing UNTAET. Operative paragraph 7 only “[s]tresses the importance of cooperation between Indonesia, Portugal and UNTAET in the implementation of this resolution”. This is particularly problematic in relation to Indonesia. However, a Memorandum of Understanding (‘MOU’) was concluded between Indonesia and UNTAET, which does not impose far reaching obligations to cooperate on Indonesia and provides for important grounds for refusal. See the Memorandum of Understanding between the Republic of Indonesia and the United Nations Transitional Administration in East Timor regarding Cooperation in Legal, Judicial and Human Rights Related Matters, Jakarta, 5-6 April 2000. For a critical discussion thereof, see G. SLUITER, Legal Assistance to Internationalized Courts and Tribunals, in C.P.R. ROMANO, A. NOLLAEMPER and J. KLEFFNER (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia*, Oxford, Oxford University Press, 2004, pp. 391 – 393.

⁵⁵⁶ On this issue, consider B. SWART, Cooperation Challenges for the Special Tribunal for Lebanon, in «*Journal of International Criminal Justice*», Vol. 5, 2007, pp. 1153 – 1163.

⁵⁵⁷ In this regard, consider Article 11 (d) SCSL Agreement (‘The Special Court shall possess the juridical capacity necessary to: Enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court’) as well as Rule 8 (C) SCSL RPE; Article 7 (d) STL Agreement (‘The Special Tribunal shall possess the juridical capacity necessary (d) To enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Tribunal’) and Rule 13 STL RPE; Rule 5 ECCC RPE.

⁵⁵⁸ As acknowledged by Rule 21 STL RPE.

⁵⁵⁹ Consider e.g. UN Security Council Resolution 1638 (2005), mandating UNAMIL “to apprehend and detain former President Charles Taylor in the event of a return to Liberia and to transfer him or facilitate his transfer to Sierra Leone for prosecution before the Special Court for Sierra Leone”.

⁵⁶⁰ A. REISINGER, Cooperation from States and Other Entities, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 115.

voluntary. Furthermore, it may be expected that obtaining cooperation from states is more problematic for the Defence. Defence counsels that were interviewed regularly referred to the lack of cooperation by states, particularly when asked about the major challenges they encountered in the course of their investigations.⁵⁶¹ The recurrent stories of intimidation and interference of the Rwandese authorities toward defence investigations are discomfiting.⁵⁶² One well-documented case is that of defence counsel Peter Erlinder, who was arrested in Rwanda in May 2010 on allegations of negating the Rwandan genocide against the Tutsis in 1994.⁵⁶³ In addition, the Rwandese authorities seem to have used Gacaca proceedings to intimidate prospective defence witnesses. Some defence witnesses were actually prosecuted upon their return to Rwanda.⁵⁶⁴

⁵⁶¹ Consider e.g. Interview with Mr. Gumpert, Defence Counsel, ICTR-20, Arusha, 22 May 2008, p. 6; Interview with Mr. Black, Defence Counsel, ICTR-19, Arusha, 22 May 2008, p. 6; Interview with Peter Zaduk, Defence Counsel, ICTR-22, Arusha, 26 May 2008, p. 6; Interview with Dr. O'Shea, Defence Counsel, ICTR-23, Arusha, 28 May 2008, pp. 3 - 4.

⁵⁶² Interview with Mr. Black, Defence Counsel, ICTR-19, Arusha, 22 May 2008, p. 7 (*Q. Have members of the defence team been prosecuted in Rwanda on any charges?* "Yes, Leonidas. He was a Rwandan lawyer. He went with his lead counsel to Kigali to do an investigation and meet with a witness. He was arrested and charged with negationism. Then there is another Rwandan named Gakwaya who was arrested here in Tanzania by the Tanzanian police"); Interview with Mr. Taku, Defence counsel, ICTR-21, Arusha, 23 May 2008, p. 4 ("You know the Rwandan government keeps a list of alleged perpetrators of the genocide. And if you conduct a study of that list from 1996 to date, you will see in the variations and changes in the list people who have not [been] at specific locations from the outset, but as soon as they accept to come to testify on behalf of the defendant, they became suspects in the alleged perpetration of crimes in those areas in which they never visited. You also find that most of our defense investigators are Rwandese citizens who have been of help to us, and many of them have had to withdraw or leave because the Rwandan government. As soon as it finds out that they are investigating for the Defense, it accuses them of committing genocide. And there are many cases of people who were not in Rwanda at the time of the crimes, some of whom were still too young, but nevertheless, they still put their names on the list. This list is used as a sort of blackmail against Rwandan citizens who would like to assist the Defense"). BUISMAN refers to one instance where an ICTR Defence investigator fled Rwanda to seek asylum in The Netherlands. See C. BUISMAN, *Ascertainment of the Truth in International Criminal Justice*, 2012, (<http://bura.brunel.ac.uk/handle/2438/6555>, last visited 18 November 2013), p. 187.

⁵⁶³ At the time of his arrest, professor Erlinder was not investigating on behalf of the ICTR but was in Rwanda to defend a well-known Rwandese opposition leader, who had been arrested. It became clear that his arrest was largely based on statements he made in his function as defence counsel of the ICTR. This led the ICTR to change its position and hold that Erlinder was immune from prosecution in Rwanda. Although these immunity claims were rejected by Rwanda, he was eventually released "on health grounds". Consider in particular the Note Verbale by the ICTR Registrar to the Rwandese authorities, attached to ICTR, Further Registrar's Submissions Under Rule 33(B) of the Rules of Procedure and Evidence in Respect of the Appeals Chamber Order to the Registrar dated 9 June 2010, *Prosecutor v. Bagosora et al.*, 98-41-A, A. Ch., 15 June 2010 ("The ICTR hereby notifies the Rwandan authorities that Professor Erlinder enjoys immunity and requests therefore, his immediate release").

⁵⁶⁴ Interview with Mr. Taku, Defence counsel, ICTR-21, Arusha, 23 May 2008, p. 4 ("this Gacaca court procedure is used to intimidate potential witnesses, in the sense that in the Gacaca proceedings, anybody can come out and denounce you: "Yes, this person burned down my home", or "This person intimidated me during the genocide". Because of the nature of proceedings, the system uses it to intimidate and imprison any potential witnesses. As soon as somebody appears on your witness list, the next thing you hear is that this person is detained in the Gacaca proceedings"); Interview with Defence Counsel Peter Zaduk, ICTR-22, Arusha, 26 May 2008, p. 7 ("At the core of this, the government of Rwanda controls most of the witnesses who are still in the country, including the defense witnesses, many of whom are very fearful about testifying. We had a witness in our case, a very helpful witness to us, who came in November 2006 to testify from Rwanda, and did not testify at

More problems are likely to arise for the Defence if the requested state belongs to the civil law family. Unlike common law criminal justice systems, civil law states tend to prefer to conduct all investigative acts themselves and often require prior approval. Also, on-site investigations will always require some involvement by state officials.⁵⁶⁵ While they will already find it difficult to accept on-site investigation powers of an international Prosecutor, this is certainly the case for the Defence. The Defence cannot address requests to the authorities of the state concerned because they are not officials.⁵⁶⁶ Defence counsel Peter Robinson confirmed that it was more difficult to obtain cooperation from civil law states.⁵⁶⁷

that session for one reason or another, and he was brought back in February of 2007 to give his evidence. In the meantime, he had been arrested on a murder that had occurred during the genocide in 1994, brought to a jurisdiction different than where the crime arose in Rwanda, tried before the Gacaca court in one day on the basis of the evidence of one witness who did not say anything against him until after he came here to Arusha to testify for the Defense, and then he was sentenced to 25 years. That was just intimidation of our witness and intimidation of other witnesses who would want to cooperate with the Defense. That has been a recurring problem all the way through this”); Interview with Ms. Lyons, Defence Counsel, ICTR-26, Arusha, 29 May 2008, p. 8.

⁵⁶⁵ B. SWART, International Cooperation and Judicial Assistance: General Problems, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, p. 1600; C. KRESS, K. PROST and P. WILKITZKI, Part 9. International Cooperation and Judicial Assistance: Preliminary Remarks, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1509; B. DE SMET, *Internationale Samenwerking in Strafzaken tussen Angelsaksische en continentale Landen*, Intersentia Rechtswetenschappen, Antwerpen – Groningen, 1999, p. 197 (noting that in civil law criminal justice systems, the independent gathering of evidence by foreign police officers or by the defendant will be considered to be a violation of the sovereignty of that state); W. WLADIMIROFF, *Cooperation on Criminal Matters: A Defence Perspective*, in R. YEPES-ENRÍQUEZ and L. TABASSI (eds.), *Treaty Enforcement and International Cooperation in Criminal Matters: with Special Reference to the Chemical Weapons Convention*, The Hague, T.M.C. Asser Press, 2002, pp. 243 – 244. Consider also Report of the Bureau on Cooperation, ICC ASP, 19 October 2007, par. 33 (“Provision of information to defence teams may in some cases pose a particular problem in relation to civil law systems, where the defence may be treated differently to the prosecution with regard to requests for judicial assistance, compared to common law systems”).

⁵⁶⁶ B. SWART, International Cooperation and Judicial Assistance: General Problems, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, p. 1603.

⁵⁶⁷ Interview with Mr. Peter Robinson, Defence Counsel, ICTR-18, Arusha, 22 May 2008, p. 5 (“We do not encounter too many problems except from some countries in Europe where they won’t do anything voluntarily to assist the Defence so we have to get an order from the Trial Chamber for example in Belgium to get any documents from the Belgian government. The Prosecutor can send them a letter and they will give them the documents but we have to go through the Trial Chamber. However, when we are investigating and there are some roadblocks we have the right to address the Trial Chamber and to ask for a motion to enforce what we are asking for. If somebody does not want to meet with us, we can ask that the Trial Chamber issues summons or subpoenas to meet with us or to come and testify. *Q. The problems you just mentioned, do you mostly encounter them with civil law countries?* A. Yes.”).

§ Outsourcing investigations

Since states may often be reluctant to cooperate, other actors, including human rights NGO's, UN entities or intermediaries may step in and offer welcome assistance. Such assistance may take different forms, two of which will be addressed below, shortly.⁵⁶⁸

First, international(ised) criminal tribunals may rely on evidence or information that was previously gathered by third parties as part of their own investigations. In the *Lubanga* case, the ICC Prosecutor relied heavily on information gathered by UN entities and NGO's. The possible dangers of this course of action were fully felt when proceedings were stayed in the *Lubanga* case because confidentiality agreements concluded with the UN (pursuant to Article 54 (3) (e) ICC Statute) prevented the ICC Prosecutor from disclosing evidence to the Defence or to the Court.⁵⁶⁹ Relying on evidence and information gathered by third parties is not a new phenomenon. For example, it is recalled that most international(ised) criminal tribunals were preceded by international commissions of inquiry mandated to investigate serious violations of human rights law and international humanitarian law.⁵⁷⁰ Besides, some NGO's have been

⁵⁶⁸ Other forms of assistance may be provided. For example, it will be discussed how arrests of suspects or accused persons may be effectuated by U.N. entities. See *infra*, Chapter 7, II.3.1.

⁵⁶⁹ Most of this confidential evidence was obtained from the U.N. In this regard, consider Article 18 (3) of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 2283 UNTS 195, entry into force 4 October 2004 ('The United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations'). See ICC, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-1401, T. Ch. I, 13 June 2008. See *infra*, Chapter 3, III. The excessive reliance on confidentiality agreements also caused its deal of problems in the *Katanga and Ngudjolo Chui* case. See in particular: ICC, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07, T. Ch. II, 20 August 2008. As far as confidentiality agreements concluded by the ICC OTP are concerned, it is to be noted that the Prosecution has stated that it seeks to reduce its reliance on such agreements. See ICC, Prosecutorial Strategy 2009 – 2012, par. 34 (b).

⁵⁷⁰ Consider *e.g.* the Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 to Investigate Violations of International Humanitarian Law in the Former Yugoslavia, U.N. Doc. S/1994/674, 27 May 1994; Final report of the Commission of Experts established pursuant to Security Council Resolution 935, U.N. Doc. S/1994/1405, 9 December 1994 (Rwanda); Report of the International Commission of Inquiry on Darfur to the United Nations Secretary - General pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005; the United Nations International Independent Investigation Commission ('UNIIC') established pursuant to Security Council Resolution 1595 (U.N., Security Council Resolution 1595, U.N. Doc. S/RES/1995, 7 April 2000); Report of the International Commission of Inquiry on East-Timor to the Secretary-General, U.N. Doc. A/54/726, S/2000/59, 31 January 2000; Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, U.N. Doc. S/1999/231, 16 March 1999. Consider also the historic United Nations War Crimes Commission ('UNWCC')

very active in providing assistance to these courts.⁵⁷¹ One of the advantages of relying on these entities lays in their better understanding of the context of the conflict, particularly if they have a long-term presence on the ground.⁵⁷²

Several dangers are connected with this kind of involvement by third parties. Apart from problems of disclosure, and the fact that a great deal of the information provided constitutes hearsay, problems of partiality may arise.⁵⁷³ For example, where MONUC was actively involved in the implementation of peace in the DRC and had regular contacts with members of the different parties involved in the conflict, including ICC suspects, its views may not be neutral.⁵⁷⁴ Besides, these third-party actors are not usually trained in the procedures of the international(ised) criminal tribunals.⁵⁷⁵ Fact-finding by third parties serves different purposes

established in the aftermath of WWII. Even during the entire investigation phase, the reliance on external entities in the collection of evidence continued, in the form of reliance on the assistance of the allied armed forces and their intelligence agencies. See H. FUJIWARA and S. PARMENTIER, *Investigations*, in L. REYDAMS, J. WOUTERS and C. REYNGAERT (eds.), *International Prosecutors*, Oxford, Oxford University Press, 2012, pp. 597 – 598.

⁵⁷¹ As an example, DC-CAM can be mentioned. This independent organisation has, since it was established in 1995, collected evidence on the crimes allegedly committed by the Khmer Rouge and conducted thousands of interviews with victims, witnesses and perpetrators. See Open Society Justice Initiative, *Justice Initiatives*, Spring 2006, p. 74.

⁵⁷² E. BAYLIS, *Outsourcing Investigations*, in «UCLA Journal of International Law & Foreign Affairs», Vol. 14, 2009, p. 142 (the author gives the example of the MONUC investigations in the DRC which “dwarf the OTP’s.” MONUC developed a ‘Special Investigations Unit’, which had the primary purpose of investigating war crimes and crimes against humanity and to produce reports, among others for the use at future prosecutions. (*ibid.*, pp. 139, 141)); L.S. SUNGA, *How Can UN Human Rights Special Procedures Sharpen ICC Fact-Finding?*, in «The International Journal of Human Rights», Vol. 15, 2011, p. 188 (arguing that the ICC Prosecutor may rely on the expertise of various U.N. human rights special procedures, which have already collected information and continue gathering it); C. BUISMAN, *Delegating Investigations: Lessons to be Learned from the Lubanga Judgment*, in «Northwestern University Journal of International Human Rights», Vol. 11, 2013, p. 54 (noting that due to their long-term presence in the field, they are more familiar with the territory).

⁵⁷³ E. BAYLIS, *Outsourcing Investigations*, in «UCLA Journal of International Law & Foreign Affairs», Vol. 14, 2009, pp. 144 – 145; Under certain circumstances, prosecutorial reliance on intermediaries may endanger his or her objectivity, see *infra*, Chapter 3, III.

⁵⁷⁴ C. BUISMAN, *Delegating Investigations: Lessons to be Learned from the Lubanga Judgment*, in «Northwestern University Journal of International Human Rights», Vol. 11, 2013, p. 56.

⁵⁷⁵ One member of the ICTR OTP, when asked about obstacles encountered in investigations by the Prosecutor, referred to the fact that initially, the OTP investigators were in fact human rights officers as well as staff of UNAMIR, who were redeployed to the ICTR, and which were “extremely incompetent individuals”. Interview with Dr. Alex Obote Odora of the OTP, ICTR-11, Arusha, 21 May 2008, p. 7. Another member of the ICTR OTP also referred to the problem of “poor investigations” and refers in that regard to the involvement of staff of UNAMIR and other UN organisations as investigators, but added that “I think it is really difficult to recruit investigators into doing what they are doing. I would not blame the investigators. I think that any investigator from any part of the world would have trouble. It is a difficult job to do”. See Interview with Ms. Christine Graham of the OTP, ICTR-14, Arusha, 28 May 2008, p. 6. Consider also Interview with a Legal Officer of the ICTR, ICTR-10, Arusha, 21 May 2008, pp. 5 - 6 (“I think it is very important that the ICC should learn that you must train investigators so they know what they should be looking for during an investigation. In many cases I think that our investigators went with fishing nets, they got an octopus, a goldfish, a shark, and so on. I think that people looking for evidence should know what they are looking for. I do not blame them, because we were just

and information has not necessarily been gathered for the purpose of criminal prosecutions. Fact-finding by third parties may focus on state responsibility rather than individual criminal responsibility.⁵⁷⁶ Additionally, it has been noted that it may be more difficult for the Defence than the Prosecution to obtain information and materials from the UN and from NGO's.⁵⁷⁷

Nevertheless, on the condition that it is understood that fact-finding cannot substitute for the parties' obligation to investigate diligently, information and fact-finding by third parties may enhance the Prosecution's (and Defence's) investigative capacities.⁵⁷⁸ However, the difficulty lies in finding the right *balance* when relying on third-party information.⁵⁷⁹ Commentators have discerned a certain tendency in the use of third-party information by international(ised) criminal courts and tribunals. They argue that while the *ad hoc* tribunals very much relied upon such reports and materials by third parties during the initial years of investigations, nowadays, such sources play a much more limited role in the investigations, limited to the commencement of an examination.⁵⁸⁰ However, some signs suggest that this may not be the case at the ICC. At least with regard to investigations relating to a number of situations and cases, the Prosecution seems to have relied (too) heavily on information gathered by third parties rather than on conducting its own investigations. Reference can be made to

starting and had no lessons learnt to guide us, but I think our experiences have highlighted lesson that we can learn").

⁵⁷⁶ As argued by SUNGA in relation to U.N. human rights fact-finding. L.S. SUNGA, How can UN Human Rights Special Procedures Sharpen ICC Fact-Finding?, in «The International Journal of Human Rights», Vol. 15, 2011, pp. 187 – 205.

⁵⁷⁷ C. BUISMAN, Delegating Investigations: Lessons to be Learned from the Lubanga Judgment, in «Northwestern University Journal of International Human Rights», Vol. 11, 2013, p. 55.

⁵⁷⁸ L.S. SUNGA, How Can UN Human Rights Special Procedures Sharpen ICC Fact-Finding, in «The International Journal of Human Rights», Vol. 15, 2011, pp. 187 – 205 (arguing that the information gathered by UN human rights special procedures' investigative and monitoring mechanisms may improve the Prosecutor's fact-finding).

⁵⁷⁹ On this interaction between human rights fact-finding missions and international criminal investigations, promising work is currently undertaken by the research project: "From Fact-finding to Evidence: Harmonising Multiple Investigations of International Crimes", by the Hague Institute for Global Justice. Consider also M. MARKOVIC, The Prosecutor's Missing Code of Conduct, in «Texas International Law Journal», Vol. 47, 2011 – 2012, p. 216 ("it is likely that the OTP will have to continue to rely on information providers, many of whom may expect confidentiality, in future investigations because the OTP does not have the capacity or resources to conduct full, intensive investigations with respect to every conflict before the Court").

⁵⁸⁰ M. BERGSMO, and W.H. WILEY, Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes, in S. SKÅRE, I. BURKEY and H. MØRK (eds.), Manual on Human Rights Monitoring: An Introduction for Human Rights Field Officers, Oslo, Norwegian Centre for Human Rights, 2010, p. 9. Some practice of the ICC seems to confirm this. One investigation team leader of the ICC Prosecution described how the Prosecution started its investigations in the DRC by checking information already in their possession against 'open source' information, items on the internet and other general information. This included various reports and documents by international and local ngo's. See ICC, Transcript of Deposition on 16 November 2010, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-Rule68Deposition-Red2-ENG, 16 November 2010, p. 17.

CASSESE's and ARBOUR's criticism of the Prosecutor's decision to not conduct investigations in Darfur (at a time when investigations within Sudan were still possible), but rather to rely on third-party evidence and documents of the UN Commission of Inquiry.⁵⁸¹ It has been argued that this kind of conduct is not limited to this situation. Also in other situations and cases, the OTP barely conducted its own investigations on the ground.⁵⁸²

Apart from this reliance on evidence and information gathered by third parties, the Prosecution or the Defence may also wish to involve third parties as 'intermediaries' in facilitating their investigative efforts. None of the procedural frameworks of the tribunals under review provide a definition of 'intermediaries'.⁵⁸³ The ICC 'Draft Guidelines Governing the Relations between the Court and Intermediaries' define an intermediary as 'someone who comes between one person and another; who facilitates contact or provides a link between one of the organs or units of the Court or counsel on the one hand, and victims, witnesses...or affected communities more broadly on the other'.⁵⁸⁴ In practice, intermediaries

⁵⁸¹ ICC, Decision Inviting Observations in Application of Rule 103, *Situation in Darfur, Sudan*, Situation No. 02/05-10, PTC I, 24 July 2006; ICC, Observations of the United Nations High Commissioner for Human Rights Invited in Application of Rule 103 of the Rules of Procedure and Evidence, *Situation in Darfur, Sudan*, Situation No. 02/05-19, PTC I, 10 October 2006; and ICC, Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending Before the ICC, *Situation in Darfur, Sudan*, Situation No. ICC-01/05-14, 25 August 2006.

⁵⁸² C. BUISMAN, *Delegating Investigations: Lessons to be Learned from the Lubanga Judgment*, in «Northwestern University Journal of International Human Rights», Vol. 11, 2013, pp. 45 – 54 (the author (in addition to the Darfur situation) refers in particular to the investigations in the *Mbarushimana* case, (the author claims that the security situation in North-Kivu was stable at the time the Prosecutor could and should have conducted its investigations); the Situation in the Republic of Kenya (where the author claims the Prosecutor relied too much on the results of the investigations carried out by the Commission of Inquiry into the Post-Election Violence and did not conduct investigations inside Kenya prior to the confirmation of charges); the *Abu Garda* case (referring to argumentations of incomplete investigations made by the Defence) and the Situation in Libya (where the author claims that the Prosecutor, at first, primarily relied on information gathered by third parties, including the U.N. Commission of Inquiry).

⁵⁸³ One reference can be found in Regulation 97 of the ICC Registry Regulations, which refers to the obligation of confidentiality "between the Court and persons or organisations serving as intermediaries between the Court and victims." Additional references may be found in Regulations 67 and 71 of the ICC Regulations of the Trust Fund for Victims.

⁵⁸⁴ Draft Guidelines Governing the Relations between the Court and Intermediaries, 1 October 2010, p. 5, as noted by C.M. DE VOS, Case Note, *Prosecutor v. Lubanga*, 'Someone who Comes Between one Person and Another': *Lubanga*, Local Cooperation and the Right to a Fair Trial, in «Melbourne Journal of International Law», Vol. 12, 2011, p. 218. Alternative definitions exist: consider S.J. MALLESONS, *The OTP v. Thomas Lubanga Dyilo: The Challenges of Using "Intermediaries" in the International Criminal Court*, in «Humanitarian Law Perspectives», 2011, p. 3 (http://www.redcross.org.au/files/2011_the_otp_v_thomas_lubanga_dyilo_-_the_challenge_of_using_intermediaries_in_the_international_criminal_court.pdf, last visited 30 August 2013) (the author defines intermediaries as "'on-the-ground contacts' who have local knowledge and an in-depth understanding of the subject matter of investigations carried out by the Office of the Prosecutor." However, this definition seems too narrow); C. BUISMAN, *Delegating Investigations: Lessons to be Learned from the Lubanga Judgment*, in «Northwestern University Journal of International Human Rights», Vol. 11, 2013, p. 31 (defining intermediaries as "liaison officers facilitating contact with potential witnesses").

often act as “informal agents” of the Court.⁵⁸⁵ It is evident that intermediaries and other local informants can offer important assistance to the Court.⁵⁸⁶ The use of ‘intermediaries’, to a large extent, dominated the trial proceedings in the *Lubanga* case thus providing some insight as to their role in the collection of evidence and information. The reliance on intermediaries was discussed on several occasions throughout the course of the trial proceedings.⁵⁸⁷ Notably, the use of intermediaries in this case led the Defence to allege that witnesses had been induced. The Defence subsequently applied for a permanent stay of proceedings on the basis of abuse of process. The request, however, was turned down.⁵⁸⁸ The ICC Prosecutor sought to explain the reliance on intermediaries by the lack of a police force, ongoing hostilities and security risks for witnesses associated with the investigation.⁵⁸⁹ Human rights activists could move more freely and talk to potential witnesses due to their long-term presence on the ground. Hence, the OTP decided that they should act as intermediaries.⁵⁹⁰ One OTP

⁵⁸⁵ C.M. DE VOS, Case Note, Prosecutor v. Lubanga, ‘Someone who Comes Between one Person and Another’: *Lubanga*, Local Cooperation and the Right to a Fair Trial, in «Melbourne Journal of International Law», Vol. 12, 2011, p. 218.

⁵⁸⁶ *Ibid.*, p. 233; Open Society Justice Initiative, Intermediaries and the International Criminal Court: A Role for the Assembly of States Parties, 2011, p. 1 (<http://www.opensocietyfoundations.org/publications/intermediaries-and-international-criminal-court-role-assembly-states-parties>, last visited 29 August 2013).

⁵⁸⁷ See, among others, ICC, Redacted Decision on Intermediaries, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06- 2434, T Ch. I, 31 May 2010 (in which the Trial Chamber ordered the disclosure of information on intermediary 143; that intermediaries 316 and 321 be called “to deal with the suggestions that they attempted to persuade one or more individuals to give false evidence”; and that someone of the Prosecution staff be called “to testify as to the approach and the procedures applied to intermediaries”); ICC, Redacted Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending further Consultations with the VWU, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-2517, T. Ch. I, 8 July 2010, par. 31 (the Trial Chamber decided to stay the proceedings after the Prosecutor defied the repeated orders of the Trial Chamber to disclose the identity of intermediary 143). On appeal, the decision to impose an unconditional stay was reversed. See ICC, Judgment on the Appeal of Prosecutor Against the Oral Decision of Trial Chamber I of 15 July 2010 to Release Thomas Lubanga Dyilo, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2583 OA17, A. Ch., 8 October 2010.

⁵⁸⁸ ICC, Redacted Decision on the “Defence Application Seeking a Permanent Stay of Proceedings”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC01/04-01/06-2690-Red2, T. Ch. I, 7 March 2011, par. 199, 205, 213, 218 and 224 (the request for a permanent stay of proceedings because of abuse of process was turned down by the Trial Chamber because “[e]ven accepting, for the sake of argument, the defence submissions at their highest that the Prosecutor knew that there were doubts as to the integrity of the four intermediaries, staying the proceedings, as an exercise of judgment, would be disproportionate”).

⁵⁸⁹ *Ibid.*, par. 123. The Prosecution additionally argued that “this approach is widely considered to be “best practice” during investigation” (*ibid.*, par. 124); ICC, Prosecution’s Response to the Defence’s “Requête de la défense aux fins d’arrêt définitive des procédures”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2678-Red, T. Ch. I, 31 January 2011, par. 14. See also ICC, Judgement pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 153 (on the security situation in Bunia) and 154 (on the security risks for witnesses). Critical on the security concerns invoked by the Prosecutor, consider C. BUISMAN, *Delegating Investigations: Lessons to be Learned from the Lubanga Judgment*, in «Northwestern University Journal of International Human Rights», Vol. 11, 2013, pp. 63 – 72.

⁵⁹⁰ ICC, Redacted Decision on the “Defence Application Seeking a Permanent Stay of Proceedings”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC01/04-01/06-2690-Red2, T. Ch. I, 7 March 2011, par. 167. Consider

investigator testified that the OTP, in fact, used two (overlapping) categories of intermediaries. The first category consisted of intermediaries that assisted in the identification of witnesses and established the contacts between the investigators and the witnesses.⁵⁹¹ They would also inform the investigators of possible health or security problems or of the lack of understanding on the relevant issues. These intermediaries were often human rights activists.⁵⁹² The second category of intermediaries consisted of persons who contributed to the evaluation of the security situation and consisted of members of MONUC, the Congolese armed forces and others with useful information on the situation.⁵⁹³ The Prosecution submitted that the role of intermediaries was limited in the sense that they were not involved in any decision making, did not participate in taking witness statements and were only exceptionally present when witnesses were screened or interviewed.⁵⁹⁴ Besides, the intermediaries were not informed about the investigation team's objectives.⁵⁹⁵ Furthermore, some background checks were usually conducted by the OTP investigation team.⁵⁹⁶ However, the OTP investigations team leader testified that during investigations in the DRC, it was sometimes difficult to conduct such tests due to security considerations. In other instances, it was held that their background was sufficiently established on the basis of reports on their

also Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, pp. 48, 63 - 64 (stating that most intermediaries were activists "most of whom were fully aware of the activities of international criminal justice, [...] they were fully aware of what we were trying to do and they consulted internet sites to keep abreast of the progress in the investigations and in the progress of international criminal justice").

⁵⁹¹ Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, p. 49; ICC, Judgement pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 190. Consider also ICC, Transcript, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009, pp. 61 - 62 (noting that it is the OTP which first identifies potential witnesses, before intermediaries step in).

⁵⁹² Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, p. 50; ICC, Judgement pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 190. Consider also Open Society Justice Initiative, *Intermediaries and the International Criminal Court: A Role for the Assembly of States Parties*, 2011, <http://www.opensocietyfoundations.org/publications/intermediaries-and-international-criminal-court-role-assembly-states-parties> (last visited 29 August 2013), p. 2.

⁵⁹³ Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, pp. 51 - 52; ICC, Judgement pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 193.

⁵⁹⁴ *Ibid.*, par. 181; ICC, Prosecution's Response to the Defence's "Requête de la défense aux fins d'arrêter définitive des procédures", *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2678-Red, T. Ch. I, 31 January 2011, par. 17.

⁵⁹⁵ Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, p. 63.

⁵⁹⁶ ICC, Transcript, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009, p. 37.

human rights activities in the field.⁵⁹⁷ The majority of intermediaries worked on a voluntary basis but received reimbursements for their travel and communication costs.⁵⁹⁸ A few of the intermediaries received compensation on the basis of a special contract because they were indispensable for the investigators.⁵⁹⁹ In its final judgement, Trial Chamber I was very harsh on the Prosecution's use of intermediaries. It concluded that:

“The Chamber is of the view that the prosecution should not have delegated its investigative responsibilities to the intermediaries in the way set out above, notwithstanding the extensive security difficulties it faced. A series of witnesses have been called during this trial whose evidence, as a result of the essentially unsupervised actions of three of the principal intermediaries, cannot safely be relied on. The Chamber spent a considerable period of time investigating the circumstances of a substantial number of individuals whose evidence was, at least in part, inaccurate or dishonest. The prosecution's negligence in failing to verify and scrutinise this material sufficiently before it was introduced led to significant expenditure on the part of the Court. An additional consequence of the lack of proper oversight of the intermediaries is that they were potentially able to take advantage of the witnesses they contacted. Irrespective of the Chamber's conclusions regarding the credibility and reliability of these alleged former child soldiers, given their youth and likely exposure to conflict, they were vulnerable to manipulation.”⁶⁰⁰

“As set out above, there is a risk that P-0143 persuaded, encouraged, or assisted witnesses to give false evidence; there are strong reasons to believe that P-0316 persuaded witnesses to lie as to their involvement as child soldiers within the UPC; and a real possibility exists that P-0321 encouraged and assisted witnesses to give false evidence. These individuals may have committed crimes under Article 70 of the Statute.”⁶⁰¹

From these excerpts, it appears that it was not so much the use of intermediaries that was problematic, but the lack of supervision or oversight of intermediaries.⁶⁰² Considering the

⁵⁹⁷ ICC, Judgement pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 197; Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, p. 55.

⁵⁹⁸ *Ibid.*, pp. 58 – 59. ICC, Judgement pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 198 – 199.

⁵⁹⁹ *Ibid.*, par. 203.

⁶⁰⁰ *Ibid.*, par. 482.

⁶⁰¹ *Ibid.*, par. 483.

⁶⁰² Confirming, consider C. BUISMAN, *Delegating Investigations: Lessons to be Learned from the Lubanga Judgment*, in «Northwestern University Journal of International Human Rights», Vol. 11, 2013, p. 57 (noting that “they made all of the relevant decisions on the ground. It was the intermediaries who travelled to locations,

extent to which intermediaries were involved in the Prosecutor's investigations, it is fair to say that the Prosecutor did, in fact, delegate a part of its investigative responsibilities to them.⁶⁰³ In the Prosecution's investigations in the (now severed) *Katanga and Ngudjolo Chui* case---which, like the *Lubanga* case, concerned the Ituri region---, intermediaries were used as well.⁶⁰⁴ For investigations in other situations and cases, it is not entirely clear but it is expected that intermediaries were used.⁶⁰⁵ While 'intermediaries' are not referred to in relation to investigations by other international(ised) criminal tribunals, it can be assumed that local contact persons are also used by the Prosecution and the Defence.⁶⁰⁶ In some instances, their use may well be unavoidable because of the dangers of witness intimidation.⁶⁰⁷ Some commentators have been very critical of the reliance on 'intermediaries'.⁶⁰⁸

The ICC has understood that further regulation of the relationship between the Court and intermediaries is necessary. To that extent, in October 2010, the 'Draft Guidelines Governing the Relationship between the Court and Intermediaries' were finalised by the Court. The future adoption thereof by the ASP may accommodate problems related to investigative methods.⁶⁰⁹

collected information, identified witnesses and established what they had to say. In essence, intermediaries shaped (and tainted) the evidence before it ever reached prosecution investigators").

⁶⁰³ ICC, Judgement pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 482.

⁶⁰⁴ C. BUISMAN, *Delegating Investigations: Lessons to be Learned from the Lubanga Judgment*, in «Northwestern University Journal of International Human Rights», Vol. 11, 2013, pp. 43 – 45.

⁶⁰⁵ *Ibid.*, p. 45. The author notes that for other cases pending before the ICC, these are either not sufficiently advanced to have an understanding on how the Prosecution conducted its investigations, or are taking place behind closed doors.

⁶⁰⁶ *Ibid.*, p. 56 (noting that it can safely be concluded that also the ICTY and ICTR worked with 'intermediaries', although they were not referred to as such). On the SCSL, consider, P. VAN TUYL, *Effective, Efficient and Fair: An inquiry into the Investigative Practices of the Office of the Prosecutor at the Special Court for Sierra Leone*, War Crimes Studies Center, University of California Berkeley, September 2008, p. 17, citing an interview with former SCSL Prosecutor David Crane, confirming the use of intermediaries.

⁶⁰⁷ Consider in this regard: Interview with a Legal Officer of the ICTR, ICTR-10, Arusha, 21 May 2008, p. 6 ("If our witnesses are seen talking to OTP investigators, villagers threaten them and even ostracize them").

⁶⁰⁸ Consider e.g. G. BOAS, *A Response to Christian De Vos*, <http://opiniojuris.org/2011/12/07/a-response-to-christian-de-vos-by-gideon-boas/> (last visited 29 August 2013), 2011 ("I have long been troubled by the use of information collected by persons other than the Office of the Prosecutor in these trials. Obvious questions about partiality and reliability arise, even in the best of circumstances"); M. BERGSMO, and W.H. WILEY, *Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes*, in S. SKÅRE, I. BURKEY and H. MØRK (eds.), *Manual on Human Rights Monitoring: An Introduction for Human Rights Field Officers*, Oslo, Norwegian Centre for Human Rights, 2010, p. 7 ("Criminal investigators and analysts should never demand assistance on their terms from third parties to an investigation, such as human rights organisations").

⁶⁰⁹ E. BAYLIS, *Outsourcing Investigations*, in «UCLA Journal of International Law & Foreign Affairs», Vol. 14, 2009, p. 145 (arguing that another possible improvement would be the use by the OTP of experts from the UN or NGO's for its own investigations. However, the author carefully notes that this may affect the Prosecutor's objectivity).

VII.2. Fragmentation of the investigation

A second feature of criminal investigations (and prosecutions) by international criminal tribunals is closely connected to the necessary reliance on state cooperation. This is the fragmentation of the investigation over several jurisdictions. Because of the important limitations in the tribunals' ability to gather evidence and information autonomously and independently on the territory of states or to effectuate the arrest of suspects or accused persons, cooperation by states (and other international actors) will be required. Therefore, evidence is gathered or arrests are made by states or other international actors, pursuant to a request by the tribunal. Where the request is consequently executed according to the laws of the requested state, this leads to fragmentation of the investigation over several jurisdictions. As a consequence, complicated situations may arise, causing tensions and conflicts between different procedural regimes. An example from the practice of the ICTY (which will be discussed in more detail further on) may illustrate this. In the *Delalić* case, *Mucić* had been interviewed according to Austrian law, which did not provide for a right to counsel during questioning. In turn, the ICTY's procedural framework provides for the right to the assistance of counsel during an interrogation.⁶¹⁰ In a case such as this, the question arises as to whether the Austrian police officers who conducted the interrogation were right to apply national procedure or whether they should have given priority to the more stringent ICTY procedural norms? Even if the latter question is answered in the affirmative, the question arises as to whether this was only the case when *Mucić* was interrogated at the tribunal's request?⁶¹¹ To give another example, if an accused person has been arrested at the behest of an international criminal tribunal, can that state, prior to the transfer of the accused to the seat of the tribunal, provisionally release the accused (if this is allowed for under its own laws)? If so, what law applies: the procedural rules of the tribunal or domestic law?

The most problematic aspect of the fragmentation of international criminal investigations and proceedings lays in the potentially reductive impact that it can have on the protection of the individual rights of the person(s) concerned. Such reductive impact will be present if and to the extent that international(ised) criminal tribunals decline responsibility for acts carried out

⁶¹⁰ As will be discussed, *infra*, Chapter 4, IV.1.1.

⁶¹¹ See *infra*, Chapter 4, II.2.2.

by states at the request of the tribunal, or for other external events from which it benefited.⁶¹² One commentator concluded that the fragmentation of international criminal proceedings over different jurisdictions does not have a diminishing impact on the level of human rights protection in proceedings before the ICC.⁶¹³ He arrived at this conclusion after finding that the ICC accepts responsibility for *all* human rights violations, even in cases when violations are the result of external events. Below, it will be illustrated how this conclusion should be faulted. For example, the ICC has so far declined to accept responsibility for *all* violations of the suspect's or the accused's rights prior to his or her transfer to the Court.⁶¹⁴ As far as other international(ised) criminal tribunals are concerned, the picture is mixed at best.

International criminal procedure shares the problem of the potentially reductive effects of fragmentation in international criminal investigations with the law on inter-state cooperation in criminal matters. Several authors have warned of the dangers of such fragmentation and emphasised the importance of internal consistency.⁶¹⁵ In the words of ORIE:

“The impression of equal protection of the position of the suspect in case of the execution of a request for judicial assistance in criminal matters could well prove to be mistaken. It is founded on the denial of the procedural complications which arise in case more than one investigating, prosecuting and adjudicating authority, more than one

⁶¹² J.K. COGAN, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, in *Yale Journal of International Law*, Vol. 27, 2002, p. 121 (noting that “commentators are well aware of the difficulties the cooperation regime creates for effective prosecutions; less appreciated is how the same problems affect the rights of the accused”).

⁶¹³ C. DEPREEZ, *Extent of Applicability of Human Rights Standards to Proceedings before the International Criminal Court: On Possible Reductive Factors*, in «*International Criminal Law Review*», Vol. 12, 2012, pp. 738 – 739 (the author agrees that the fragmentation of proceedings is one of the distinctive characteristics of international criminal proceedings).

⁶¹⁴ See *infra*, Chapter 7, VIII.

⁶¹⁵ A.M.M. ORIE, *De verdachte tussen wal en schip òf de systeem-breuk in de kleine rechtshulp*, in E.A. DE LA PORTE et al. (eds.), *Bij deze stand van zaken - bundel opstellen aangeboden aan A. L. Melai, Gouda, Quint, 1983*, pp. 351 – 361; C. SAFFERLING, *The Rights and Interests of the Defence in the Pre-Trial Phase*, in «*Journal of International Criminal Justice*», Vol. 9, 2011, p. 651 (noting, with regard to the ICC, that “under the cooperation-model the defence situation becomes complex and runs the danger of losing itself between national and international law”); E. VAN SLIEDREGT, J.M. SJÖCRONA, A.M.M. ORIE, *Handboek Internationaal Strafrecht, Schets van het Europese en Internationale Strafrecht*, Deventer, Kluwer, 2008, p. 271; B. DE SMET, *Internationale samenwerking in strafzaken tussen Angelsaksische en continentale landen*, Intersentia, Antwerpen – Groningen, 1999, p. 195 (arguing that procedural safeguards of the suspect in the *lex fori* are at risk of being lost in case the assistance of another state is required in the proceedings).

procedural system is involved. At the interface of both systems, the safeguards every system in isolation affords to suspects may seriously become prejudiced.”⁶¹⁶

The risk of *lacunae* in the legal protection of individual rights when more than one legal system is involved may be best illustrated with an example. If an international criminal tribunal requests the assistance of a state in the collection of evidence, the relevant laws of the requested state will normally be applied in the execution of the request (*locus regit actum*), subject to procedural wishes indicated in the request.⁶¹⁷ However, if the evidence is subsequently gathered in disrespect of the formal or material requirements of the national law (which may very well have been adopted to ensure the respect of human rights norms), there is often very little chance that the affected individual(s) will obtain a remedy.⁶¹⁸ Where the evidence was gathered at the request of an international tribunal or the national authorities were compelled to do so by an international tribunal, the requested state may be reluctant to accept responsibility for irregularities.⁶¹⁹ Besides, by the time a remedy is sought at the national level, the evidence that was obtained as a result of the violation may have already been transmitted to the international tribunal. When the evidence has been transferred, the state may request that the tribunal not make use of the evidence. However, the requested state may be reluctant to honour such a request.⁶²⁰ It follows that the prospects for an effective remedy in the requested state are limited.

Hence, remedies may be sought before the tribunal. After all, the tribunal may exclude the evidence; in many cases, this may be the most suitable remedy. However, the tribunal is not under any obligation to provide remedies when the laws of the requested state are violated.

⁶¹⁶ A.M.M. ORIE, *De verdachte tussen wal en schip òf de systeem-breuk in de kleine rechtshulp*, in E.A. DE LA PORTE et al. (eds.), *Bij deze stand van zaken - bundel opstellen aangeboden aan A. L. Melai, Gouda, Quint, 1983*, p. 353 (author's translation).

⁶¹⁷ Consider e.g. Article 99 (1) ICC Statute. In much more detail, see G. SLUITER, *International Criminal Adjudication and the Collection of Evidence*, Antwerp, Intersentia, 2002, pp. 203 – 229. The 'national law' applied is not necessarily identical to the law applied in domestic criminal cases. This depends on the manner in which the state concerned has implemented its obligations *vis-à-vis* the international criminal tribunals. The law will differ in case the state has regulated in detail the execution of requests for assistance by the tribunals, without or with minimal reference to the ordinary laws of criminal procedure and international cooperation in criminal matters (*ibid.*, p. 211).

⁶¹⁸ A.M.M. ORIE, *De verdachte tussen wal en schip òf de systeem-breuk in de kleine rechtshulp*, in E.A. DE LA PORTE et al. (eds.), *Bij deze stand van zaken - bundel opstellen aangeboden aan A. L. Melai, Gouda, Quint, 1983*, p. 355.

⁶¹⁹ M. INAZUMI, *Commentary*, in A. KLIP and G. SLUITER (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 2000-2001*, Vol. VI, Antwerp, Intersentia, 2003, p. 437.

⁶²⁰ G. SLUITER, *International Criminal Adjudication and the Collection of Evidence*, Antwerp, Intersentia, 2002, p. 223.

The tribunals will only offer remedies if the evidence was obtained in such a way that violated the international criminal tribunal's own legal framework.⁶²¹ The flexible rules of evidence may effectively prevent the exclusion of the evidence.

International criminal courts should be aware of the fact that part of the investigative actions may not have been submitted to effective control.⁶²² In order to address these potentially reductive effects of fragmentation, several scholars have advocated the need of increased human rights protection by means of accepting the shared responsibility of the tribunals and the states whose cooperation is sought to protect the human rights of the individual(s) concerned.⁶²³ In this regard, it has been noted that, much like inter-state cooperation in criminal matters, vertical cooperation must be seen as a “triangular” relation between the court, the requested state and the individual(s) concerned.⁶²⁴ From this, it follows that both the court and the requested state have the responsibility to protect the rights of the individual(s) concerned when cooperation is sought from states or other international actors. This serves to avoid loopholes in the protection of the rights of these individuals.⁶²⁵ Since international criminal tribunals are bound to respect international human rights norms, as previously discussed, the international courts or tribunals are not allowed to request assistance which would violate the individual rights of the person(s) concerned. This is why, as will be discussed in more detail further on, a judicial authorisation is required when the assistance required from states involves coercive measures.⁶²⁶ It also implies that the international criminal tribunals are not allowed to request cooperation when the commission of gross human rights violations by the requested state is clearly foreseeable.⁶²⁷ In turn, the requested

⁶²¹ *Ibid.*, p. 223.

⁶²² A.M.M. ORIE, De verdachte tussen wal en schip òf de systeem-breek in de kleine rechtshulp, in E.A. DE LA PORTE et al., Bij deze stand van zaken - bundel opstellen aangeboden aan A. L. Melai, Gouda, Quint, 1983, p. 360.

⁶²³ A. REISINGER, Cooperation from States and Other Entities, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, pp. 111 – 112, 115 (holding that international criminal tribunals “are therefore well-advised to assume a shared responsibility for potential infringements in the execution of cooperation measures, independent of the ultimate determination of the responsibility”).

⁶²⁴ C. KRESS, K. PROST and P. WILKITZKI, Part 9. International Cooperation and Judicial Assistance: Preliminary Remarks, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1510.

⁶²⁵ *Ibid.*, p. 1510.

⁶²⁶ See *infra*, Chapter 6, I.3.1.

⁶²⁷ C. KRESS, K. PROST and P. WILKITZKI, Part 9. International Cooperation and Judicial Assistance: Preliminary Remarks, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1510 – 1511; G. SLUITER, *International Criminal Adjudication and the Collection of Evidence*, Antwerp, Intersentia, 2002, pp. 201, 356; A.

state should respect human rights when executing the request. This implies that when the tribunal would, in violation of its obligations, still request assistance which would infringe upon the rights of the individual(s) concerned, the requested state can (or should) refuse cooperation.⁶²⁸ Cooperation must also be refused when the requested state has substantial grounds to believe that grave human rights violations will take place during the proceedings in the trial forum (for example a flagrant denial of justice).⁶²⁹

The risk of reductive effects on the individual rights of the person(s) involved and for potential loopholes to be exploited explains why it is important that the tribunal's law be indirectly applied. This is true even when evidence was gathered by a state according to its own relevant laws following a tribunal's request. Otherwise, applying the *lex loci* may put the rights of the suspects, accused persons or other individuals under the *lex fori* at risk. As SLUITER points out, this 'hypothetical' application of the *lex fori* upholds the general responsibility of these tribunals as being the "ultimate guardian of the fairness of the trial".⁶³⁰ Besides, when a person is investigated and prosecuted by the trial forum, he or she should also enjoy the (procedural) protection of its laws (notion of mutuality).⁶³¹

The question then arises as to whether the *lex fori* should also apply in cases where evidence was not gathered at the tribunals' request and to events preceding the tribunals' request. It is argued that this question should be answered positively, in order to ensure that the individual concerned at least enjoys the full protection of one of the jurisdictions involved.⁶³² This implies that the international criminal tribunals should consider all relevant violations, whether or not they were committed directly by the tribunal.

REISINGER, Cooperation from States and Other Entities, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 112.

⁶²⁸ Consider the *Soering* and *Abu-Qatada* judgments of the ECtHR, *supra*, fn. 250 - 255 and accompanying text. A. REISINGER, Cooperation from States and Other Entities, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 112.

⁶²⁹ C. KRESS, K. PROST and P. WILKITZKI, Part 9. International Cooperation and Judicial Assistance: Preliminary Remarks, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1511.

⁶³⁰ G. SLUITER, *International Criminal Adjudication and the Collection of Evidence*, Antwerp, Intersentia, 2002, p. 217. See in particular Article 20 (1) ICTY Statute, Article 19 (1) ICTR Statute and Article 64 (2) ICC Statute.

⁶³¹ *Ibid.*, pp. 218 – 219.

⁶³² *Ibid.*, p. 221.

VII.3. Scope and complexity of the investigations

Lastly, the scope and complexity of cases is a distinctive feature of cases traditionally dealt with by these international(ised) criminal tribunals.⁶³³ It cannot seriously be doubted that international criminal investigations are usually complex and extensive. One may, for example, think of the evidentiary difficulties posed by issues of linkage and responsibility with regard to indirect (high-level) perpetrators. The case law occasionally refers to this complexity of investigations in order to emphasise the inherently distinct nature of international criminal proceedings from domestic criminal proceedings.⁶³⁴ Investigations presuppose the collection of vast amounts of documentary evidence or the identification of hundreds of potential witnesses.⁶³⁵ Investigative acts may be required in many different parts of the world. For example, victims and witnesses will often have fled to different parts of the world.⁶³⁶ This may make the tracking down of witnesses a challenge.⁶³⁷ It may be objected that these crimes may not be too different from serious (organized) crime investigations in the

⁶³³ See e.g. X.A. ARANBURU, *Methodology for the Criminal Investigation of International Crimes*, in A. SMEULERS, *Collective Violence and International Criminal Justice*, Antwerp, Intersentia, 2010, p. 355; A. WHITING, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, in «Harvard International Law Journal», Vol. 50, 2009, p. 337 (noting that cases may only exceptionally be straightforward); J.I. TURNER, *Policing International Prosecutors*, in «International Law and Politics», Vol. 45, 2013, p. 209; V. TOCHILOVSKY, *Special Commentary: International Criminal Justice: Some Flaws and Misperceptions*, in «Criminal Law Forum», Vol. 22, 2011, p. 600 (“The investigation of cases under the jurisdiction of international criminal tribunals is no equivalent to police investigations of domestic crimes. In the international tribunals, one has to identify and collect evidence to prove elements of war crimes, crimes against humanity, and other serious violations of the international humanitarian law”).

⁶³⁴ Consider e.g. ICTR, Judgment, *Prosecutor v. Nahimana, Barayagwiza, and Ngeze*, Case No. ICTR-99-52-A, A. Ch., 28 November 2007, par. 1076 – 1077 (on the length of the proceedings, the Appeals Chamber noted: “the Appeals Chamber notes in particular that the case cited to support the Appellant’s argument relates to criminal proceedings before a domestic court and not before an international tribunal. However, because of the Tribunal’s mandate and of the inherent complexity of the cases before the Tribunal, it is not unreasonable to expect that the judicial process will not always be as expeditious as before domestic courts”).

⁶³⁵ M. KARNAVAS, *Gathering Evidence in International Criminal Trials – The View of the Defence Lawyer*, in M. BOHLANDER, *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, Cameron May, London, 2007, p. 75.

⁶³⁶ Interview with Mr. Taku, Defence counsel, ICTR-21, Arusha, 23 May 2008, p. 7 (“As I said, we have witnesses of all over the world, many of them cannot stay in Rwanda – they are afraid for their lives”). M.B. HARMON and F. GAYNOR, *Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings*, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 407 (noting, with regard to the ICTY that victims often have scattered to different parts of the Former Yugoslavia and of the world).

⁶³⁷ When asked about the major obstacles encountered during investigations, several interviewees would include this challenge. Consider e.g. Interview with a member of the OTP, ICTR-12, Arusha, 21 May 2008, p. 4 (“there are geographical challenges, witnesses who know about certain facts have to be identified and traced”); Interview with Mr. Gershom Otachi BW’Omanwa, Defence Counsel, ICTR-27, Arusha, 30 May 2008, p. 11; Interview with a Defence Counsel at the ICTR, ICTR-25, Arusha, 29 May 2008, p. 4 (“One of the main problems is just the practical aspect of getting the witnesses”).

municipal context. Still, there are several factors that set the investigation of crimes within the jurisdiction of the international(ised) criminal tribunals apart.

For example, because of the vast number of perpetrators and crimes as well as the great number of victims, the focus of the investigations differs.⁶³⁸ Scale is often an issue and the Prosecutor has the difficult task of selecting charges that have the highest chance of returning a conviction while, at the same time, satisfying the interests of the society and of the victims.⁶³⁹ Unlike national criminal investigations, the context in which a crime occurred is of primary importance insofar that it determines the jurisdiction of the Court.⁶⁴⁰ Typically, fewer variables are known to the investigators. Where national criminal investigations deal with crimes committed by one or more perpetrators and in which the victim(s) and one or more of the suspects' identities are usually known, it is impossible to establish all perpetrators and victims of the crimes committed in international criminal investigations.⁶⁴¹ These crimes often result in mass victimisation.⁶⁴² Furthermore, the lack of access to the crime scene and to witnesses makes these investigations even more complicated.⁶⁴³ It is not unusual for investigators to gain access to the crime scene only years after the event, at which time evidence may have deteriorated or been tampered with.⁶⁴⁴

⁶³⁸ The number of perpetrators also creates additional problems in that a number of witnesses "are not clean". See Interview with a member of the OTP, ICTR-09, Arusha, 20 May 2008, p. 3.

⁶³⁹ M. BERGSMO and M.J. KEEGAN, Case Preparation for the International Criminal Tribunal for the Former Yugoslavia, in *Manual on Human Rights Monitoring: An Introduction for Human Rights Field Officers*, Oslo, Norwegian Centre for Human Rights, 2008, p. 5.

⁶⁴⁰ *Ibid.*, p. 4.

⁶⁴¹ *Ibid.*, pp. 4-5; H. FUJIWARA and S. PARMENTIER, Investigations, in L. REYDAMS, J. WOUTERS and C. REYNGAERT (eds.), *International Prosecutors*, Oxford, Oxford University Press, 2012, p. 574.

⁶⁴² *Ibid.*, p. 575; M. DAMAŠKA, The Competing Visions of Fairness: The Basic Choices for International Criminal Tribunals, in «North Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2010 – 2011, p. 365.

⁶⁴³ Consider e.g. ICC, Judgment pursuant to Article 74 of the Statute, *Prosecutor v. Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-02/12-3, T. Ch. II, 18 December 2012, par. 115 ("The Chamber is mindful that these investigations were conducted in a region still plagued by high levels of insecurity. It therefore acknowledges that the Office of the Prosecutor would have encountered difficulties in locating witnesses with sufficiently accurate recollections of the facts and able to testify without fear, as well as in the collection of reliable documentary evidence necessary for determining the truth in the absence of infrastructure, archives and publicly available information"); A. WHITING, In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered, in «Harvard International Law Journal», Vol. 50, 2009, pp. 335 – 336; M.B. HARMON and F. GAYNOR, Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings, in «Journal of International Criminal Justice», Vol. 2, 2004, pp. 406 - 407.

⁶⁴⁴ J.D. JACKSON and S.J. SUMMERS, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*, Cambridge, Cambridge University Press, 2012, p. 113.

VIII. THE IDENTIFICATION OF NORMATIVE PARAMETERS

From the overview above, it can be concluded that there are many reasons why finding agreement on procedural rules in international criminal procedure is fraught with difficulties. The sources from which such rules are to be derived remain uncertain. Also, different perceptions persist as to whether and to what degree human rights norms should be adjusted to the context of international criminal procedure or what goals international criminal procedure is intended to serve. Overall, international criminal procedure seems to lack a strong theoretical foundation and a convincing theory, which takes into consideration its specific characteristics and the goals it is intended to serve.⁶⁴⁵

It remains to be determined what criteria will be used to normatively assess international criminal procedure. From the discussion above, one suitable candidate for such a normative evaluation clearly emerges. It was concluded that all courts and tribunals under review are bound by international human rights norms. This renders these norms a suitable tool for the normative evaluation of international criminal procedure. In the following chapters, the law of international criminal procedure relevant to the investigation phase of proceedings will be assessed in light of these norms. It is clear that fair trial norms will be of paramount importance. However, other human rights norms, including the right to privacy, are also relevant to investigations under international criminal procedure.

Other potential normative tools for the evaluation of international criminal procedure are the goals of international criminal justice and international criminal procedure. It was concluded how ideally, the design of the procedural framework of international criminal investigations, every aspect of it, should be informed by the goals of international criminal justice and international criminal procedure. However, this presupposes agreement on these goals and the hierarchy that exists between them. The absence of any such agreement takes a great deal away from the evaluative potential of these goals. They do not allow us to say much on the form that proceedings *should* take to serve these goals or to make firm choices regarding the procedural design of international criminal proceedings. Although it may be possible on the

⁶⁴⁵ G. SLUITER, *The Law of International Criminal Procedure and Domestic War Crimes Trials*, in «International Criminal Law Review», Vol. 6, 2006, p. 634; P.C. KEEN, *Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals*, in «Leiden Journal of International Law», Vol. 17, 2004, p. 813.

basis of individual (added) goals of international criminal justice, to say something meaningful on the manner proceedings should best be structured and how ends and means should be matched, attention should be paid to the fact that different goals require different procedures and often pull in different directions. It follows that these goals will only be relied upon to a very limited extent in this study.

A third possibility is to evaluate international criminal procedure in light of the common law and civil law dichotomy. However, it was concluded that while this dichotomy has some descriptive, explanatory force, it is not a normative tool *per se*. That said, where international criminal procedure borrows a lot from the common law and civil law style of proceedings, this dichotomy will be used as a tool to better understand international criminal procedure and thus to *assist* the normative evaluation. Besides, it may allow us to discover ‘systemic tensions’ in international criminal procedure and help to better understand evolutions. Finally, caution is necessary in that criminal justice systems were developed in response to a certain socio-political climate. Hence, one should consider the different context and goals of international criminal procedure in applying this common law – civil law terminology.

Finally, it was concluded that any assessment on what procedure is most fit for international criminal tribunals should consider its ‘uniqueness’ or unique characteristics. Therefore, when relevant, reference will be made to these unique characteristics in assessing international criminal procedure.

Chapter 3: Structure and scope of the investigation

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INTRODUCTION

This chapter explores the procedural design of the investigation phase at the different tribunals under review. Before embarking upon a detailed discussion of any investigative activities in the subsequent chapters, it is necessary to first delineate and define what ‘investigation’ means under international criminal procedural law. As with other chapters, the emphasis lies on identifying communalities and differences between the tribunals under review.

It is necessary to precisely determine the *start* and the *end point* of investigations in international criminal procedure. It needs to be examined from which moment on and under what conditions the Prosecutor may avail him or herself from the full gamut of investigative powers which are provided for under international criminal procedure. For example, it may be that a minimum level of suspicion is required in order to justify the use of these investigative measures. Furthermore, while international criminal investigations are traditionally *reactive* in nature, it needs to be investigated whether or not, and if so, to what extent, investigations can be *proactive* in nature.

For that purpose, in the first section of this chapter, whether or not any ‘minimum threshold’ exists for the commencement of investigations will be examined. Related to this is the question whether or not any investigative activity may precede the determination that such a threshold has been met. Whereas a ‘pre-investigation phase’ is clearly envisaged by the procedural rules of the ICC, it will be asked whether such a phase also exists at other tribunals under review. An outline of the structure of the investigation phase at the different international(ised) criminal tribunals will then be provided. Also the role and function of the different actors during this phase of proceedings will be scrutinised. This first section will conclude with a discussion on the nature (reactive vs. proactive) of investigations within international criminal procedure.

The second section of this chapter then seeks to determine whether the Prosecutor in international criminal proceedings enjoys discretion in selecting cases for investigation (and prosecution) or whether he or she is rather bound by a principle of legality. At the outset, considering the nature of crimes that these tribunals are dealing with, it seems logical to

assume that international Prosecutors should at least enjoy some degree of discretion. However, the level of discretion may vary amongst tribunals.

In the third and fourth section, some important normative principles will be discussed. Firstly, it will be examined to what extent the international Prosecutor should only gather incriminating evidence and information in the course of the investigation, or whether he or she is bound by a principle of objectivity, requiring the Prosecutor to investigate *à charge* and *à décharge*. Secondly, it will be asked to what extent the Prosecutor and other participants are bound by ethical considerations of due diligence in the conduct of investigations.

This chapter concludes with an overview of any common rules or shared practices that could be identified.

I. THE INVESTIGATION PHASE: DEFINITION AND DELINEATION

I.1. Minimum threshold for the commencement of the investigation

§ The ad hoc tribunals

The *ad hoc* tribunals' Statutes include an explicit threshold for the commencement of investigations. A 'sufficient basis to proceed' should exist.¹ It is clear from the wording that this evidentiary threshold is not concerned with the appropriateness of the investigation.² Neither the statutory documents, nor the jurisprudence further elucidate the content of this threshold. A contextual reading clarifies that this threshold should be lower than the threshold provided for under Article 17 (4) ICTR and 18 (4) ICTY Statute for the preparation of the indictment. Furthermore, some hints on the interpretation of this threshold by the ICTY Prosecution may be found in an expert report the Prosecutor requested on the politically delicate issue of the NATO bombing campaign against the Federal Republic of Yugoslavia. A committee had been tasked to advise the Prosecution "whether or not there existed a sufficient basis to proceed with an investigation with regard to allegations that war crimes had been

¹ Article 18 (1) ICTY Statute; Article 17 (1) ICTR Statute. No such threshold is to be found in the Statute or the RPE of the Special Court.

² M. BERGSMO and P. KRUGER, Article 53, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1068.

committed by NATO personnel and leaders in the course of the air campaign against the Federal Republic of Yugoslavia.”³ The committee proposed the following test:

“(a) Are the prohibitions alleged sufficiently well-established as violations of international humanitarian law to form the basis of a prosecution, and does the application of the law to the particular facts reasonably suggest that a violation of these prohibition may have occurred? And (b), upon the reasoned evaluation of the information by the committee, is the information credible and does it tend to show that crimes within the jurisdiction of the Tribunal may have been committed by individuals during the NATO bombing campaign.”⁴

The report states that the same criteria were applied by the Prosecution to “activities of other actors in the territory of the Former Yugoslavia.”⁵ Hence, it follows that the test formulated above at least reflects the test that was applied by the OTP. Importantly, since no judicial control is exerted over the Prosecutor’s decision to commence an investigation and in the absence of relevant jurisprudence, it is up to the Prosecutor to interpret the ‘sufficient basis to proceed’ threshold. From such a minimum threshold for the commencement of an investigation follows the existence of a phase immediately preceding it.⁶

§ *The International Criminal Court*

Unlike the *ad hoc* tribunals, the ICC Statute and RPE expressly provide for a pre-investigative phase.⁷ The threshold to move from a preliminary investigation to a full-blown investigation differs from the ‘sufficient basis to proceed’ threshold at the *ad hoc* tribunals. Rather, the ICC Statute requires a ‘reasonable basis to proceed’. This threshold is found in Article 15 (3), (4) and (6) ICC Statute with regard to *proprio motu* investigations; in the *chapeau* of Article 53

³ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, par. 3. As noted by CÔTÉ, the appointment of a committee was appropriate given the delicate nature of the issues. He underlines that no obligation for the Prosecutor to disclose the factors that he or she relies upon in the exercise of prosecutorial discretion can be found in the statutory framework of the *ad hoc* tribunals. See L. CÔTÉ, Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law, in «Journal of International Criminal Justice», Vol. 3, 2005, p. 181.

⁴ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, par. 5.

⁵ *Ibid.*, par. 5.

⁶ See *infra*, Chapter 3, I.2.

⁷ See *infra*, Chapter 3, I.2.

(1) ICC Statute as well as in Rule 48 ICC RPE. This raises the question whether this threshold is the same in all of these provisions.

Under Article 53 (1) (a) a different threshold is included, ‘reasonable basis to believe’, adding to the complexity. It is unclear how the ‘reasonable basis to proceed’ requirement in the *chapeau* of Article 53 (1) ICC Statute and the ‘reasonable basis to believe’ threshold under Article 53 (1) (a) mutually relate.⁸ A textual interpretation of Article 53 (1) hints that a ‘reasonable basis to proceed’ exists once the different criteria of subparagraphs (a) – (c) are met. Such understanding has been confirmed by the jurisprudence. Pre-Trial Chamber II held that the ‘reasonable basis to believe’ test in Article 53 (1) (a) is subsumed by the ‘reasonable basis to proceed’ standard referred to in the opening clause of Article 53 (1) of the Statute, since the former is only one element of the latter.⁹ Hence, there is a strong presumption that the ‘reasonable basis to proceed’ requirement is met when the requirements under Article 53 (1) (a) – (c) ICC Statute are fulfilled.¹⁰ This conclusion is supported by the *travaux préparatoires*.¹¹

A contextual interpretation in light of other thresholds that are found in the Statute further sheds light on the correct understanding of the threshold. Article 15 (3) ICC Statute is concerned with only one triggering mechanism (*proprio motu* investigations by the ICC Prosecutor), more precisely with the assessment of the information received by the Prosecutor and the question whether this information reveals the existence of a ‘reasonable basis to proceed’. It follows from Rule 48 ICC RPE that in this determination, the Prosecutor should equally consider the criteria under Article 53 (1) (a) – (c) ICC Statute. Hence, it appears that

⁸ Seemingly, several authors do not distinguish between the ‘reasonable basis to proceed’ requirement in the *chapeau* of Article 53 (1) and the ‘reasonable basis to believe’ requirement under Article 53 (1) (a) ICC Statute. Consider e.g. G. TURONE, Powers and Duties of the Prosecutor, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, pp. 1151 - 1152.

⁹ ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 26.

¹⁰ *Ibid.*, par. 26.

¹¹ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum: Draft Statute for the International Criminal Court and Draft Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court, U.N. Doc. A/CONF.183/2/Add.1, 14 April 1998, p. 75 (a *nota bene* is included, highlighting that the “term ‘reasonable basis’ in the opening clause is also used in the criteria listed in paragraph 2 (i). If the latter is retained, a broader term in the opening clause might be necessary in order to cover all the criteria listed under paragraph 2”).

similar considerations underlie the ‘reasonable basis to proceed’ threshold in Article 15 (3) and in the *chapeau* of Article 53 (1) ICC Statute.

As acknowledged by Pre-Trial Chamber II, it would be illogical to dissociate the threshold in Article 15 (3) and Article 53 (1) from the threshold provided for under Article 15 (4) ICC Statute, which deals with the authorisation of a *proprio motu* investigation by the Pre-Trial Chamber.¹² The Pre-Trial Chamber refers to the fact that these thresholds are used in the same or related articles and that they share the *same purpose*: the opening of a formal investigation.¹³ This conclusion finds support in the *travaux préparatoires*.¹⁴ Moreover, Pre-Trial Chamber II argued that the meaningful exercising of a supervisory function by the Pre-Trial Chamber in case of a *proprio motu* initiative by the Prosecutor presupposes that “the Chamber applies the exact standard on the basis of which the Prosecutor arrived at his conclusion.”¹⁵ This relationship between Article 15 and 53 ICC Statute is further confirmed by Rule 48 ICC RPE.

Clearly, a ‘reasonable basis to proceed’ requires less certainty than the ‘sufficient basis for a prosecution’ threshold in Article 53 (2) ICC Statute. Similarly, the threshold is lower than the ‘reasonable grounds to believe’ prerequisite for the issuance of an arrest warrant or the existence of substantial grounds to believe as required for the confirmation of the charges.¹⁶ One author labels it “the first step of a stairway which becomes stricter with every step taken towards trial and requires more profound evidence with each level.”¹⁷ It has been suggested

¹² ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 21.

¹³ *Ibid.*, par. 21. Confirming F. RAZESBERGER, *The International Criminal Court: The Principle of Complementarity*, Frankfurt am Main, Peter Lang, 2006, p. 70 (holding that the ‘initiation of the investigation’ has the same meaning in both articles so that the ‘reasonable basis’ requirement under Article 15 (3) and Article 53 (1) ICC Statute applies to the same phase in the investigation process).

¹⁴ ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 22 – 23 (the *travaux préparatoires* reveal that the drafters intended to use the same standard in the different provisions and wanted to establish the link between Article 15 and 53). On the drafting history, see in detail, I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, pp. 242 – 249.

¹⁵ ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 24.

¹⁶ Article 61 (7) ICC Statute.

¹⁷ I. STEGMILLER, *The Pre-Investigation Stage of the ICTY and the ICC Compared*, in T. KRUESSMANN (ed.), *ICTY: Towards a Fair Trial?*, Wien - Graz, Neuer Wissenschaftlicher Verlag, 2008, p. 322; I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 253.

that the ‘reasonable basis to proceed’ threshold, in the manner it has been applied by the Court, is in fact the same as the ‘reasonable grounds to believe’ standard which is required for the issuance of an arrest warrant. The difference is that the evidence required should be directed to the individual, rather than to the situation or to events.¹⁸

In comparison, it seems that the ‘sufficient basis to proceed’ (the *ad hoc* tribunals) and the ‘reasonable basis to proceed’ threshold (ICC) do not differ that much. Such a view is supported by the drafting history of the provisions. During the 1996 PrepCom debates, the same threshold (‘sufficient basis to proceed’) which is found in the Statutes of the *ad hoc* tribunals was first proposed.¹⁹ In draft Article 12, the formulation ‘a sufficient basis to proceed’ was used, while in draft Articles 13 and 54 (1) a ‘reasonable basis to proceed’ was required.²⁰ A *nota bene* was included in Article 12 that “[t]he terms “sufficient basis” used in this article (if retained) and “reasonable basis” in article 54, paragraph 1, should be harmonized.” From there, it could arguably be reasoned that both concepts (‘sufficient basis to proceed’ and ‘reasonable basis to proceed’) are not that different from each other. However, future case law (primarily by the ICC Pre-Trial Chambers) may further elucidate the meaning of the ‘reasonable basis to proceed’ threshold. In contrast, since the ‘sufficient basis to proceed’ threshold is not subject to direct judicial supervision, the exact understanding thereof by the Prosecutors of the *ad hoc* tribunals remains enigmatic.

According to an ICC Pre-Trial Chamber, the ‘reasonable basis to proceed’ threshold serves to prevent “unwarranted, frivolous, or politically motivated investigations.”²¹ This finding regarding the purpose of this minimum threshold is confirmed by the *travaux préparatoires*: this threshold was inserted “to prevent any abuse of the process not only by the Prosecutor but

¹⁸ M.J. VENTURA, The ‘Reasonable Basis to Proceed’ Threshold in the Kenya and Côte d’Ivoire *Proprio Motu* Investigation Decisions: The International Criminal Court’s Lowest Evidentiary Standard?, in «The Law and Practice of International Courts and Tribunals», Vol. 12, 2013, pp. 49 – 80.

¹⁹ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II (Compilation of proposals), 2006, p. 109.

²⁰ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum: Draft Statute for the International Criminal Court and Draft Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court, U.N. Doc. A/CONF.183/2/Add.1, 14 April 1998, pp. 27 and 75.

²¹ See ICC, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Situation in the Republic of Côte d’Ivoire”, *Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-14-Corr, PTC III, 15 November 2011, par. 21 (speaking on Article 15 (4) ICC Statute). See also M. BERGSMO and J. PEJÍČ, Article 15, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 589 and 591.

also by any of the other triggering parties.”²² While some authors argue that this threshold is purely evidentiary in nature,²³ it will be shown further on in this chapter, that this threshold also includes the appropriateness of the investigation. Several factors which are subsumed in this threshold (in particular the ‘interests of justice’) are in fact discretionary in nature.²⁴

§ *Other international(ised) criminal tribunals*

Also at the ECCC, the investigation phase consists of two subsequent stages. Prior to the commencement of the judicial investigation, preliminary investigations are normally conducted by the Co-Prosecutors. No minimum threshold is provided for the commencement of preliminary investigations. Only when the Co-Prosecutors have ‘reason to believe’ that crimes within the jurisdiction of the Extraordinary Chambers have been committed, shall they order the opening of a judicial investigation.²⁵ Similar to the *ad hoc* tribunals, no judicial review of this finding is normally provided for. One notable exception is the scenario when a disagreement arises between the two Co-Prosecutors on the presence of ‘reasons to believe’.²⁶ In this regard, reference is to be made to the disagreement between the national and the international Co-Prosecutor on the submission of new introductory submissions for Cases 003 and 004 (and thus the question whether ‘reasons to believe’ existed pursuant to Rule 53 (1) ECCC IR).²⁷ In the absence of further clarification within the Internal Rules or the jurisprudence of the Extraordinary Chambers of the meaning of this threshold, discretion to define it is left with the Co-Prosecutors.²⁸

The statutory documents of the SPSC, the SCSL and the STL do not require the existence of a sufficient or reasonable basis for the commencement of a formal investigation. No standard of proof for the initiation of the investigation is provided for.

²² S.A.F. DE GURMENDI, *The Role of the International Prosecutor*, in R.S. LEE (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, The Hague, Kluwer Law International, 1999, p. 182.

²³ M. BERGSMO and J. PEJIĆ, Article 15, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 587.

²⁴ See *infra*, Chapter 3, II.4. Confirming, see A. ZAHAR and G. SLUITER, *International Criminal Law: a Critical Introduction*, Oxford, Oxford University Press, 2008, p. 374.

²⁵ Rule 53 (1) ECCC IR.

²⁶ Rule 71 ECCC IR; Article 7 ECCC Agreement.

²⁷ See ECCC, Annex I: Public Redacted Version - Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, Disagreement No. 001/18-11-2008-ECCC/PTC, 18 August 2009.

²⁸ As will be discussed, *infra*, Chapter 3, II.5.

§ Conclusion

From the above, it emerges that a standard of proof for the commencement is only provided for at the *ad hoc* tribunals, the ICC and the ECCC. A comparison can be drawn with national criminal justice systems. Also at the national level, only some criminal justice systems provide for such standard of proof. For example, in Germany, the opening of a formal investigation (*Ermittlungsverfahren*) is required once there are ‘sufficient factual indications’.²⁹ Hence, the sanctioning of the start of a formal investigation presupposes the existence of an ‘initial suspicion’ (*Anfangsverdacht*). This threshold implies that according to factual circumstances, and taking into account criminal experience, a participation of the person concerned in the alleged criminal offence(s) seems possible.³⁰ Likewise, other national jurisdictions established such minimum threshold for the commencement of full investigations.³¹ In turn, other countries, such as the United States, do not seem to provide for such standard of proof.³²

I.2. The pre-investigation phase

§ *The ad hoc tribunals and the SCSL*

The powers to investigate and to prosecute are vested with the Prosecutor.³³ Hence, it is the Prosecutor who initiates the investigation. No preference is included regarding the *notitia criminis*.³⁴ The Prosecutor can initiate investigations *ex officio* or on the basis of information from ‘any source’.³⁵ There is no possibility for third parties to initiate investigations. This

²⁹ § 152 (2) StPO.

³⁰ M. BOHLANDER, *Principles of German Criminal Procedure*, Oxford and Portland, Hart Publishing, 2012, pp. 69 – 70; I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 504.

³¹ Consider e.g. Article 224 (1) of the Criminal Procedure Act of the Kingdom of Norway (‘A criminal investigation shall be carried out when as a result of a report or other circumstances there are reasonable grounds to inquire whether any criminal matter requiring prosecution by the public authorities subsists’).

³² I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 538.

³³ Article 16 (1) of the ICTY Statute and Article 15 (1) of the ICTR and SCSL Statutes.

³⁴ M.R. BRUCHBACHER, *Prosecutorial Discretion within the International Criminal Court*, in «*Journal of International Criminal Justice*», Vol. 2, 2004, p. 77.

³⁵ Article 18 (1) ICTY Statute and Article 17 (1) ICTR Statute expressly refer to information received from governments, United Nations organs, intergovernmental and non-governmental organizations. No similar provision can be found in the SCSL Statute.

power is left with the Prosecutor alone.³⁶ The identification, in the previous section, of a minimum threshold for the commencement of the investigation presupposes the existence of a phase immediately preceding this phase.³⁷ This phase may be labelled the ‘pre-investigation phase’. However, unlike the ICC’s procedural set-up (which will be discussed subsequently), the ICTY, ICTR and SCSL Statute and RPE do nowhere explicitly regulate it.³⁸ As a minimum, it should comprise of the analysis and evaluation of information and materials in order to assess whether the minimum threshold for the commencement of the investigation has been reached in a particular case.³⁹ Important in this regard is the possibility to obtain information from ‘any source’.⁴⁰ In particular, the ICTY and ICTR Prosecutors benefited from the work conducted by the Commissions of Experts.⁴¹ Where the prosecutorial powers enumerated in Articles 18 (2) ICTY Statute and Article 17 (2) (and Rule 39 *et seq.* ICTY and ICTR RPE) apply to the ‘investigation’, it logically follows that these powers are not at the Prosecutor’s disposal during the pre-investigation phase. Hence, the Prosecutor cannot interview witnesses, question suspects or conduct on-site investigations at this preliminary stage. However, it was previously noted that in the absence of judicial oversight over the question whether there exist ‘sufficient basis to proceed’, the Prosecutor enjoys some latitude with regard to the moment in time these investigative measures apply.

³⁶ Cassese provides three possible explanations for this omission, to know (1) the fact that there already existed numerous reports on the alleged crimes, making such a right of complaint superfluous; (2) the risk that the availability of such mechanism would have triggered proceedings regarding alleged crimes of minor importance and (iii) that such right might have enabled states to act on political grounds or could have prompted states to make use of criminal justice for their own ends. See A. CASSESE, *International Criminal Law* (2nd Ed.), Oxford, Oxford University Press, 2008, p. 396.

³⁷ Confirming, e.g. I. STEGMILLER, *The Pre-Investigation Stage of the ICTY and the ICC Compared*, in T. KRUESSMANN (ed.), *ICTY: Towards a Fair Trial?*, Wien - Graz, Neuer Wissenschaftlicher Verlag, 2008, p. 317.

³⁸ At least one author argues that in the absence of an explicit regulation of this pre-investigation, it may not be sensible to separate it from the investigation phase proper. However, it is argued that such distinction is necessary to properly delineate the investigation phase proper. Compare C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, p. 231.

³⁹ *Ibid.*, p. 152; J. D. OHLIN, *Peace, Security and Prosecutorial Discretion*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 231: “From the wording of Art. 18 (1) ICTYSt/Art. 17 (1) ICTRSt, one must assume that the pre-investigation phase, if one were required to define it, only comprises the assessment of information the Prosecutor has received according to the same provisions. Once the Prosecutor ‘proceeds’ and investigates beyond that information, the actual investigation phase begins.” Consider also H. FUJIWARA and S. PARMENTIER, *Investigations*, in L. REYDAMS, J. WOUTERS and C. REYNGAERT (eds.), *International Prosecutors*, Oxford, Oxford University Press, 2012, p. 594 (noting that at most international tribunals, including the ICTY and ICTR, “this phase lacks a clear definition and is presumed to form an integral part of the investigative stage”).

⁴⁰ Article 18 (1) ICTY Statute and Article 17 (1) ICTR Statute.

⁴¹ Consider the Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 to Investigate Violations of International Humanitarian Law in the Former Yugoslavia, U.N. Doc. S/1994/674, 27 May 1994; Final report of the Commission of Experts Established Pursuant to Security Council Resolution 935, U.N. Doc. S/1994/1405, 9 December 1994 (Rwanda).

§ *The International Criminal Court*

At the ICC, the pre-investigation is regulated by Articles 15 (1) (2) (3) and (6) and 53 (1) of the ICC Statute as well as by Rules 48 and 104 ICC RPE. While only Article 15 (6) explicitly refers to a ‘preliminary examination’, the existence of a phase immediately preceding the investigation proper follows from the existence of a minimum threshold for the commencement of the investigation proper. It constitutes a phase which can be distinguished from the investigation proper.⁴²

It follows from the ICC Statute as well as the ICC RPE that the preliminary examination starts once the dormant jurisdiction of the Court is triggered and irrespective of the manner in which the jurisdiction of the court is triggered: either on the basis of information received on crimes or upon a referral.⁴³ Therefore, while the ICC Statute uses the term ‘preliminary examination’ only if the Prosecutor proceeds on the basis of his or her *proprio motu* powers, a formal investigation does also not follow automatically in case of a referral.⁴⁴ It is for the Prosecutor to decide whether or not to open an investigation.⁴⁵ In all instances, the Prosecutor should assess the seriousness of the information received.⁴⁶ Furthermore, irrespective of the triggering mechanism, in assessing whether the minimum threshold for the opening of an investigation proper has been fulfilled, the same criteria should be considered.⁴⁷ What differs is the procedural presumption.⁴⁸ With regard to referrals, it follows from the ICC Statute that the Prosecutor ‘shall [...] initiate an investigation *unless* he or she determines that there is no reasonable basis to proceed’. Judicial review by the Pre-Trial Chamber is limited to a

⁴² See e.g. I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, pp. 58, 65.

⁴³ Articles 15 and 53 (1) ICC Statute, Rule 48 ICC RPE; Regulation 25 ICC Regulations of the Prosecutor; ICC, Policy Paper on Preliminary Examinations, 2013, par. 73. Consider e.g. I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 57; G. TURONE, Powers and Duties of the Prosecutor, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1146.

⁴⁴ *Contra*, consider BRUBACHER, distinguishing between referrals, which do not presuppose a preliminary investigation, and *proprio motu* investigations, which do. See M.R. BRUBACHER, Prosecutorial Discretion in the International Criminal Court, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 77.

⁴⁵ ICC, Policy Paper on Preliminary Examinations, 2013, par. 76.

⁴⁶ Rule 104 (1) ICC RPE, Article 15 (2) ICC Statute.

⁴⁷ Article 15 (3) ICC Statute *juncto* Rule 48 ICC RPE and Article 53 (1) ICC Statute.

⁴⁸ K. DE MEESTER, K. PITCHER, R. RASTAN and G. SLUITER, Investigation, Coercive Measures, Arrest and Surrender, in H. FRIMAN, S. LINTON, G. SLUITER, S. VASILIEV and S. ZAPALLÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 182; I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 91.

determination *not* to proceed, not of an affirmative decision to proceed.⁴⁹ Hence, in such a case, there is a strong presumption in favour of the finding of a ‘reasonable basis’, thereby limiting prosecutorial discretion in case of a referral. In contrast, when the Prosecutor assesses information received, the starting point is that there will be no initiation of the investigation: the Prosecutor needs authorisation by the Pre-Trial Chamber to proceed with an investigation.⁵⁰ From the above, it emerges that irrespective of the triggering mechanism, the pre-investigative phase is –at least in theory- almost identical.⁵¹

Provided that a preliminary examination or pre-investigative stage is provided with respect to all triggering mechanisms, it should be asked whether and to what extent the Prosecutor can start a preliminary examination in the absence of a communication. In other words, is the *notitia criminis* a *conditio sine qua non* for the conduct of a preliminary examination? From the combined reading of Article 15 (1) (2) and (6), it seems to follow that this question should be answered in the affirmative.⁵² Such reading has been questioned.⁵³ It is pointed out that Article 15 (1) refers to ‘information’, rather than ‘information received’. However, a contextual interpretation of this provision, in light of Article 15 (2) and Article 15 (6) ICC Statute contradicts such interpretation. Indeed, these two latter provisions respectively refer to ‘information received’ and ‘information provided’.⁵⁴ Other authors agree that a communication is presupposed but add that the threshold is very low and may include the

⁴⁹ Article 53 (1) ICC Statute *chapeau* and *in fine*.

⁵⁰ Article 15 (3) ICC Statute.

⁵¹ ICC, Corrigendum to “Judge Fernández de Gurmendi’s Separate and Partially Dissenting Opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d’Ivoire”, *Situation in the Republic of Cote d’Ivoire*, Case No. ICC-02/11-15-Corr, PTC III, 5 October 2011, par. 24.

⁵² Confirming, see H. OLÁSOLO, The Prosecutor of the ICC before the Initiation of Investigations: a Quasi-Judicial or Political Body?, in «International Criminal Law Review», Vol. 3, 2003, pp. 124 – 125; M. BERGSMO and J. PEJIĆ, Article 15, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 586.

⁵³ I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 192 (who concludes that such approach would be too stringent where the purpose of Article 15 was to allow the Prosecutor to start investigations on his own).

⁵⁴ H. OLÁSOLO, The Prosecutor of the ICC before the Initiation of Investigations: a Quasi-Judicial or Political Body?, in «International Criminal Law Review», Vol. 3, 2003, p. 126. Other arguments provided by the author why the communication of the *notitia criminis* is presupposed seem less convincing: (1) the author argues, in referring to the three triggering mechanisms, that the possibility for the Prosecutor to *proprio motu* start an investigation presupposes the communication of the *notitia criminis* (this seems to be a circular argument) and (2) that the lack of limitations to the Prosecutor’s possibility to conduct preliminary investigations would undermine the delicate balance reached at the Rome conference).

Prosecutor receiving information by watching the news.⁵⁵ In turn, the Prosecutor holds the view that no formal communication is required and he or she “proactively monitor[s] information on crimes potentially falling within the jurisdiction of the Court.”⁵⁶

A related question is whether the Prosecutor is obliged to proceed with a preliminary examination in all cases where he or she receives information. According to Article 15 (1) ICC Statute, the Prosecutor ‘may’ initiate investigations *proprio motu*. From this wording, it could be concluded that the Prosecutor’s initiation right is discretionary.⁵⁷ This interpretation has been adopted by the ICC OTP.⁵⁸ One could argue that the discretion in Article 15 (1) relates to the *formal* investigation, which is to be distinguished from any preliminary investigation. However, this view seems to contradict Article 15 (6), from which it follows that Article 15 (1) and (2) are concerned with the preliminary examination.⁵⁹ Less clear is how this discretion imbedded in Article 15 (1) should then be reconciled with Article 15 (2), which states that the Prosecutor ‘shall analyse the seriousness of the information received’. From this wording an obligation for the Prosecutor to properly assess all information submitted to the Prosecutor clearly follows.⁶⁰ However, a threshold is embedded in Article 42 (1) ICC Statute, which speaks of ‘substantiated information’.⁶¹ Some authors even provide a different interpretation.⁶² Based on an understanding that the Prosecutor may not only proceed on the basis of information that was formally submitted (an understanding which was rejected by this author), they argue that the discretion referred to in Article 15 (1) is narrow (in light of Article 15 (2) - (6) ICC Statute) with regard to information that has formally been submitted

⁵⁵ See J. WOUTERS, S. VERHOEVEN and B. DEMEYERE, The International Criminal Court’s Office of the Prosecutor: Navigating between Independence and Accountability?, in «International Criminal Law Review», Vol. 8, 2008, p. 280.

⁵⁶ U.N., Report on the International Criminal Court, U.N. Doc. A/66/309, 19 August 2011, par. 62.

⁵⁷ M. BERGSMO and J. PEJIĆ, Article 15, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 585.

⁵⁸ OTP, Policy Paper on Preliminary Examinations, 2013, par. 73.

⁵⁹ M. BERGSMO and J. PEJIĆ, Article 15, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 584; I. STEGMILLER, The Pre-Investigation Stage of the ICC, Berlin, Duncker & Humblot GmbH, 2011, p. 189.

⁶⁰ M. BERGSMO and J. PEJIĆ, Article 15, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 587; J. WOUTERS, S. VERHOEVEN and B. DEMEYERE, The International Criminal Court’s Office of the Prosecutor: Navigating between Independence and Accountability?, in «International Criminal Law Review», Vol. 8, 2008, p. 294.

⁶¹ Confirming, see OTP, ‘Annex to the “Paper on Some Policy Issues before the Office of the Prosecutor”: Referrals and Communications’, p. 2.

⁶² J. WOUTERS, S. VERHOEVEN and B. DEMEYERE, The International Criminal Court’s Office of the Prosecutor: Navigating between Independence and Accountability?, in «International Criminal Law Review», Vol. 8, 2008, pp. 295, 297.

and that the Prosecutor enjoys “a wide range of discretion” when he or she initiates an investigation on his or her own initiative.⁶³

In light of the broad mandate of the ICC, it is important to determine what the *object* is of the pre-investigation phase. It is clear that the triggering mechanisms are concerned with ‘situations’.⁶⁴ However, this concept is nowhere further defined.⁶⁵ Case law has clarified that ‘situations’ “are generally defined in terms of temporal, territorial and in some cases personal parameters.”⁶⁶ They entail “the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such.”⁶⁷ Situations are to be distinguished from ‘cases’ which include “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects.”⁶⁸ Such definitions are in line with the *travaux préparatoires* which intended that cases and situations were to be distinguished in negative terms: situations could not identify specific individuals for specific crimes.⁶⁹ Where the Pre-Trial Chambers also held that a case refers to proceedings *after* the issuance of a summons to

⁶³ I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 188; H. OLÁSULO, *The Triggering Procedure of the International Criminal Court*, Leiden – Boston, Martinus Nijhoff Publishers, 2005, p. 58.

⁶⁴ See Articles 13 (a) and (b), 14, 15 (5) and (6), 18 (1) and 19 (3) ICC Statute. However, with regard to the *proprio motu* triggering of jurisdiction by the Prosecutor, it is to be noted that while Article 15 (5) and (6) refer to ‘situations’, other provisions are less clear. For example, Article 13 (c) ICC Statute refers to a ‘crime’, while Article 15 (4) refers to a ‘case’. It is clear that such formulation is the result of poor drafting and that ‘situations’ were intended. See e.g. I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 99.

⁶⁵ P. KIRSCH and D. ROBINSON, *Referral by States Parties*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 625; R. RASTAN, *What is a ‘Case’ for the Purpose of the Rome Statute?*, in «Criminal Law Forum», Vol. 19, 2008, p. 435. The author clarifies that the term ‘situation’ was included in the ICC Statute “to frame in objective terms the theatre of investigations, thereby rejecting the idea that a referring body could limit the focus of the Prosecutor’s activities by reference to particular conduct, suspect or party.”; I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, pp. 94 - 95.

⁶⁶ ICC, Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the DRC*, Case No. ICC-01/04-101, PTC I, 17 January 2006, par. 65; ICC, Decision Requesting Clarification on the Prosecutor’s Application under Article 58, *Situation in the DRC*, Case No. ICC-01/04-575, PTC I, 6 September 2010, par. 8; ICC, Decision on Victims’ Applications 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, *Prosecutor v. Kony, Otti, Odhiambo and Ongwen, Situation in Uganda*, Case No. ICC-02/04-01/05-252, PTC II, 10 August 2007, par. 83, fn. 57.

⁶⁷ ICC, Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the DRC*, Case No. ICC-01/04-101, PTC I, 17 January 2006, par. 65.

⁶⁸ *Ibid.*, par. 65; ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 21.

⁶⁹ I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, pp. 94-100.

appear or a warrant of arrest, it logically follows that the pre-investigation is concerned with situations and not cases.⁷⁰

It is important to consider to what extent the Prosecutor is bound, during the pre-investigative phase, by the delineation of the situation by a referring party. Several principles, such as the principles of objectivity and impartiality as well as the principle of prosecutorial independence, militate against an inflexible approach with regard to situations referred to the Court.⁷¹ For example, it follows from the independence of the Prosecutor as laid down in Article 42 (1) ICC Statute that the referring party cannot dictate the boundaries of the situation.⁷² Also the OTP's Policy Paper on Preliminary Examinations confirms that the principle of independence implies that the Prosecution is not bound by any limitation of the situation to certain individuals or certain parties.⁷³ This is of particular importance with regard to self-referrals, where the risk of an "asymmetrical self-referral" is clear.⁷⁴ For example, when the government of Uganda referred the "situation concerning the Lord's Resistance Army" to the ICC, the ICC Prosecutor responded that the referral was understood to refer to all crimes committed within the situation in Northern Uganda "by whomever committed".⁷⁵ Where a referral or information received by the Prosecutor is accompanied by a list of alleged perpetrators, this is not binding upon the Prosecutor.⁷⁶ In a similar vein, it is important that the principle of objectivity and the obligation to cover all facts and evidence, as laid down in Article 54 (1) (a) ICC Statute, permeate the analysis at the pre-investigative stage.⁷⁷

⁷⁰ ICC, Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the DRC*, Case No. ICC-01/04-101, PTC I, 17 January 2006, par. 65.

⁷¹ See *infra*, Chapter 3, II.4.4.

⁷² See e.g. F. GUARIGLIA, *The Selection of Cases by the Office of the Prosecutor of the International Criminal Court*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 212.

⁷³ OTP, Policy Paper on Preliminary Examinations, 2013, par. 27.

⁷⁴ C. KRESS, 'Self-Referrals' and 'Waivers of Complementarity': Some Considerations in Law and Policy, in «*Journal of International Criminal Justice*», Vol. 2, 2004, p. 946.

⁷⁵ ICC, Letter from Prosecutor Moreno-Ocampo to President Kirsch, dated 17 June 2004, annexed to ICC, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, *Situation in Uganda*, Case No. ICC-02/04-1, Presidency, 5 July 2004.

⁷⁶ OTP, Policy Paper on Preliminary Examinations, 2013, par. 27. Reference can be made to a list of persons allegedly bearing criminal responsibility by the U.N. International Commission of Inquiry for Darfur and a list of potential perpetrators identified by the Commission of Inquiry into the post-election violence with regard to the Kenya situation.

⁷⁷ As acknowledged by the OTP, Policy Paper on Preliminary Examinations, 2013, par. 30 – 33.

It has been argued that since referrals and information received serve as *notitia criminis*, their function is to inform the Prosecutor who may then freely redefine the situation referred.⁷⁸ Hence, delineation of the situation by the referring entity or by the information provider may not seem problematic at first. However, KRESS has argued that it is unclear whether ‘corrections’ to a *referral* can be made (unlike interpretation thereof, which is not problematic). Other commentators explicitly reject the possibility for the Prosecutor to *sua sponte* make changes to the parameters of the situation that was referred.⁷⁹ However, it is clear that the Prosecutor may use the information in the referral to proceed on the basis of his or her *proprio motu* powers or, alternatively, to solicit a revised referral.⁸⁰ Hence, taking the example of the Uganda referral, it would have been preferable for the Prosecutor (taking into consideration the Prosecutor’s duty of independence), to request a revised referral by the Government of Uganda or to make use his or her *proprio motu* powers, subject to an authorisation by the Pre-Trial Chamber.

Article 16 ICC Statute allows the Security Council to defer investigations or prosecution in a resolution that is adopted under Chapter VII. However, insofar that Article 16 refers to ‘investigations’, it is unclear whether the pre-investigation phase is included. Nevertheless, it follows from Article 15 (6) that the ‘preliminary examination’ is to be distinguished from the investigation proper. Commentators are in agreement that this power leaves pre-investigative efforts unaffected and presupposes the existence of a formal investigation.⁸¹

⁷⁸ I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 112.

⁷⁹ WCRO, *The Relevance of a “Situation” to the Admissibility and Selection of Cases before the International Criminal Court*, October 2009, p. 25 (“there is no evidence that the ICC Prosecutor may choose cases that fall *beyond* the terms of a State Party or Security Council referral” (emphasis in original)). See also *ibid.*, p. 26 (“Based on the plain language of the Statute and the relevant drafting history, the Court’s jurisdiction is only as broad as its referral”).

⁸⁰ *Ibid.*, p. 25.

⁸¹ L. CONDORELLI and S. VILLALPANDO, *Referral and Deferral by the Security Council*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 651 (arguing that a deferral does not imply a “complete paralysis”, the Prosecutor should still be entitled to conduct a preliminary examination); M. NEUNER, *The Security Council and the ICC: Assessing the first ten Years of Coexistence*, in «New England Journal of International and Comparative Law», Vol. 18, 2012, p. 300 (the author adds that it follows from the Negotiated Relationship Agreement between the International Criminal Court and the United Nations (Article 17 (2)) that if the Prosecutor wishes to proceed with preliminary examinations following an Article 16 request for deferral, it should so inform the Security Council); J. WOUTERS, S. VERHOEVEN and B. DEMEYERE, *The International Criminal Court’s Office of the Prosecutor: Navigating between Independence and Accountability?*, in «International Criminal Law Review», Vol. 8, 2008, p. 282; I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 157; C. STAHN, *The Ambiguities of Security Council Resolution 1422*, in «European Journal of International Law», Vol. 14, 2003, pp. 85-104, M. BERGSMO and J. PEJIĆ, Article 16, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 601.

The Statute and the RPE do not regulate in detail the *method* for the conduct of the preliminary examination. However, some limited investigative powers are explicitly provided for. Firstly, the Prosecutor may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organisations, or other reliable sources.⁸² This information is then critically evaluated by the Prosecution.⁸³ In addition, he or she may receive written or oral testimony at the seat of the Court.⁸⁴ It is stipulated that the procedural rules on the recording of the questioning during the investigation apply *mutatis mutandis*.⁸⁵ The Prosecutor should ensure the confidentiality of the testimony received or take other necessary measures pursuant to his or her duties under the ICC Statute.⁸⁶ When the Prosecutor considers that there is a serious risk that testimony may not be available later (during a possible formal investigation), he or she may request the Pre-Trial Chamber ‘to take such measures as may be necessary to ensure the efficiency and integrity of the proceedings’ which may include the appointment of a counsel or a Judge to protect the rights of the Defence during the taking of the testimony.⁸⁷ Other investigative powers are not mentioned. It is clear that these are only at the Prosecutor’s disposal after the start of the investigation proper.⁸⁸

As far as the power to receive written or oral testimony at the seat of the Court is concerned, it has been argued that this power should be given a liberal interpretation. This would entail that testimony may also be received at one of the field offices.⁸⁹ However, other commentators hold more convincingly that the power should be interpreted restrictively and be limited to the premises in The Hague.⁹⁰ Indeed, a textual interpretation suggests that the addition ‘at the seat of the Court’ excludes field offices. In addition, a contextual reading, in light of Article 3 (1) ICC Statute (defining the seat of the Court) supports such view. Nevertheless, it is clear that this finding does not impact on the power of national authorities to take evidence (outside any

⁸² Rule 104 (2) ICC RPE, Article 15 (2) ICC Statute.

⁸³ OTP, Policy Paper on Preliminary Examinations, 2013, par. 27.

⁸⁴ Article 15 (2) ICC Statute and Rule 104 (2) ICC RPE.

⁸⁵ Rules 47, 104 (2), 111 and 112 ICC RPE. See the detailed discussion thereof, *infra*, Chapter 5.

⁸⁶ Rule 46 ICC RPE.

⁸⁷ Rule 47 (2) ICC RPE.

⁸⁸ Consider *e.g.* Article 54 ICC Statute.

⁸⁹ Consider M. BERGSMO and J. PEJIĆ, Article 15, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 588 (“The term “seat of the Court” should include possible field offices and temporary arrangements which the Office of the Prosecutor may establish”). At present, the ICC website mentions two field offices, to know: the DRC and Uganda. See http://www.icccpi.int/en_menus/icc/about%20the%20court/practical%20information/Pages/field%20offices.aspx, last visited 2 February 2014).

⁹⁰ Consider *e.g.* F. RAZESBERGER, *The International Criminal Court: The Principle of Complementarity*, Frankfurt am Main, Peter Lang, 2006, pp. 62 – 63 and 66.

obligation incumbent on them to do so) and to deliver such testimony to the Court in The Hague.⁹¹

It emerges from the practice of the ICC Prosecutor that the Prosecutor has interpreted his or her powers at this stage in a broad manner. In particular, the Prosecutor, on a regular basis, undertakes ‘field missions’ to monitor a situation.⁹² Furthermore, on several occasions, the Prosecutor received diplomatic missions at the seat of the Court and entered into a dialogue with different stakeholders in the conflict.⁹³

A related question is whether or not Part 9 of the ICC Statute applies to the pre-investigative stage. At first, such liberal interpretation does not seem to be precluded by the wording of Articles 86 and 93 ICC Statute, which outline the cooperation obligations for States Parties.⁹⁴ These provisions refer to the obligations to ‘cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court’ and the obligation to provide assistance ‘in relation to investigations or prosecutions’. However, a narrow interpretation, according to which Part 9 only applies from the moment a reasonable basis has been established, has been adopted by the OTP.⁹⁵ It was held in an informal expert paper by the OTP that, among others, such interpretation is “easier to reconcile with Article 15(2) than the broad interpretation, not least because it corresponds to the desire of States, during the negotiations, to limit the investigative powers of the Prosecutor prior to obtaining judicial authorisation in the case of *proprio motu* investigations.”⁹⁶

⁹¹ I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 229; W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 320.

⁹² See e.g. U.N., Report on the International Criminal Court, U.N. Doc. A/66/309, 19 August 2011, par. 75 and 78 (reporting on field missions to Georgia and Guineau). See OTP, Policy Paper on Preliminary Examinations, 2013, par. 85.

⁹³ H. OLÁSOLO, *The Role of the International Criminal Court in Preventing Atrocity Crimes Through Timely Intervention: From the Humanitarian Intervention Doctrine and Ex Post Facto Judicial Institutions to the Notion of Responsibility to Protect and the Preventative Role of the International Criminal Court*, Inaugural Lecture as Chair in International Criminal Law and International Criminal Procedure at Utrecht University, 18 October 2010, (<http://responsibilitytoprotect.org/Professor-Olasolo-Inaugural-Lecture-at-Utrecht-University-English-Version.pdf>, last visited 10 February 2014), pp. 6 – 7.

⁹⁴ I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 227.

⁹⁵ ICC, Policy Paper on Preliminary Examinations, 2013, par. 84 (“At the preliminary examination stage, the Office does not enjoy investigative powers, other than for the purpose of receiving testimony at the seat of the Court, and cannot invoke the forms of cooperation specified in Part 9 of the Statute from States”).

⁹⁶ See OTP, Informal Expert Paper: Fact-Finding and Investigative Functions of the Office of the Prosecutor, Including International Cooperation, 2003, par. 25. Consider additionally C. KRESS, K. PROST and P. WILKITZKI, Part 9. International Cooperation and Judicial Assistance: Preliminary Remarks, in O.

With regard to the *process* of the pre-investigation, it further follows from Article 15 (2) and Rule 104 (1) ICC RPE that irrespective of the triggering mechanism, the Prosecutor should analyse the seriousness of the information received. This preliminary assessment is conducted by the Prosecutor.⁹⁷ The Pre-Trial Chamber has not been endowed with any investigative function at this stage.⁹⁸ The analysis of the seriousness of the information received is solely evidentiary in nature.⁹⁹ Since the pre-investigation stage should result in a decision whether or not to proceed with a formal investigation, the Prosecutor should consider the criteria mentioned in Article 53 (1) ICC Statute and determine whether or not a reasonable basis exists.

No particular time frame is provided for the conduct of the pre-investigation. According to the Prosecution, this was a deliberate choice made when drafting the ICC Statute.¹⁰⁰ However, a ‘reasonable time’ criterion has been advanced by Pre-Trial Chamber III.¹⁰¹ It held that this obligation derives from Rule 105 (1) ICC RPE, according to which the Prosecutor should ‘promptly’ inform in writing the state which referred the situation, when deciding not to

TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1515.

⁹⁷ ICC, Judgment on Victim Participation in the Investigation Stage of Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, *Situation in the DRC*, Case No. ICC-01/04-556 (OA4 OA5 OA6), A. Ch., 19 December 2008, par. 51 (“The initial appraisal of a referral of a situation by a State Party, in which one or more crimes within the jurisdiction of the Court appear to have been committed as well as the assessment of information reaching the Prosecutor and in relation to that the initiation by the Prosecutor of investigations *proprio motu* are the exclusive province of the Prosecutor”).

⁹⁸ ICC, Corrigendum to “Judge Fernández de Gurmendi’s Separate and Partially Dissenting Opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d’Ivoire”, *Situation in the Republic of Cote d’Ivoire*, Case No. ICC-02/11-15-Corr, PTC III, 5 October 2011, par. 35.

⁹⁹ M. BERGSMO and J. PEJIĆ, Article 15, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 587. Consider also W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 320 (noting that the *travaux préparatoires* do not assist in elucidating the drafter’s intentions).

¹⁰⁰ ICC, Prosecution’s Report Pursuant to Pre-Trial Chamber III’s 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, *Situation in the Central African Republic*, Case No. ICC-01/05-7, PTC III, 15 December 2006, par. 10; OTP, Policy Paper on Preliminary Examinations, 2013, par. 89.

¹⁰¹ ICC, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, *Situation in the Central African Republic*, Case No. ICC-01/05-6, PTC III, 30 November 2006, p. 4 (“CONSIDERING that, in the view of the Chamber, the preliminary examination of a situation pursuant to article 53 (1) of the Statute and rule 104 of the Rules must be completed within a reasonable time from the reception of a referral by a State Party under articles 13 (a) and 14 of the Statute, regardless of its complexity”). *In casu*, the pre-investigation phase had covered a period of almost two years, whereupon the Pre-Trial Chamber requested the Prosecutor to provide a report on the current status of the preliminary examination as well as an estimation when the pre-investigation phase will be concluded.

commence an investigation.¹⁰² Indeed, prolonged preliminary examinations may involve certain risks. It has been argued that when a general timeline is missing, the deterrent effect as well as the potential of preliminary examinations to encourage national proceedings may be diminished.¹⁰³ Further, it may create the impression that non-legal factors were considered by the Prosecutor.¹⁰⁴ Nevertheless, such pronouncements require further research on the effects of prolonged preliminary examinations. This clearly falls outside the scope of the present chapter. Moreover, as rightly noted by the ICC Prosecutor, it should be kept in mind that “the timing and length of preliminary examination activities will necessarily vary based on the situation.”¹⁰⁵ For example, since the preliminary examination process with regard to the situation in Columbia included the monitoring of national proceedings, the preliminary examination process will necessarily be longer. Consequently, some flexibility should be built into the timeframe.

The Prosecution’s understanding on the method to be applied during pre-investigations is further detailed in the OTP’s ‘Policy Paper on Preliminary Examinations’.¹⁰⁶ The Prosecution split up the pre-investigation phase into four sub-phases. First, the information received is reviewed to filter out information on crimes which manifestly fall outside the ICC’s jurisdiction. During the second and third phase, the information received (including communications that were not rejected during the first step as well as information in relation to referrals or Article 12 (3) declarations, open source information and testimony received at the seat of the Court) is further analysed, from the perspective of jurisdiction and admissibility respectively. From this, it follows that, to some extent, the Prosecution does distinguish between information received (which is vetted during a first subphase) and referrals (which are not subjected to this additional vetting process). According to the OTP, the formal commencement of the preliminary examination is to be situated at the beginning of phase

¹⁰² *Ibid.*, p. 3. The Pre-trial Chamber additionally considered that “[a] number of provisions of the Statute and Rules embrace the “reasonable time” standard as well [as] other related standards such as “without delay”, “promptly” or “in an expeditious manner” in relation to the exercise of their functions by the different organs of the court. See *inter alia* articles 61 (1) and (3), 64 (2), 67 (1) (c) and 82 (1) (d), and rules 24 (2) (b), 49 (1), 101 (1), 106 (1), 114 (1), 118 (1), 121 (1) and (6) and 132 (1).”

¹⁰³ C. GRANDISON, Update from the International and Internationalized Criminal Tribunals, in «Human rights Brief», Vol. 19, 2012, p. 49.

¹⁰⁴ *Ibid.*, p. 49.

¹⁰⁵ OTP, Policy Paper on Preliminary Examinations, 2013, par. 89.

¹⁰⁶ *Ibid.*, par. 77 - 88. Note that this process was also detailed in the ‘Annex to the “Paper on Some Policy Issues before the Office of the Prosecutor”: Referrals and Communications’. However, this document only applied prior to the adoption of the Regulations of the Office of the Prosecutor.

two.¹⁰⁷ The last phase of the pre-investigation phase comprises of an assessment in light of the interests of justice before formulating a final recommendation whether or not there is a reasonable basis to initiate an investigation.

During the pre-investigation phase, the Jurisdiction, Complementarity and Co-operation Division ('JCCD') plays a major role, as well as the Services Section, which is responsible for the registration and storage of information and evidence.¹⁰⁸ Within the JCCD, the Situation Analysis Section is responsible for the preliminary examination of information received.¹⁰⁹ In all instances, the pre-investigation results in a detailed report by the JCCD ('Article 53(1) report') containing recommendations in order to assess whether or not to open a formal investigation.¹¹⁰ The preliminary investigation ends with a decision to continue with a formal investigation or to terminate proceedings.¹¹¹

The Policy Paper on Preliminary Examinations further outlines several 'general principles' that apply during the preliminary examination. These include the principle of independence¹¹², impartiality¹¹³ including the prohibition of adverse distinctions on grounds prohibited under the Statute, the application of 'consistent methods and criteria'¹¹⁴ and objectivity.¹¹⁵ While this policy paper to some extent clarifies the general principles with regard to the pre-investigation phase (e.g. the consistent application of methods and criteria), it does not further define them. Overall, this paper is a policy document, which legal value is low.

In case of a negative decision at the end of the pre-investigation phase, Article 15 (6) ICC Statute (and Rule 49 (1) ICC RPE) requires the ICC Prosecutor to inform the information provider. It appears that the Prosecutor has interpreted this obligation broadly, and also

¹⁰⁷ *Ibid.*, par. 80.

¹⁰⁸ Regulations 7 (a) and 10 (d) of the Regulations of the Office of the Prosecutor.

¹⁰⁹ Consider e.g. ASP, Proposed Programme Budget for 2010 of the International Criminal Court, ICC-ASP/8/10, 30 July 2009, par. 145.

¹¹⁰ Regulations 7 (a) and 29 (1) of the Regulations of the OTP; ICC, Prosecution's Report pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, *Situation in the Central African Republic*, Case No. ICC-01/05-07, PTC III, 15 December 2006, par. 19. The Prosecution adopted a policy of making such reports publicly available. Consider OTP, Situation in Mali: Article 53(1) Report, 16 January 2013.

¹¹¹ Articles 15 (3) and 53 (1) ICC Statute and Rule 48 ICC RPE.

¹¹² OTP, Policy Paper on Preliminary Examinations, 2013, par. 26 – 27.

¹¹³ *Ibid.*, par. 28 - 29 and Article 21 (3) ICC Statute.

¹¹⁴ Regulation 24 of the Regulations of the OTP.

¹¹⁵ OTP, Policy Paper on Preliminary Examinations, 2013, par. 30 - 33. Article 54 (1) ICC Statute.

informs persons or entities when additional information was sought pursuant to Article 15 (2) ICC Statute. The said provision(s) only deal(s) with *proprio motu* investigations. However, a similar information duty follows from Rule 105 (1) ICC Statute.¹¹⁶

§ Other international(ised) tribunals

At the ECCC, the exclusive competence to initiate prosecutions is vested with the Co-Prosecutors. They may commence prosecutions *proprio motu* or on the basis of a complaint.¹¹⁷ There is no preference regarding the *notitia criminis*. Information or complaints may be received from persons, organisations or from other sources that witnessed, have knowledge of or were a victim of the alleged crime.¹¹⁸ Furthermore, lawyers or victim associations are allowed to lodge a complaint on behalf of a victim.¹¹⁹

With the lodging of a complaint, the prosecution is not automatically initiated. The procedural framework of the ECCC provides for a preliminary phase, immediately preceding the commencement of the investigation proper. This phase is not compulsory and the Co-Prosecutors may choose to forward the complaint directly to the Co-Investigating Judges.¹²⁰ The preliminary investigation aims at determining ‘whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed and to identify suspects and potential witnesses’.¹²¹ The preliminary investigation ends with the sending of the introductory submission to the Co-Investigating Judges, which triggers the start of the judicial investigation. The threshold for sending the introductory submission is ‘reason to believe that crimes within the jurisdiction of the ECCC have been committed’.¹²² A decision not to pursue a complaint does not have the effect of a *res judicata* and may be changed afterwards.¹²³

In the course of the preliminary investigation, a limited number of investigative powers are at the Co-Prosecutors’ disposal. They include the ability to summon and interview persons,

¹¹⁶ See *infra*, Chapter 3, II.4.3. (on Article 53 (3) ICC Statute).

¹¹⁷ Rule 49 (1) IR.

¹¹⁸ Rule 49 (2) ECCC IR; Article 23 new ECCC Law (the Co-Investigating Judges may obtain information from any institution, including the Government, United Nations organs, or non-governmental organisations).

¹¹⁹ Rule 49 (3) ECCC IR.

¹²⁰ Rule 49 (4) ECCC IR.

¹²¹ Rule 50 (1) ECCC IR.

¹²² Article 23 new ECCC Law; Rule 53 (1) ECCC IR. See *supra*, Chapter 3, I.1.

¹²³ Rule 49 (5) ECCC IR. The complainant should be informed of such decision within 30 days.

limited search and seizure powers and the competence to take suspects into custody.¹²⁴ Unlike at the ICC, the power to interview persons is not limited to the taking of evidence at the seat of the Court.¹²⁵ The Co-Prosecutors can rely on the assistance of judicial police officers.¹²⁶ It is clear that these powers by far surpass the ‘passive’ powers at the ICC prosecutor’s disposal during the pre-investigative stage. Additionally, insofar that Rule 5 (2) ECCC IR also refers to the Co-Prosecutors, it seems to follow that also the Co-Prosecutors have the authority to request states (other than Cambodia) to provide judicial assistance. However, cooperation obligations are only incumbent on the government of Cambodia.¹²⁷

At the ICC and the *ad hoc* tribunals, the Prosecution is in charge of both the pre-investigation and the ‘formal’ investigation phase. In contrast, at the ECCC, the Co-Prosecutors are jointly in charge of the preliminary investigation, while the Co-Investigating Judges head over the judicial investigation. Afterwards, it will be for the Co-Prosecutors to prosecute the case at trial. This procedural design reflects the civil law style of proceedings at the pre-trial stage. However, it may be asked in how far such division of investigative efforts is the most efficient in practice. Staff of the Office of the Co-Prosecutors confirmed that this division leads to duplication of work. One staff member held:

“I think that the difficulty of this procedure is that it inevitably causes duplication. It is unavoidable. And we have seen it. The investigator necessarily has to gather information, do a preliminary investigation, understand what it is about, put it into an organized form [...] and submit that the Co-Investigating Judges who have to then learn all that information from scratch, do a lot of that work again, and then go beyond.”¹²⁸

Other staff members of the Office of the Co-Prosecutors confirm that this procedural design in practice leads to duplication of investigative efforts when compared to the proceedings of

¹²⁴ Rules 50 (2)-(4) and 51 ECCC IR. Normally, at this stage, searches need the approval of the owner or occupant of the premises. Where the owner or occupier is absent, refuses access or in cases of emergency, searches need judicial approval by the president of the Pre-Trial Chamber (oral authorisation is possible in cases of emergency, if confirmed in writing within 48 hours).

¹²⁵ *Supra*, Chapter 4, 1.2.

¹²⁶ Rules 50 (2) and 15 (2) ECCC IR.

¹²⁷ Article 25 ECCC Agreement.

¹²⁸ Interview with a member of the OCP, ECCC-14, Phnom-Penh, 13 November 2009, p. 2.

other international criminal tribunals or to common law jurisdictions.¹²⁹ In general, the prosecution staff were critical of this procedural constellation and consider it to be ineffective and cost-intensive.¹³⁰

Staff members of the Office of the Co-Investigating Judges agree that the procedural set-up of investigations in practice leads to the duplication of efforts, and a loss of efficiency.¹³¹ However, they consider that these problems follow from a lack of understanding of the proper role and function of the different organs in the proceedings.¹³² More precisely, staff of the OCIJ argue that the Co-Prosecutors may have overstepped their role by continuing investigations after sending the introductory submission.

“In fact, what they have done, because they are not used to trusting a Judge to do that for them, they basically ran a parallel investigation. Not in the sense of going out into the field and doing anything they are not allowed to do, but analyzing all of the material that is placed on the case-

¹²⁹ Interview with a member of the OCP, ECCC-11, Phnom-Penh, 9-11 November 2009, p. 2 (who notes that the investigation and the prosecution are conducted by the same organ which prevents the duplication of analysis units).

¹³⁰ Interview with a member of the OCP, ECCC-11, Phnom-Penh, 9-11 November 2009, pp. 2, 9 (“Spreading out those responsibilities creates a difficulty in terms of effectiveness and cost. [...] I think there is a problem in the sense of time. The time and money to have the Co-Prosecutors know the case, and to have the Co-Investigative Judges know the case and then have the Trial Chamber know the case to the level that you need to... I think it is an extra step in the process that is perhaps not as efficient as possible when you need to do things in a short period of time”).

¹³¹ Consider e.g. Interview with a Legal Officer of the SCSL, SCSL-12, The Hague, 4 February 2010, p. 4 (the interviewee has a previous experience as a legal officer at the Office of the Co-Investigating Judges at the ECCC).

¹³² Interview with a member of the OCIJ, ECC-05, Phnom-Penh, 16 November 2009, p. 2 (“If all the actors limit their own role, then it works. If prosecutors are trying to extend their mandate to a more common law system and continue to investigate even though they have seized the investigative judges, then we may have a problem of duplication of work. If each of the different organs of the court stays within its own limits and role, it works fine”). Former international Co-Investigating Judge Lemonde gives the following example to illustrate this: “C’est que de fait on n’a pas vraiment appliqué le système, parce que petit à petit au stade de l’instruction on a, contraint et forcé en quelque sorte, introduit des éléments qui étaient davantage inspirés du « common law » que du « civil law », surtout à l’audience. Je ne sais pas si vous avez suivi un peu l’audience du procès Duch, mais là c’était caricatural. On avait l’impression qu’il n’y avait pas eu d’instruction. Les procureurs ne se sont pas servis de l’instruction et je trouvais ça regrettable. Par exemple on avait fait une reconstitution à Tuol Sleng et à Choeng Ek, une reconstitution entièrement enregistrée et les procureurs n’ont pas utilisé ça, alors que c’était une pièce essentielle. On voyait Duch avec les anciens prisonniers qui expliquaient exactement comment les choses s’étaient passées sur place. C’était évidemment pour le procès qu’on avait fait ça, pas pour le plaisir. Ils n’ont pas utilisé ça. La seule chose qu’ils ont trouvée à faire c’était de faire projeter un extrait du film de Rithy Panh sur S-21, qui est une fiction. On amène les gens sur place, mais pendant le cas judiciaire les procureurs ont utilisé une espèce de reconstitution cinématographique plutôt que les documents judiciaires qui étaient dans le dossier. C’est un exemple caricatural de la mauvaise utilisation du système en fait. Toujours est-il qu’à l’arrivée on a ces inconvénients du système de « civil law » plus les inconvénients du système de « common law » et finalement une expérience qui n’aura pas eu lieu parce que le procès tel qu’il aurait dû être organisé n’a pas eu lieu. On n’a finalement pas pu faire l’expérience que moi j’aurais préféré, c’était d’appliquer vraiment notre système.” See Interview with Co-Investigating Judge Lemonde, ECCC-04, Phnom-Penh, 11 November 2009, p. 3.

file. Basically it is being done twice. We do it, and they do it. [...] [T]here is a lack of efficiency there.”¹³³

In the *Duch* case, this loss of efficiency was further exacerbated by the fact that a lot of evidence was later presented again at trial.¹³⁴ When evidence had to be read in at trial, the Co-Prosecutors relied upon their own evidence, rather than on the evidence which was on the case file.¹³⁵

It was previously concluded that the statutory documents of the SPSC, the SCSL and the STL do not encompass the existence of a sufficient or reasonable basis for the commencement of a formal investigation. No standard of proof for the initiation of the investigation is provided for. Hence, no pre-investigation phase is envisaged by the procedural frameworks of these tribunals.

§ Conclusion

It follows that a pre-investigation phase is envisaged by several of the international(ised) criminal tribunals under review. While some tribunals explicitly regulate such pre-investigation phase (ICC and ECCC), the procedural rules of other tribunals (the *ad hoc* tribunals) do not expressly provide for it. There, the existence of this phase derives from the existence of a minimum threshold for the commencement of the investigation proper (full investigation). The failure, by the *ad hoc* tribunals, to further define this phase of proceedings is not exceptional when considered in light of existing national practices. For example, in Germany, as previously explained, preliminary investigations (*Vorermittlungen*) are conducted by the police and the Prosecutor to establish the existence or not of ‘simple suspicion’. Nevertheless, this phase is not regulated by the StPO.¹³⁶

¹³³ Interview with a member of the OCIJ, ECCC-03, Phnom-Penh, 16 November 2009, p. 3. However, the interviewee additionally notes that there may be a grey area as to what Prosecutors can do after sending the Introductory Submission because all crimes are so intimately related to each other.

¹³⁴ A. BATES, *Transitional Justice in Cambodia*, Analytical Report, 2010, p. 132 (available at: http://projetatlas.univ-paris1.fr/IMG/pdf/ATLAS_Cambodia_Report_FINAL_EDITS_Feb2011.pdf, last visited 10 February 2014) (“In the *Duch* case, a twelve-month judicial investigation comprised the questioning of the accused over almost 24 days; the interviewing of more than 60 witnesses by investigators; a full site visit at both S-21 and Choeung Ek; and two days of *in camera* confrontation hearings between *Duch* and twelve of the key witnesses. The vast majority of this questioning had to be repeated at the trial”).

¹³⁵ Interview with a member of the OCIJ, ECCC-03, Phnom-Penh, 16 November 2009, p. 2.

¹³⁶ I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 504.

The set-up of this stage of proceedings differs considerably. At the ICC, the Prosecutor possesses a limited number of narrowly defined powers at this stage. It was shown how these powers have been given a liberal interpretation by the Prosecutor. In the absence of a clear definition of this phase at the *ad hoc* tribunals, it was concluded that this phase at least comprises of the analysis and evaluation of information and materials in order to assess whether the minimum threshold for the commencement of the investigation has been reached. In turn, it was illustrated how the powers of the Co-Prosecutors at the Extraordinary Chambers during this stage exceed the powers of the Prosecutors of the ICC and of the *ad hoc* tribunals. Rather than ‘passive’ powers, the Co-Prosecutors possess a number of additional investigative powers, such as limited search and seizure powers or the power to take suspects into custody. Furthermore, regarding the ICC, it was concluded that the application of cooperation obligations at this stage of proceedings remains uncertain. In turn, the Co-Prosecutors may rely on the support by the judicial police during this stage of proceedings.¹³⁷

What remains to be answered is the question of how far the pre-investigative phase serves the same *function* at all courts and tribunals where such phase was identified. At the ECCC, the preliminary investigation aims at determining ‘whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed and to identify suspects and potential witnesses’.¹³⁸ If it follows from this investigation that the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall sanction the opening of judicial investigation. In a similar vein, it emerges that the primary aim of the pre-investigative phase at the ICC and at the *ad hoc* tribunals respectively is to establish the presence of a ‘reasonable basis to proceed with an investigation’ or ‘sufficient basis to proceed’. Therefore, at all tribunals where a pre-investigative phase was found, it consists of a preliminary phase which seeks to confirm the presence or not of a minimum threshold to justify the opening of a full investigation (ICC, *ad hoc* tribunals) or a judicial investigation (ECCC), with the broad investigative powers it allows for. In this regard, this preliminary phase protects the interests of the persons targeted by this investigation. In addition, commentators refer to an additional ‘aim’ of the pre-investigative stage, which is to

¹³⁷ See Rules 15 (2), 50 and 51 ECCC RPE.

¹³⁸ Rule 50 (1) ECCC IR.

protect against the spending of the scarce resources on an investigation which does not stand any chance of resulting in an actual prosecution.¹³⁹

Since in most instances no judicial control is exerted over the Prosecutor's determination that the threshold for the opening of a full (or judicial) investigation has been reached, the protective potential of this preliminary phase is limited. With regard to the ICC, only in the case where the ICC Prosecutor proceeds on the basis of his or her *proprio motu* powers, the decision to proceed with an investigation will be subject to judicial overview by the Pre-Trial Chamber. Furthermore, in case of a negative decision by the Prosecutor at the end of the pre-investigative phase, the Pre-Trial Chamber may exert control.¹⁴⁰ It was previously shown how the minimum threshold for the commencement of investigations at the ICC seeks to prevent frivolous and unwarranted investigations.¹⁴¹ However, in the absence of any judicial overview in case the ICC Prosecutor proceeds on the basis of referral, it is solely for the Prosecutor to check whether the threshold has been reached.

I.3. The investigation proper

I.3.1. The *ad hoc* tribunals and the SCSL

It follows from the RPE of the *ad hoc* tribunals and the SCSL that the 'investigation' encompasses 'all activities undertaken by the Prosecutor under the Statute and the Rules for the collection of information and evidence, whether before or after an indictment is confirmed'.¹⁴² With regard to the *starting point* of the investigation, it was previously determined that a minimum threshold has to be met.¹⁴³ As far as the *ending point* of the investigation phase is concerned, the aforementioned definition confirms that the investigation should not necessarily be completed at the time the indictment is confirmed. No temporal limitation is included. While the pre-trial phase formally starts with the confirmation of the indictment, investigations may continue past that stage.¹⁴⁴ This is confirmed by the

¹³⁹ M. BERGSMO and P. KRUGER, Article 53, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1097; C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, p. 230.

¹⁴⁰ See in detail, *infra*, Chapter 3, II.4.3.

¹⁴¹ See *supra*, Chapter 3, I.1.

¹⁴² Rule 2 ICTY, ICTR, and SCSL RPE.

¹⁴³ See *supra*, Chapter 4, I.1.

¹⁴⁴ According to the Rules, the confirmation of the charges is the first procedural step under Part V ('Pre-Trial Proceedings').

jurisprudence.¹⁴⁵ For example, in the *Boškoski and Tarčulovski* case, the Trial Chamber held that:

“It is the practice of most jurisdictions and the practice of this Tribunal that investigations should be conducted primarily before an indictment is issued or submitted for confirmation [...] The Rules and the Statute of the Tribunal [...] do not explicitly restrict investigations to the time of confirmation of an indictment. The *nature and scope of the indictments tried in this Tribunal* would make such a restriction unreasonable. In fact the Rules implicitly allow for the possibility that investigation[s] may be conducted after the confirmation of the indictment.”¹⁴⁶

Also various provisions in the RPE hint that the evidence gathering process may continue after the confirmation of indictment, during the trial phase, and, exceptionally, into the appeals phase. Pursuant to Rule 50 of the ICTY, ICTR, and SCSL RPE, the Prosecutor may, under certain conditions, seek leave to amend the indictment after confirmation.¹⁴⁷ Additionally, Rule 73bis (F) ICTY RPE allows the Prosecutor to seek leave, after the commencement of the trial, to change the number of crime sites or incidents in relation to which evidence will be presented. This need to vary the number of incidents or crime sites “often may stem from investigation[s] conducted at a later stage.”¹⁴⁸ Also the possibility for the Prosecutor to seek leave to change the (Rule 65ter) exhibit and witness lists after the commencement of trial, when the ‘interests of justice’ so allow, may be relevant in light of

¹⁴⁵ Consider *e.g.* ICTY, Decision on Prosecution Motion Seeking Leave to Amend the Indictment, *Prosecutor v. Čermak and Markač*, Case No. IT-03-73-PT, T. Ch. II, 19 October 2005, par. 51; ICTR, Decision on Prosecutor’s Request for Leave to File an Amended Indictment, *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-I, T. Ch. II, 21 June 2000, par. 27; ICTR, Decision on the Prosecutor’s Request for Leave to File an Amended Indictment, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-I, T. Ch. I, 11 April 2000, p. 4; ICTR, Decision on the Prosecutor’s Request for Leave to File an Amended Indictment, *Prosecutor v. Nahimana*, Case No. ICTR-96-11-T, T. Ch. I, 5 November 1999, par. 18.

¹⁴⁶ ICTY, Reasons for Oral Decision Denying Boškoski Defence Motion to Stop Prosecution’s Continued Investigation and Continued Disclosure, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, T. Ch. II, 10 May 2007, par. 4 (emphasis added). *In casu*, the Defence sought an order from the Trial Chamber to the OTP, among others to stop the Prosecution from conducting further investigations.

¹⁴⁷ With leave from the Confirming Judge (or a Judge assigned by the President) where the case has not yet been assigned to a Trial Chamber or, where the case has been assigned, with leave from that Trial Chamber or a Judge thereof. See Rule 50 (A) (i) (b) and (c) ICTY RPE; At the ICTR and the SCSL only with leave from the Confirming Judge (or a Judge assigned by the President) prior to the initial appearance and with leave of the Trial Chamber from that moment. See Rule 50 (A) (i) ICTR RPE and Rule 50 (A) SCSL RPE.

¹⁴⁸ ICTY, Reasons for Oral Decision Denying Boškoski Defence Motion to Stop Prosecution’s Continued Investigation and Continued Disclosure, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, T. Ch. II, 10 May 2007, par. 4.

newly discovered evidence during continued investigations.¹⁴⁹ Indeed, the fact that investigations are on-going has been accepted as a relevant factor in the assessment of whether the ‘interests of justice’ necessitate the amendment of the list.¹⁵⁰ Furthermore, the possibility for a party to re-open its case in exceptional circumstances and to present evidence it previously did not have access to may be relevant in light of continuing investigations.¹⁵¹ On appeal, the possibility to exceptionally present additional evidence on a fact or issue litigated at trial may be a further indication that the RPE implicitly allow for continued investigations.¹⁵² However, at the same time, jurisprudence has insisted that this latter mechanism is not intended to be an opportunity for the parties to remedy “failures or oversights” made during the pre-trial and trial phase¹⁵³ and that “investigations should be carried out at the pre-trial stages.”¹⁵⁴ The previous unavailability of the evidence must not

¹⁴⁹ Rule 65ter (E) (ii) ICTY RPE *juncto* Rule 73bis (F) ICTY RPE allows for the amendment of the witness list, also after the start of the trial. Consider *e.g.* ICTY, Decision on Prosecution’s Motion to Amend Rule 65ter Witness List and on Related Submissions, *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-PT, T. Ch. III, 22 April 2008, par. 9. Also Rule 73bis (B) (iv) *juncto* Rule 73bis (E) ICTR and SCSL RPE allow for the Prosecutor to add new witnesses to the list after the commencement of the trial, where such would be in the interests of justice.

Similarly, the Rule 65ter (E) (iii) exhibit list may be amended in the interests of justice. See *e.g.* ICTY, Decisions on Appeals against Decision Admitting Material Related to Borovčanin’s Questioning, *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.1, A. Ch., 14 December 2007, par. 37; ICTY, Decision on Prosecution’s Motion for Admission of Evidence to Mladić Notebooks with a Separate Opinion from Presiding Judge Antonetti Attached, *Prosecutor v. Šešelj*, Case No. IT-03-67-T, T. Ch. III, 22 October 2010, par. 14; ICTY, Decision on Prosecution’s Third Motion for Leave to Amend its Rule 65ter Exhibit List, *Prosecutor v. Milošević*, Case No. IT-98-21/1-T, T. Ch. III, 23 April 2007, p. 3. Also the ICTR has allowed for the amendment of the exhibit list under Rule 73bis (B) (v) after the commencement of the trial. See *e.g.* ICTR, Decision on Prosecutor’s Motion to Modify her List of Exhibits, *Prosecutor v. Ndajambaye et al.*, Case No. ICTR-96-8-T, T. Ch. II, 14 December 2001, par. 11 (entertaining the request under Rule 54 ICTR RPE).

¹⁵⁰ See ICTR, Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses, *Prosecutor v. Nahimana and Barayagwiza*, Case No. ICTR-99-55-T, T. Ch. I, 26 June 2001, par. 20, quoted with approval in SCSL, Decision on Prosecution Request for Leave to Call Additional Witnesses, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, T. Ch., 29 July 2004, par. 16.

¹⁵¹ See *e.g.* ICTY, Judgment, *Prosecutor v. Delalić et al. (Čelebići case)*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 279; ICTY, Decision on the Prosecution’s Motion to Re-open its Case, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, T. Ch. III, 6 October 2010, par. 31; ICTY, Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, T. Ch. III, 27 November 2008, par. 20; ICTY, Decision on the Prosecutor’s Application to Re-open its Case, *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47, T. Ch. II, 1 June 2005, par. 31; SCSL, Decision on Confidential Prosecution Motion to Reopen the Prosecution Case to Present an Additional Prosecution Witness, *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, T. Ch. II, 28 September 2006.

¹⁵² Rule 115 ICTY, ICTR, and SCSL RPE.

¹⁵³ Consider *e.g.* ICTR, Decision on Appellants Jean-Bosco Barayagwiza’s and Ferdinand Nahimana’s Motions for Leave to Present Additional Evidence Pursuant to Rule 115, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, A. Ch., 12 January 2007, par. 5; ICTR, Decision on Appellant Jean-Bosco Barayagwiza’s Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, *Prosecutor v. Nahimana et al.*, Case No. IT-99-52-A, A. Ch., 8 December 2006, par. 4; ICTY, Judgment, *Prosecutor v. Erdemović*, Case No. IT-96-22-A, A. Ch., 7 October 1997, par. 15.

¹⁵⁴ ICTR, Decision on Appellant Hassan Ngeze’s Motion for Approval of Further Investigations on Specific Information Relating to the Additional Evidence of Potential Witnesses, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, A. Ch., 20 June 2006, par. 4; ICTR, Decision on Appellant Hassan Ngeze’s Motion for the

result from the lack of due diligence.¹⁵⁵ Moreover, only in exceptional circumstances will the Registrar fund investigations at the appeal stage.¹⁵⁶

The jurisprudence further offered some explanations why prolonged investigations should be allowed. Firstly, a rigid and formalistic approach would sit uneasy with the prosecutorial duty “to prosecute an accused to the full extent of the law and to present all relevant evidence before the Trial Chamber.”¹⁵⁷ Secondly, the Trial Chamber in *Boškoski and Tarčulovski* referred to the “nature and scope” of the investigations to justify continued investigations. However, the Chamber does not further explain why the “complex nature” or the “large scale” of the case necessitates the conduct of continued investigations after the confirmation of the indictment.¹⁵⁸ It has been suggested that the ‘unique character’ of the investigations should not be relied upon too easily.¹⁵⁹ Certainly, relevant arguments may be put forward, including difficulties to ensure the cooperation by relevant states. In his dissent in *Milutinović et al.*, Judge Hunt argued that where the prosecutorial investigation continues throughout the trial phase, such is the result of the imperfect system and the necessary reliance on states to assist in the conduct of the investigation.¹⁶⁰

It is evident that the practice of continued investigations during the trial phase involves certain risks. In case the continued gathering of evidence results in the amendment of the indictment

Approval of the Investigation at the Appeal Stage, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, A. Ch., 3 May 2005, p. 3.

¹⁵⁵ See e.g. ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-95-1-A, A. Ch., 15 July 1999, par. 15.

¹⁵⁶ See ICTR, Decision on Appellant Hassan Ngeze’s Motion for the Approval of the Investigation at the Appeal Stage, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, A. Ch., 3 May 2005, pp. 3 – 4.

¹⁵⁷ ICTR, Decision on Prosecutor’s Request for Leave to File an Amended Indictment, *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-I, T. Ch. II, 21 June 2000, par. 27; ICTR, Decision on the Prosecutor’s Request for Leave to File an Amended Indictment, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-I, T. Ch. I, 11 April 2000, p. 4; ICTR, Decision on the Prosecutor’s Request for Leave to File an Amended Indictment, *Prosecutor v. Nahimana*, Case No. ICTR-96-11-T, T. Ch. I, 5 November 1999, par. 18; ICTR, Decision on the Prosecutor’s Request for Leave to File an Amended Indictment, *Prosecutor v. Ndayambaje*, Case No. ICTR-96-8-T, T. Ch. II, 2 September 1999, par. 7; ICTR, Reasons for the Decision on the Prosecutor’s Request for Leave to Amend the Indictment, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, T. Ch. II, 12 August 1999, par. 24; ICTR, Decision on the Prosecutor’s Request for Leave to Amend the Indictment, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, T. Ch. I, 6 May 1999, par. 17.

¹⁵⁸ ICTY, Reasons for Oral Decision Denying Boškoski Defence Motion to Stop Prosecution’s Continued Investigation and Continued Disclosure, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, T. Ch. II, 10 May 2007, par. 4.

¹⁵⁹ Consider in general G. MCINTYRE, Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY, in G. BOAS and W.A. SCHABAS (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Leiden, Martinus Nijhoff Publishers, 2003, pp. 193-238.

¹⁶⁰ ICTY, Decision on Interlocutory Appeal on Motion for Additional Funds, *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR73.2, A. Ch., 13 November 2003, Dissenting Opinion of Judge David Hunt, par. 39.

or the presentation of additional evidence at trial, care must be taken that the Defence is informed of the nature and cause of the charges against him or her and has an adequate opportunity to prepare an effective defence. As emphasised by ICTY Trial Chamber II, “[t]he touchstone is fairness.”¹⁶¹

The definition included in the RPE is limited to prosecutorial investigative acts, thereby excluding defence investigations from its scope (“all activities undertaken by the Prosecutor under the Statute and the Rules”).¹⁶² Such a limitation is unfortunate, given the adversarial style of proceedings at the *ad hoc* tribunals and the SCSL. As confirmed by the ICTY Appeals Chamber, the Defence is expected to conduct its own investigations, and in practice all defence teams conduct on-site investigations.¹⁶³ Such limitation is reflective of the procedural frameworks of the *ad hoc* tribunals and the SCSL. These do not regulate the conduct of defence investigations save for some general references to it, including to the general power of the Trial Chamber in assisting the Defence in the conduct of its investigations.¹⁶⁴ Moreover, the Defence is not an organ of the tribunal, in the sense of an independent body with its own budget. In this regard, the procedural set-up of the Special Court offered a welcome improvement *vis-à-vis* the *ad hoc* tribunals, insofar that it envisages a Defence Office.¹⁶⁵ Nevertheless, since this office is not an independent organ and resorts under the

¹⁶¹ ICTY, Reasons for Oral Decision Denying Boškoski Defence Motion to Stop Prosecution’s Continued Investigation and Continued Disclosure, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, T. Ch. II, 10 May 2007, par. 5.

¹⁶² Rule 2 ICTY, ICTR and SCSL RPE (emphasis added).

¹⁶³ ICTY, Decision on Prosecutor’s Appeal on Admissibility of Evidence, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, A. Ch., 16 February 1999, par. 18 (“The Appeals Chamber, however, points out that there is a firm obligation placed upon those representing an accused person to make proper enquiries as to what evidence is available in that person’s defence”). Not only does this follow from the manner in which the RPE conceive of the parties conducting their own pre-trial investigations, but also from the way in which the parties are conceived as competitors in a contest. See e.g. M. LANGER, *The Rise of Managerial Judging in International Criminal Law*, in «American Journal of Comparative Law», Vol. 53, 2005, pp. 859, 861. See J.I. TURNER, *Defense Perspectives on Law and Politics in International Criminal Trials*, in «Virginia Journal of International Law», Vol. 48, 2008, p. 554.

¹⁶⁴ Rule 54 ICTY, ICTR and SCSL RPE and Rule 54*bis* ICTY RPE. Among others, the right for the Defence to conduct its own investigations follows from the right afforded to the accused person to have ‘adequate time and facilities for the preparation of his defence’, the general ‘right to a fair trial’ and from the right ‘to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him’; See Article 21 (4) (b) and (e) ICTY Statute, Article 20(4) (b) and (e) ICTR Statute and Article 17 (4) (b) and (e) SCSL Statute.

¹⁶⁵ Rule 45 SCSL RPE.

Registry, it cannot operate fully independently.¹⁶⁶ In addition, experiences of the Defence with this office were mixed, at best.¹⁶⁷

Lastly, from a normative point of view, it also follows that this definition is construed too narrowly since it limits the objective of the investigation to the collection of evidence and information. While most investigative acts will serve the purpose of gathering evidence, some prosecutorial investigative acts serve other goals, including the goal of ensuring the future execution of sentences.¹⁶⁸

Whereas judicial overview over the pre-trial stage *sensu stricto* has gradually increased (cf. managerial judging), judicial intervention during the investigation stage of proceedings remains exceptional. Such intervention is only guaranteed at the very end of the investigation phase, when the indictment has to be confirmed. Only in cases where a transfer order, subpoena, summons or another order is needed, do the Judges intervene in the investigation, when requested to do so by the parties.¹⁶⁹ Besides, if the Prosecutor wants to detain a suspect provisionally at the detention unit of the tribunal, judicial intervention is required in the form of an order by a Judge.¹⁷⁰

¹⁶⁶ G. McINTYRE, Equality of Arms – Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, in «Leiden Journal of International Law», Vol. 16, 2003, p. 278.

¹⁶⁷ Interview with Mr. Jordash, Defence Counsel, SCSL-11, The Hague, 7 December 2009, p. 4 (“they were nothing more than an adjunct to the Registry designed to assist the defence, but in practice acted as a convenient vehicle for the Registry to continue as before” [...] “in truth the Defence Office were simply in bed with the Registry and did not stand up for the defence rights.” “So did we ever get help from the Defence Office? I cannot think of a time. Did they hinder our work? Almost always.”); SCSL, Interview with a Defence Counsel at the SCSL, SCSL-04, Freetown, 19-20 October 2009, p. 4 (“I think having it is a great achievement. In terms of what it actually achieved, it was very limited. It was set up as an afterthought initially. When the Special Court came into being, there was not even a budget line for the Defence Office. It was always kind of the poor cousin of everything else.” [...] “[D]uring the trials, you could read what you want in the annual report: that they provided legal advice and they helped draft motions, but none of that is actually true. They did not provide us with any legal advice. Actually, the Defence Office is a little bit better now. Our life with the [...] team would have been considerably easier if we did not have a Defence Office. Not only were they not helpful, they actually hindered us from doing our jobs”); Interview with a Defence counsel at the SCSL, SCSL-03, Freetown, 20 October 2009, p. 6 “Q: Has the Defence Office been helpful? A: It has been difficult for our team to have any substantive academic input from the Defence Office. They have provided almost exclusively for us a logistics role. In Cambodia, I think things work differently”); Interview with a Defence counsel at the SCSL, SCSL-02, Freetown, 22 October 2009, p. 9 (Q: Did the Office really work together well with defence teams or not? A: They did as far as no research issues were concerned, but in terms of research issues they were not much of assistance. [...] Q: So they could not be of assistance with ad hoc research assignments? A: No. Administratively, they could be of assistance, for example to make travel arrangements and things like that, they were okay, but in terms of legal research and advice on submissions, no”).

¹⁶⁸ See *infra*, Chapter 6.

¹⁶⁹ Rule 54 ICTY, ICTR and SCSL RPE and Rule 39 (iv) ICTY, ICTR and SCSL RPE; see also Rule 54bis ICTY RPE.

¹⁷⁰ Rule 40bis ICTY, ICTR and SCSL RPE.

I.3.2. The International Criminal Court

Once the minimum threshold for the opening of an investigation has been met, the pre-investigation ends and the investigation proper commences. Depending on the triggering mechanism, the initiation of the investigation *sensu stricto* follows a decision by the Prosecutor under Article 53 (1) ICC Statute (referral) or the decision by the Pre-Trial Chamber, pursuant to Article 15 (4) ICC Statute (*proprio motu*), authorising the commencement of the investigation proper. According to the ICC Statute, the Prosecutor is vested with the authority ‘for conducting investigations and prosecutions before the Court’.¹⁷¹ However, neither the ICC Statute nor the ICC RPE further define the term ‘investigations’. The Appeals Chamber has defined the investigation as “an inquiry conducted by the Prosecutor into the commission of a crime with a view to bringing to justice those deemed responsible.”¹⁷²

During this investigation process, the Prosecutor can avail himself or herself of the full gamut of investigative powers under Article 54 ICC Statute.¹⁷³ The individual investigative measures will be discussed in depth in subsequent chapters.¹⁷⁴ Once the investigation has started, the Prosecutor is the organ which is primarily entrusted with the investigation of those crimes within the jurisdiction of the Court allegedly committed within the relevant situation.¹⁷⁵ The object of investigations becomes more concrete and the Prosecutor should identify cases and decide whether one or more persons should be charged.¹⁷⁶ It follows that during the

¹⁷¹ Article 42 (1) ICC Statute; ICC, Judgment on Victim Participation in the Investigation Stage of Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, *Situation in the DRC*, Case No. ICC-01/04-556 (OA4 OA5 OA6), A. Ch., 19 December 2008, par. 52 (“Manifestly, authority for the conduct of investigations vests in the Prosecutor”).

¹⁷² *Ibid.*, par. 45; ICC, Judgment on Victim Participation in the Investigation Phase of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 3 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 6 December 2007, *Situation in Darfur, Sudan*, Case No. ICC-02/05-177 (OA OA2 OA3), A. Ch., 2 February 2009.

¹⁷³ Article 54 (1) (a) ICC Statute.

¹⁷⁴ See *infra*, Chapters 4 – 6.

¹⁷⁵ Article 54 ICC Statute; ICC, Decision on Application Under Rule 103, *Situation in Darfur, Sudan*, Case No. ICC-02/05-185, PTC I, 4 February 2009, par. 12.

¹⁷⁶ See also Article 14 (1) ICC Statute.

investigation *sensu stricto*, investigations gradually become more specific, resulting into the identification of suspects. Step by step, the different elements of a case are selected.¹⁷⁷

Therefore, while pre-investigations had ‘situations’ as their *object*, during investigations, ‘cases’ are identified. With regard to the definition of a case, the only indication is to be found in the ICC Regulations of the Registry, which state that “the Registry shall open a case record upon receipt of an application requesting the issuance of a warrant of arrest or a summons to appear pursuant to article 58.”¹⁷⁸ However, the formal act of opening a case record by the Registry does not exclude that a ‘case’ already exists at an earlier stage.¹⁷⁹ It is recalled that Pre-Trial Chamber I defined a ‘case’ in *Lubanga* as including “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects.”¹⁸⁰ Cases entail “proceedings that take place after the issuance of a warrant of arrest or a summons to appear.”¹⁸¹ The Pre-Trial Chambers added that “a case arising from the investigation of a situation will fall within the jurisdiction of the Court only if the specific crimes of the case do not exceed the territorial, temporal and possibly personal parameters defining the situation under investigation and fall within the jurisdiction of the Court.”¹⁸²

¹⁷⁷ X.A. ARANBURU, Gravity of Crimes and Responsibility of the Suspect, in M. BERGSMO (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Oslo, Torkel Opsahl Academic EPublisher, 2010, p. 206.

¹⁷⁸ Regulation 20 (2) of the Regulations of the Registry.

¹⁷⁹ Confirming, see C. SAFFERLING, *The Rights and Interests of the Defence in the Pre-Trial Phase*, in «Journal of International Criminal Justice», Vol. 9, 2011, pp. 651 – 667.

¹⁸⁰ ICC, Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the DRC*, Case No. ICC-01/04-101, PTC I, 17 January 2006, par. 65; ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 21. Compare with ARANBURU, who defines a case as “compris[ing] the whole of facts and charges attributed to one or several accused jointly, as stated in an indictment or warrant of arrest.” It consists of (1) the facts or criminal events; (2) the suspect or accused; (3) the charges, the legal characterisation of the facts; (4) the mode of responsibility and (5) the standard of evidence (depending on the phase of development of the case). See X.A. ARANBURU, *Gravity of Crimes and Responsibility of the Suspect*, in M. BERGSMO (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Oslo, Torkel Opsahl Academic EPublisher, 2010, pp. 205 – 206.

¹⁸¹ ICC, Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the DRC*, Case No. ICC-01/04-101, PTC I, 17 January 2006, par. 65. Consider additionally ICC, Decision on Application Under Rule 103, *Situation in Darfur, Sudan*, Case No. ICC-02/05-185, PTC I, 4 February 2009, par. 13.

¹⁸² Consider e.g. ICC, Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the DRC*, Case No. ICC-01/04-101, PTC I, 17 January 2006, par. 65; ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 21; ICC, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Prosecutor v. Al Bashir, Situation in Darfur, Sudan*, Case No. ICC 02/05-01/09-3, PTC I, 4 March 2009, par. 36; ICC, Decision

In *Mbarushimana*, the issue arose whether the case fell within the existent situation in the DRC.¹⁸³ Pre-Trial Chamber I reiterated that “it is only within the boundaries of crisis for which the jurisdiction of the Court was activated that subsequent prosecutions can be initiated.”¹⁸⁴ Importantly, the Pre-Trial Chamber underlined that a situation “can include not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation of crisis referred to the Court as ongoing at the time of the referral.”¹⁸⁵ The need of a sufficient link between a case and the situation is rooted in the complementarity regime underpinning the Court.¹⁸⁶ *In casu*, the Pre-Trial Chamber was convinced that the case fell within the ‘situation of crisis’ which was referred and triggered the investigations by the Prosecutor.¹⁸⁷ Likewise, Pre-Trial Chamber III, when authorising the investigation in the situation in Côte d’Ivoire, upheld the view that the temporal scope of the situation could also include crimes committed after the date of the referral insofar as they are sufficiently linked to the situation of crisis referred to the Court. The Pre-Trial Chamber added that the volatile situation in Côte d’Ivoire necessitated the inclusion of crimes “whose commission extends past the date of the application.”¹⁸⁸ However, this approach seems to be more limited than the approach taken by Pre-Trial Chamber I since only crimes that continue after the date of application (“continuing crimes (*sic*)”) are included and not crimes that take place after the date of the application.¹⁸⁹

on the Prosecutor’s Application under Article 58, *Prosecutor v. Mudacumura, Situation in the DRC*, Case No. ICC-01/04-01/12-1, PTC II, 13 July 2012, par. 14.

¹⁸³ The question was first raised by the Pre-Trial Chamber and later by the Defence in a jurisdictional challenge. See ICC, Decision Requesting Clarification on the Prosecutor’s Application under Article 58, *Situation in the DRC*, Case No. ICC-01/04-575, PTC I, 6 September 2010 and ICC, Defence Challenge to the Jurisdiction of the Court, *Prosecutor v. Mbarushimana, Situation in the DRC*, ICC-01/04-01/10-290, PTC I, 20 July 2011 respectively.

¹⁸⁴ ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-1, PTC I, 28 September 2010, par. 6; ICC, Decision on the “Defence Challenge to the Jurisdiction of the Court”, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-451, PTC I, 26 October 2011, par. 16.

¹⁸⁵ *Ibid.*, par. 16; ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-1, PTC I, 28 September 2010, par. 6.

¹⁸⁶ ICC, Decision on the “Defence Challenge to the Jurisdiction of the Court”, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-451, PTC I, 26 October 2011, par. 16.

¹⁸⁷ ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-1, PTC I, 28 September 2010, par. 7; ICC, Decision on the “Defence Challenge to the Jurisdiction of the Court”, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-451, PTC I, 26 October 2011, par. 16 – 51.

¹⁸⁸ ICC, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Situation in the Republic of Côte d’Ivoire”, *Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-14-Corr, PTC III, 15 November 2011, par. 178.

¹⁸⁹ Critical of this limitation, consider ICC, Corrigendum to “Judge Fernández de Gurmendi’s Separate and Partially Dissenting Opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of

Pre-Trial Chamber II upheld yet a different interpretation when it held in the Kenya situation that a case “may only cover those crimes that have occurred up until the time of the filing of the Prosecutor’s Request.”¹⁹⁰ The Pre-Trial Chamber reasoned that “[s]ince article 15(4) of the Statute subjects the Chamber’s authorization of an investigation to an examination of the Prosecutor’s Request and supporting material, it would be erroneous to leave open the temporal scope of the investigation to include events subsequent to the date of the Prosecutor’s Request.”¹⁹¹ One way of explaining this divergence would be to distinguish between the different triggering mechanisms. Understood in this way, the requirement of authorisation in Article 15 (4) ICC Statute in case the Prosecutor relies on his or her *proprio motu* powers would require a different definition of ‘situations’. This distinct interpretation would then be necessitated by the Pre-Trial Chamber’s supervisory functions.¹⁹² In the absence of a definition of the term ‘situations’ in the ICC Statute or the RPE, nothing seems to prevent such distinction being drawn. Nevertheless, it may well prove unworkable, and neglects the fact that unlike other international tribunals, the ICC often deals with conflicts that are ongoing. Moreover, RASTAN argued that, at least in the case of the Kenya situation, such temporal limitation would not have been necessary if the Pre-Trial Chamber had more clearly defined the material scope of the situation and had focused on the post-election violence and related events.¹⁹³ In such case, the absence of a temporal limitation would not be at tension with the ICC Statute. Article 53 (1) (a) ICC Statute refers to ‘a crime has been or is being committed’.

In its decision on the Prosecutor’s application for a warrant of arrest in the *Mudacumura* case, Pre-Trial Chamber II, confusingly, seems to have adopted the view that the parameters of a

an Investigation into the Situation in the Republic of Cote d’Ivoire”, *Situation in the Republic of Cote d’Ivoire*, Case No. ICC-02/11-15-Corr, PTC III, 5 October 2011, par. 65 – 70.

¹⁹⁰ ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 206.

¹⁹¹ *Ibid.*, par. 206. The Pre-Trial accordingly defined the temporal scope of the situation as those events that took place between 1 June 2005 (which is the date of the Statute’s entry into force for the Republic of Kenya) and 26 November 2009 (which is the date of the filing of the Prosecutor’s Request), since this was the last opportunity for the Prosecutor to assess the information available to him prior to his submission to the Chamber’s examination (*ibid.*, par. 207).

¹⁹² *Ibid.*, par. 208.

¹⁹³ R. RASTAN, The Jurisdictional Scope of Situations before the International Criminal Court, in «Criminal Law Forum», Vol. 23, 2012, pp. 22 – 23 (“rather than relying on temporal parameters for this purpose, the Chamber could have specified with greater emphasis the focus of the situation: i.e., crimes related to or connected with the post-election violence”).

situation can also include crimes committed after the date of the referral of the situation which initially triggered the jurisdiction of the Court.¹⁹⁴

Overall, it seems that the approach of Pre-Trial Chamber I (and III) should be preferred. As one commentator notes, such approach “appears better suited to the many volatile situations that the Court will continue to confront.”¹⁹⁵

This definition of a ‘case’ confirms the existence of a process, whereby the facts are originally broad and gradually narrowed down.¹⁹⁶ It is not clear why a case only exists after the ‘Article 58 stage’ of proceedings (issuance of a warrant of arrest or a summons to appear). Several commentators have convincingly argued that such definition is too narrow insofar that individuals will most likely already be the focus of investigations before the issuance of a warrant of arrest or a summons to appear.¹⁹⁷ Moreover, Article 53 (2) has cases as its object, not situations. However, at this stage, no warrant or summons has yet been issued.¹⁹⁸

Hence, as has been suggested in the literature, it would be useful to introduce an additional distinction between cases in a narrower sense and cases in a broader sense.¹⁹⁹ This entails that a case *sensu stricto* only exists after the issuance of a warrant or summons. However, a case considered in the broader sense (or ‘case hypothesis’) exists already earlier during investigations.²⁰⁰

It seems that the Prosecutor has defined a ‘case’ in a different manner than the Pre-Trial Chambers have. The Prosecutor speaks of “an identified set of incidents, suspects and

¹⁹⁴ ICC, Decision on the Prosecutor’s Application under Article 58, *Prosecutor v. Mudacumura, Situation in the DRC*, Case No. ICC-01/04-01/12-1, PTC II, 13 July 2012, par. 14.

¹⁹⁵ R. RASTAN, The Jurisdictional Scope of Situations before the International Criminal Court, in «Criminal Law Forum», Vol. 23, 2012, p. 29.

¹⁹⁶ X.A. ARANBURU, Gravity of Crimes and Responsibility of the Suspect, in M. BERGSMO (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Oslo, Torkel Opsahl Academic EPublisher, 2010, p. 206.

¹⁹⁷ C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, pp. 94 (arguing that the situation becomes a case somewhere between the identification of individuals and the decision to prosecute a case); I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, pp. 119 – 120, 419.

¹⁹⁸ *Ibid.*, p. 418.

¹⁹⁹ *Ibid.*, p. 419.

²⁰⁰ *Ibid.*, p. 419.

conduct.”²⁰¹ Elsewhere, the Prosecutor referred to “a specific incident in which crimes within the jurisdiction of the Court have been committed by identified perpetrators.”²⁰²

Following an investigation, the Prosecutor can decide, on the basis of the materials and information collected, not to prosecute a case. If so, then he or she has to inform the Pre-Trial Chamber and the referring party in writing and provide reasons.²⁰³ There is no corresponding obligation to inform the information provider. A threshold is included and there should be “sufficient basis for a prosecution” if the Prosecutor wants to proceed. From the negative formulation of the threshold under Article 53 (2) (“If, upon investigation, the Prosecutor concludes that there is *not* a sufficient basis for a prosecution”) it follows that it is presumed that one or more prosecutions will indeed follow from an investigation.²⁰⁴ The threshold has not yet been further defined in the jurisprudence. It has been argued that such threshold requires that “the evidence gathered would provide a basis on which a court can convict the suspect.”²⁰⁵ Another commentator speaks of “reliable and admissible evidence so that there is a realistic chance of securing a conviction”.²⁰⁶

The factors that may lead the Prosecutor not to proceed with a prosecution are to be found in Article 53 (2) (a) – (c) and to some extent mirror the factors the Prosecutor should consider when initiating an investigation.²⁰⁷ It follows that during the investigation, the Prosecutor should also consider these variables. Furthermore, these variables are not static, necessitating an ongoing consideration thereof.²⁰⁸ The threshold differs from the ‘reasonable basis’ test in

²⁰¹ ICC, Policy Paper on Preliminary Examinations, 2013, par. 43.

²⁰² Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to 14 June 2006, p. 3.

²⁰³ Article 53 (2) ICC Statute and Rule 106 ICC RPE.

²⁰⁴ C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, p. 240.

²⁰⁵ M. BERGSMO and P. KRUGER, Article 53, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1073.

²⁰⁶ C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, p. 419.

²⁰⁷ Article 53 (1) (a) – (c) ICC Statute. These factors are not mere ‘guidance’ for the determination of sufficiency, as is argued by BERGSMO and KRUGER. See the discussion of these criteria, *infra*, Chapter 3, II.4.2. M. BERGSMO and P. KRUGER, Article 53, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1073.

²⁰⁸ Consider K. DE MEESTER, K. PITCHER, R. RASTAN and G. SLUITER, *Investigation, Coercive Measures, Arrest and Surrender*, in H. FRIMAN, S. LINTON, G. SLUITER, S. VASILIEV and S. ZAPALLÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 185.

Article 53 (1) ICC Statute, insofar that it applies at a different stage.²⁰⁹ The *travaux préparatoires* show that such different formulation was a deliberate choice.²¹⁰ At this stage, the threshold is stricter and more specific.

The fundamental problem with the threshold in Article 53 (2) ICC Statute is that the object of prosecution is not defined. One commentator notes that this threshold may refer to (1) a decision not to prosecute a particular individual, (2) a decision not to prosecute a certain group of persons in a given situation, (3) a decision not to prosecute certain crimes and (4) a decision not to bring any case at all.²¹¹ It will be for the Pre-Trial Chamber to further elucidate this threshold when it exercises its functions under Article 53 (2).²¹²

One commentator further divides the investigation phase into two chronological steps, to know (1) the distillation of one or more cases out of a situation and (2) the collection of incriminating and exonerating evidence with regard to an individual suspect.²¹³ However, to this author, it seems incorrect to refer to consecutive steps in this regard. As previously explained, during the investigation, there is a gradual move from a general situation to one or more particular cases. Evidence may already be collected with regard to individuals, before all elements which constitute a case have been defined. Moreover, as will be discussed further, the ICC Prosecutor follows a ‘sequenced approach’, which implies that investigations continue with regard to the situation while cases are, one by one, gradually selected within this situation.²¹⁴

The Prosecutor’s investigation of a situation is conducted by a ‘joint team’, consisting of persons from within the three main divisions of the OTP (to know the Investigation Division, the Prosecution Division and the Jurisdiction, Complementarity, and Cooperation

²⁰⁹ Confirming, consider e.g. F. RAZESBERGER, *The International Criminal Court: The Principle of Complementarity*, Frankfurt am Main, Peter Lang, 2006, p. 105.

²¹⁰ See W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 666, referring to U.N. Doc. A/CONF.183/13 (Vol. III), p. 292.

²¹¹ C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years on*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 270.

²¹² *Ibid.*, p. 270. The author argues that different levels of judicial scrutiny correspond to the four understandings of the Article 53 (2) threshold mentioned in the main text. In the first scenario (1), control would be very strict. Under (4), the exercise of judicial review would very limited. Lastly, with regard to scenario (2) and (3) judicial review would be more nuanced (*ibid.*, pp. 270 - 271).

²¹³ C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, p. 240.

²¹⁴ See *infra*, Chapter 3, II.4.5.

Division).²¹⁵ In the course of the investigation, they will form case hypotheses, on the basis of the information that was already gathered during the pre-investigation phase and information and evidence collected during the investigation proper.²¹⁶ These case hypotheses include information on specific incidents to be investigated and the person(s) who appear to be the most responsible. Additionally, they already include a tentative indication of possible charges and potentially exonerating circumstances.²¹⁷

Whereas most investigative acts that are undertaken aim at collecting evidence and material to establish the criminal liability of individuals, the discussion of the individual investigative acts will illustrate how these may also serve other goals, including the execution of a warrant of arrest or the restitution of property.²¹⁸ In addition, investigations aim at the consideration by the Court of the individual circumstances of the convicted person, the gravity of the crime or the existence of mitigating or aggravating circumstances.²¹⁹ At this juncture, it suffices to emphasise that investigative acts may serve different goals.

With regard to the end point of the investigations, neither the Statute nor the RPE seem to require that all investigative activities are over at the moment a decision is taken, pursuant to Article 53 (2), to prosecute one or more cases or not to prosecute. However, from an *a contrario* reading of Article 61 (4) ICC Statute, one could argue that investigations may not continue after the start of the confirmation hearing.²²⁰ The ICC Appeals Chamber has emphasised that “ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing.”²²¹ It follows that these investigative activities “should largely be completed at the stage of the confirmation of charges hearing.”²²² Additionally, it

²¹⁵ Regulation 32 of the Regulations of the OTP (the composition and size of the team may vary throughout the investigation); ICC, Transcript, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009, pp. 7, 29 (decisions are made jointly by the three parts of the team).

²¹⁶ Regulation 33 of the Regulations of the OTP.

²¹⁷ Regulation 34 (1) of the Regulations of the OTP.

²¹⁸ See *infra*, Chapter 6.

²¹⁹ Article 78 ICC Statute and Rule 145 ICC RPE.

²²⁰ Article 61 (4) ICC Statute reads: ‘Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges’.

²²¹ ICC, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I Entitled: “Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-568 (OA 3), A. Ch., 13 October 2006, par. 54.

²²² ICC, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 Entitled “Decision on the Confirmation of Charges”, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. 01/04-01/10-514 (OA 4), A. Ch., 30 May 2012, par. 44; ICC, Decision on Defence Application

has been stated by Trial Chamber IV that post confirmation hearing investigations should be finished as soon as possible.²²³ The Appeals Chamber underlined that in case investigations have not been concluded, the Prosecutor has the possibility to request for the postponement of the confirmation of charges. Furthermore, if the Pre-Trial Chamber declines to confirm a charge, the Prosecutor may submit a new request, if such request is supported by additional evidence.²²⁴ However, there is no requirement in the Statute to have all investigations concluded. As stated by the Appeals Chamber, in some situations, “to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence, including potentially exonerating evidence.”²²⁵ This holds particularly true for the ICC where situations of conflict are ongoing and new compelling evidence would only emerge after the confirmation hearing. Furthermore, it has been argued that such understanding would be more in line with the ICC Prosecutor’s obligation to establish the truth and to collect exculpatory evidence where “the relevance of a particular item of evidence or lead may only become apparent during the course of proceedings, when assessed against other evidence, including witness testimony, or in the light of the defence’s case.”²²⁶ The Appeals Chamber emphasised that there is no need for authorisation by the Pre-Trial Chamber for post-confirmation investigations.²²⁷

From the above, it can be concluded that investigations may continue in the pre-trial phase *sensu stricto* and even in the trial phase. In practice, prosecutorial investigative efforts continue after the confirmation of charges.²²⁸ Nevertheless, as will be argued, it is important

pursuant to Article 64(4) and Related Requests, *Prosecutor v. Uhuru Muigai Kenyatta, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-728, T. Ch. V, 26 April 2013, par. 118.

²²³ ICC, Decision on the Re-interviews of six Witnesses by the Prosecution, *Prosecutor v. Abakaer Nourain and Jerbo Jamus, Situation in Darfur, Sudan*, Case No. ICC-02/05-03/09-158, T. Ch. IV, 6 June 2011, par. 13.

²²⁴ Rule 61 (8) ICC Statute.

²²⁵ ICC, Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I Entitled: “Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-568 (OA 3), A. Ch., 13 October 2006, par. 54.

²²⁶ K. DE MEESTER, K. PITCHER, R. RASTAN and G. SLUITER, Investigation, Coercive Measures, Arrest and Surrender, in H. FRIMAN, S. LINTON, G. SLUITER, S. VASILIEV and S. ZAPALLÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 192.

²²⁷ ICC, Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I Entitled: “Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-568 (OA 3), A. Ch., 13 October 2006, par. 53; ICC, Decision on the Re-interviews of six Witnesses by the Prosecution, *Prosecutor v. Abakaer Nourain and Jerbo Jamus, Situation in Darfur, Sudan*, Case No. ICC-02/05-03/09-158T. Ch. IV, 6 June 2011, par. 14.

²²⁸ Consider e.g. ICC, Transcript, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009, pp. 45-46 (a Prosecution head of investigations testified that “a

that post-confirmation investigative efforts are limited by prosecutorial ethical obligations demanding that all investigations should be conducted expeditious and as effective as possible *ab initio*.²²⁹ As argued by Judge Kaul:

“the possibility, if not the risk, that [the] permission of post-confirmation investigations in practice might be too broadly interpreted by the Prosecutor, possibly as some kind of license to investigate whenever, even after confirmation, thus enabling the Prosecutor also to allow a phased approach for the gathering of evidence [...]. This would in my view amount to a serious misinterpretation of the Appeals Chamber judgment of 13 October 2006.”²³⁰

For example, Judge Kaul points out that it would risky (or even irresponsible) for investigatory efforts to be initially aimed at gathering sufficient evidence to fulfil the evidentiary standard for the confirmation of charges in the expectation that additional evidence may be gathered later to fulfil the ‘beyond reasonable doubt’ standard.²³¹ It follows that relevant and convincing evidence which enables the Trial Chamber to consider whether criminal responsibility is proven ‘beyond reasonable doubt’ should be obtained as expeditious and effective as possible.²³² These concerns later proved to be legitimate. On 23 April 2013, in the *Kenyatta* case, the Trial Chamber was concerned about “the considerable volume of evidence collected by the Prosecution post-confirmation”.²³³ It held that 24 out of 31 fact witnesses had been interviewed for the first time after the confirmation of charges. In addition, large amounts of documentary evidence were collected post-confirmation.²³⁴ The Trial Chamber reminded the Prosecution that the possibility to continue investigations post-confirmation “is not an unlimited prerogative”.²³⁵ The Prosecution should not collect evidence

large part of the investigation has been conducted before the confirmation hearing, although of course there was investigative activity that took place also after that point in time”).

²²⁹ Consider ICC, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Muthaura, Muigai Kenyatta and Hussein Ali, Situation in the Republic of Kenya*, Case No ICC-01/09-02/11-382-Red, PTC II, 23 January 2012, Dissenting Opinion by Judge Hans-Peter Kaul, par. 47 – 57; ICC, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Situation in the Republic of Kenya*, Case No. ICC-01/09-01/11-373, PTC II, 23 January 2012, Dissenting Opinion by Judge Hans-Peter Kaul, par. 42-52; see *infra*, Chapter 3, IV.

²³⁰ *Ibid.*, par. 51.

²³¹ *Ibid.*, par. 52.

²³² *Ibid.*, par. 53.

²³³ ICC, Decision on Defence Application pursuant to Article 64(4) and Related Requests, *Prosecutor v. Uhuru Muigai Kenyatta, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-728, T. Ch. V, 26 April 2013, par. 118.

²³⁴ *Ibid.*, par. 122.

²³⁵ *Ibid.*, par. 119.

post-confirmation that it could reasonably be expected to collect prior to the confirmation of charges.²³⁶

Similar to the *ad hoc* tribunals and the Special Court, the statutory documents of the ICC do not include any express investigative powers for the Defence. Nevertheless, one of the principal tasks of the defence team is to conduct separate investigations, in order to challenge the allegations raised by the Prosecutor. Of course, from the moment there is a formal case (issuance of a warrant of arrest or summons to appear), Article 57 (3) (b) ICC Statute provides that the Pre-Trial Chamber may upon request ‘issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence’. The second part of this provision entails a ‘necessity requirement’.²³⁷ This encompasses, for example, that it should not be possible to obtain the materials sought from another source.²³⁸ It follows from Rule 116 ICC RPE that an order at the request of the Defence will be issued when the Pre-Trial Chamber is satisfied ‘[t]hat such an order would facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person’s defence’ (‘relevance requirement’).²³⁹ Cooperation shall be sought if the Pre-Trial Chamber is satisfied ‘that sufficient information to comply with article 96, paragraph 2, has been provided’ (‘specificity requirement’).²⁴⁰ More problematic for the Defence, in light of the risk of exposing its strategy is the possibility for the Pre-Trial Chamber to consult the Prosecution before issuing an order.²⁴¹ In the *Banda and Jerbo* case, the Pre-Trial dismissed the application of the Defence pursuant to Article 57 (3) (b) and concluded that any order would serve no purpose, since the Defence had stated its strategy not to challenge charges or evidence, or to present evidence, for the purposes of the confirmation hearing.²⁴²

²³⁶ *Ibid.*, par. 121. Consider additionally *ibid.*, Concurring Opinion of Judge Christine Van den Wyngaert, par. 2 (noting that “the Prosecution offers no cogent and sufficiently specific justification for why so many witnesses in this case were only interviewed for the first time post-confirmation”).

²³⁷ See e.g. ICC, Decision on “Defence Applications Pursuant to Article 53(3)(b) & 64(6)(a) of the Statute for an Order for the Preparation and Transmission of a Cooperation Request to the Government of the Republic of Sudan”, *Prosecutor v. Abakaer Nourain and Jerbo Jamus, Situation in Darfur, Sudan*, Case No. ICC-02/05-03/09-169, T. Ch. IV, 1 July 2011, par. 17.

²³⁸ ICC, Decision on the “Defence Application pursuant to Article 57(3)(b) of the Statute to seek the Cooperation of the Democratic Republic of Congo (DRC)”, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-444, PTC I, 25 April 2008, pp. 6, 7, 11.

²³⁹ Rule 116 (1) (a) ICC RPE.

²⁴⁰ Rule 116 (1) (b) ICC RPE.

²⁴¹ Rule 116 (2) ICC RPE.

²⁴² The Pre-Trial Chamber added that after the confirmation hearing, in case the charges would be confirmed, the Defence could file a new application. However, such distinction between the pre- and post-confirmation stage of

Requests for cooperation are subsequently transmitted by the Registrar. To some extent, the possibility to request assistance by the Pre-Trial Chamber may help restore any imbalance between the Prosecutor and the Defence in the collection of evidence.²⁴³ It has been suggested that in order to expedite proceedings, the Defence should rely more often on Article 57 (3) (b), rather than to first send cooperation requests directly to states or with a covert letter from the Registry.²⁴⁴ What is not provided for is a provision allowing the Defence to request the Prosecutor to undertake certain investigative actions. However, nothing seems to prevent the Defence to address such requests to the Prosecutor.²⁴⁵ An ICC Trial Chamber suggested that as an alternative to the drastic remedy of a temporary stay of proceedings, “the defence may consider revealing one line of argument to the prosecution in order to facilitate the search for, and disclosure of, relevant evidence and the investigation thereof.”²⁴⁶ However, it is understandable that the Defence will be reluctant to disclose its lines of defence to the Prosecution. According to FRIMAN, the powers of the Pre-Trial Chamber include the possibility for the Pre-Trial Chamber to order investigative acts in case the Prosecutor rejected a request by the Defence for such measures.²⁴⁷ However, to instruct the Prosecutor to conduct

proceedings seems artificial where the Defence may anticipate that the case proceeds to trial, in case the charges are confirmed. See ICC, Decision on the “Defence Application pursuant to Article 57(3)(b) of the Statute for an Order for the Preparation and Transmission of a Cooperation Request to the Government of the Republic of Sudan”, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan*, Case No. ICC-02/05-03/09-102, PTC I, 17 November 2010, par. 3-6; M. FEDOROVA, *The Principle of Equality of Arms in International Criminal Proceedings*, Antwerp, Intersentia, 2012, (non-commercial edition), pp. 205-206.

²⁴³ F. GUARIGLIA, K. HARRIS and G. HOCHMAYR, Article 57, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1124 (stating that this provision “attempts to balance the situations of the accused person and the Prosecutor at the pre-trial stage, by providing –even if incompletely– some degree of “equality of arms” during this procedural phase”). Consider also ICC, Decision on the “Defence Application pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)”, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-444, PTC I, 25 April 2008, Partly Dissenting Opinion of Judge Anita Ušacka, par. 6.

²⁴⁴ International Bar Association, *Fairness at the International Criminal Court*, August 2011, p. 36 (“This circuitous approach is resource intensive and needs to be revised”).

²⁴⁵ P.C. KEEN, *Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals*, in «Leiden Journal of International Law», Vol. 17, 2004, p. 799 (the author states that “ICC subjects do have such powers, because they are necessarily implicit in the duties and mechanisms of control imposed on the Prosecutor”).

²⁴⁶ ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan*, Case No. ICC-02/05-03/09-410, T. Ch. IV, 26 October 2012, par. 113.

²⁴⁷ H. FRIMAN, *The Rules of Procedure and Evidence in the Investigative Stage*, in H. FISHER, C. KRESS and S.R. LÜDER (eds.), *International and National Prosecution of Crimes under International Law: Current Developments*, Berlin, Berlin Verlag Arno Spitz GmbH, 2001, p. 192.

certain investigative acts would be at tension with his or her independence.²⁴⁸ Moreover, a proposal to expressly include such power was rejected during negotiations.²⁴⁹ Although the Defence will want to conduct on-site investigations, it follows from the case law of the ICC that the Defence does not possess “an all-encompassing right” to conduct on site investigations.²⁵⁰ Hence, in case defence teams are denied access to a territory and the collection of relevant evidence is impaired such does not automatically render the trial unfair.²⁵¹

With regard to the *participatory rights of victims* during the investigation, it should be noted that the Appeals Chamber held that there is no all-encompassing right for victims to participate during the investigation phase. This is because investigations do not constitute ‘judicial proceedings’ in the sense of Article 68 (3), but “an inquiry conducted by the Prosecutor into the commission of a crime with a view of bringing to justice those deemed responsible.”²⁵² Moreover, where Article 42 (1) ICC Statute vests the Prosecutor with the authority to conduct investigations, reading participatory rights for victims in the investigation into the ICC Statute would contravene this provision.²⁵³ In holding so, the Appeals Chamber overturned the view held by the Pre-Trial Chamber that the victims’ participatory rights extended to the investigative stage.²⁵⁴ Nevertheless, in the absence of a general participatory

²⁴⁸ F. GUARIGLIA, K. HARRIS and G. HOCHMAYR, Article 57, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1124.

²⁴⁹ *Ibid.*, p. 1126.

²⁵⁰ ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan*, Case No. ICC-02/05-03/09-410, T. Ch. IV, 26 October 2012, par. 99.

²⁵¹ *Ibid.*, par. 100 (the Defence argued that it was unable to conduct interviews in order to identify and locate potential witnesses with knowledge of the facts relevant to the case and, with regard to the potential defence witnesses it could identify, was unable to interview them where the Sudanese government refused access to its territory).

²⁵² ICC, Judgment on Victim Participation in the Investigations Stage of Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, *Situation in the DRC*, Case No. ICC-01/04-556 (OA4 OA5 OA6), A. Ch., 19 December 2008, par. 45, 48, 58; ICC, Judgment on Victim Participation in the Investigation Phase of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 3 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 6 December 2007, *Situation in Darfur, Sudan*, Case No. ICC-02/05-177 (OA OA2 OA3), A. Ch., 2 February 2009, par. 7. Consider additionally: OTP, Policy Paper on Victims’ Participation, April 2010, p. 14.

²⁵³ ICC, Judgment of Victim Participation in the Investigations Stage of Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, *Situation in the DRC*, Case No. ICC-01/04-556 (OA4 OA5 OA6), A. Ch., 19 December 2008, par. 52.

²⁵⁴ ICC, Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the DRC*, Case No. ICC-01/04-101, PTC I, 17 January 2006, par. 54 (holding

right for victims at the investigation stage, some provision is made in the ICC Statute for the victims to convey information to the Prosecutor.²⁵⁵ Besides, victims enjoy certain limited participatory rights.²⁵⁶ It is for the Pre-Trial Chamber to determine the participation of victims *in judicial proceedings* during the investigation stage.²⁵⁷

Further, the Appeals Chamber has acknowledged that while it is primarily for the parties to lead evidence to the guilt or innocence of the accused, it follows from the Court's authority 'to request the submission of all evidence that it considers necessary for the determination of the truth' (Article 69 (3) ICC Statute) read together with Article 68 (3) and Rule 91 (3) on victim participation that the possibility is left open for victims to request the Chamber to submit all evidence it considers necessary for the determination of the truth.²⁵⁸ This requires that the evidence or issue is shown to affect the interests of the victims.²⁵⁹ It is for the Chamber to decide on a case by case basis and due regard should be paid to the rights of the accused.²⁶⁰ Similarly, the Appeals Chamber concurred with the Trial Chamber that the legislative framework of the ICC does not exclude the possibility for the Trial Chamber to receive submissions by the victims on the admissibility or the relevance of evidence.²⁶¹

that Article 68 (3) applies to the investigation of a situation), par. 63 (holding that generally, the personal interests of victims are affected at the investigation stage) and par. 71 (holding that "[i]n the light of the core content of the right to be heard set out in article 68 (3) of the Statute, persons accorded the status of victims will be authorised, notwithstanding any specific proceedings being conducted in the framework of such an investigation, to be heard by the Chamber in order to present their views and concerns and to file documents pertaining to the current investigation of the situation in the DRC"). In more detail, consider B. MCGONIGLE LEYH, *Procedural Justice? Victim Participation in International Criminal Proceedings*, Antwerp, Intersentia, 2011, pp. 267 – 271.

²⁵⁵ See Articles 15 (2) and 42 (1) ICC Statute.

²⁵⁶ See e.g. Article 15 (3) and Article 19 (3) ICC Statute.

²⁵⁷ ICC, Judgment of Victim Participation in the Investigations Stage of Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, *Situation in the DRC*, Case No. ICC-01/04-556 (OA4 OA5 OA6), A. Ch., 19 December 2008, par. 57. Consider ICC, Decision on Victim's Participation in Proceedings Related to the Situation in Uganda, *Situation in Uganda*, Case No. ICC-02/04-191, PTC II, 9 March 2012; ICC, Decision on Victims' Participation in Proceedings Related to the Situation in Libya, *Situation in Libya*, Case No. ICC-01/11-28, PTC I, 24 January 2012; ICC, Decision on Victims' Participation in Proceedings Relating to the Situation in the Democratic Republic of the Congo, *Situation in the DRC*, Case No. ICC-01/04-593, PTC I, 11 April 2011; ICC, Decision on Victims' Participation in Proceedings Related to the Situation in the Central African Republic, *Situation in the CAR*, Case No. 01/05-31, PTC II, 11 November 2010; ICC, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. 01/09-24, 3 November 2010.

²⁵⁸ ICC, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-1432 (OA 9 OA 10), A. Ch., 11 July 2008, par. 94 – 98.

²⁵⁹ *Ibid.*, par. 99.

²⁶⁰ *Ibid.*, par. 98 – 105.

²⁶¹ *Ibid.*, par. 101 – 102. What is required for victims to tender and examine evidence is (i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings,

However, what remains unclear from the reasoning by the Appeals Chamber is whether victims may only tender evidence which has previously been gathered by the parties or not. It remains to be seen whether victims are able to request the tendering and examination of evidence they have collected themselves.²⁶² In this regard the Pre-Trial Chamber held in the *Katanga and Ngudjolo Chui* case that:

“granting investigative powers, independent from those of the Prosecution, to those granted the procedural status of victim would not be consistent with the procedural system embraced by the Statute and the Rules. Therefore, if those granted the procedural status of victim find it necessary to undertake certain investigative steps, they must request the Prosecution to undertake such steps. In the view of the Single Judge, this is not only consistent with the procedural framework of the Statute and the Rules, but also corresponds with the manner in which those national systems from the Romano-Germanic tradition which provide for a procedural status of victim at the pre-trial stage of a case operate.”²⁶³

The ICC Statute envisages several possibilities for *judicial intervention* during the investigation proper. These possibilities should be distinguished from the role played by the Pre-Trial Chamber during the pre-investigation stage.²⁶⁴ During the ‘full investigation’, the Pre-Trial Chamber may come to the assistance of the Prosecutor in the case where a state is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system (failed state scenario).²⁶⁵ Additionally, Article 56 ICC Statute allows the Pre-Trial Chamber to take certain investigative measures at the request of the Prosecutor or on its own initiative for the collection or preservation of evidence in case of a ‘unique investigative opportunity’. The exercise of these powers at the Chamber’s own initiative must be preceded by consultations with the Prosecutor, so as to ascertain whether

(iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness, and (vi) consistency with the rights of the accused and a fair trial (*ibid.*, par. 104).

²⁶² *Ibid.*, par. 100 (“If the Trial Chamber decides that the evidence should be presented then it could rule on the modalities for the proper disclosure of such evidence before allowing it to be adduced and depending on the circumstances it could order one of the parties to present the evidence, call the evidence itself, or order the victims to present the evidence”).

²⁶³ ICC, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-474, PTC I, 13 May 2008, par. 83-84. Consider also ICC, Decision on Modalities of Victim Participation, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-1788, T. Ch. II, 22 January 2010, par. 102 (“The Chamber must stress that the fact that the victims are authorised to present incriminating or exculpatory evidence during the trial does not, however, mean that they are entitled to conduct investigations in order to establish the guilt of the accused”).

²⁶⁴ See *supra*, Chapter 3, I.2.

²⁶⁵ Articles 54 (2) (b) and 57 (3) (d) ICC Statute; Rule 155 ICC RPE.

there is good cause why the Prosecutor did not request measures to be taken in relation to a unique investigative opportunity. The Chamber itself will only act *proprio motu* if it concludes that the Prosecutor's failure to request such measures is unjustified.²⁶⁶ The Statute provides the Pre-Trial Chamber with a number of specific steps it can take in this regard, 'as may be necessary to ensure the efficiency and integrity of the proceedings and in particular to protect the rights of the defence'. A non-exhaustive list of possible actions that can be taken is included in Article 56 (2) of the ICC Statute.²⁶⁷ This includes the ordering of the appointment of an *ad hoc* counsel to represent the general interests of the Defence for the purpose of certain investigative acts.²⁶⁸ However, the practice of the Court to date reveals that the Pre-Trial Chamber has not adopted an active role in the investigative stage.²⁶⁹

Pursuant to Article 57 (3) (c) of the ICC Statute, the Pre-Trial Chamber may '[w]here 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'. This open-ended provision could be interpreted as providing for broad and general powers for the Pre-Trial Chamber during the pre-trial phase and, on one interpretation, provide for a more interventionist bench.²⁷⁰ However, a contextual reading clarifies that this provision is an exception to the general duties and powers with respect to investigations conferred on the Prosecutor under Article 54. It must be read together with other provisions such as Article 68 ICC Statute on the protection and privacy of victims and witnesses and Article 72 on the protection of national security information. Consequently, its significance lies in clarifying certain competences of the Pre-Trial Chamber at the pre-trial stage.²⁷¹ To exercise its functions under this provision, the Pre-Trial Chamber will depend on information it receives from the parties. In particular, Regulation 48 stipulates that the Pre-Trial Chamber may request the Prosecutor

²⁶⁶ Article 56 (3) ICC Statute.

²⁶⁷ Article 56 (2) ICC Statute. Consider in particular Article 56 (2) (f) ICC Statute: 'Taking such other action as may be necessary to collect or preserve evidence'; ICC, Decision on the Prosecutor's Request for Measures under Article 56, *Situation in the Democratic Republic of Congo*, Case No. ICC-01/04-21, PTC I, 26 April 2005, p. 3.

²⁶⁸ *Ibid.*, p. 3.

²⁶⁹ Confirming, see J. JACKSON, Finding the Best Epistemic Fit for International Criminal Tribunals, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 36 (noting that much of the time of the Pre-Trial Chamber has been spent on disclosure issues, rather than taking investigative steps).

²⁷⁰ M. MIRAGLIA, The First Decision of the ICC Pre-Trial Chamber, in «Journal of International Criminal Justice», Vol. 4, 2006, p. 191.

²⁷¹ F. GUARIGLIA, K. HARRIS and G. HOCHMAYR, Article 57: Functions and Powers of the Pre-Trial Chamber, in O. TRIFFTERER, Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, München, C.H. Beck oHG, 2008, p. 1126.

to provide specific or additional documents in its possession, or summaries thereof, in order to exercise its function under, *inter alia*, Article 57 (3) (c).

Article 57 (3) (c) ICC Statute was relied upon by Pre-Trial Chamber I during the early life of the Court to organise a status conference with the Prosecution on the progress of the investigation in the DRC.²⁷² However, status conferences are only provided for under the Rules in two instances: before the confirmation hearing to control the disclosure between parties and set the date for the hearing, and before the trial to set the date of the trial and to facilitate its fair and expeditious conduct.²⁷³ One commentator argues that by organising a status conference at this early moment during investigations, the Pre-Trial Chamber “shifted the equilibrium between legal traditions reached in Rome, arguably getting closer to being an Investigating Judge than provided in the Statute and the ICC RPE.”²⁷⁴ She argues that the decision was made in an attempt to speed up investigations and to ostensibly safeguard the rights of ‘prospective suspects’ to whom delay would be prejudicial.²⁷⁵ The Pre-Trial Chamber also exercised a more assertive role by requesting reports from the Prosecutor on its progress within the situation.²⁷⁶

On the one hand, it may be argued that the interpretation by Pre-Trial Chamber I of Article 57 (3) (c) of the ICC Statute in this manner overextends the powers of the bench. The Pre-Trial Chamber’s primary function is to serve as a controlling organ, not an investigating body.²⁷⁷ Alternatively, the interpretation of the Pre-Trial Chamber might also be viewed as part of its

²⁷² ICC, Decision to Convene a Status Conference, *Situation in the Democratic Republic of Congo*, Case No. ICC-01/04-9, PTC I, 17 February 2005, p. 2.

²⁷³ Rule 121 and Rule 132 ICC RPE respectively.

²⁷⁴ M. MIRAGLIA, The First Decision of the ICC Pre-Trial Chamber, in «Journal of International Criminal Justice», Vol. 4, 2006, pp. 192 - 193.

²⁷⁵ *Ibid.*, p. 193; see further D. SCHEFFER, A Review of the Experience of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence, in «Leiden Journal of International Law», Vol. 21, 2008, p. 158, who remarks that: “Despite the logic that might underpin such an evaluation, it remains a huge leap for PTC I to intervene in the Prosecutor’s discretionary power as the investigator of a situation and determine, from the Judge’s relatively detached vantage point, that the investigation should be intensified or accelerated or broadened.”

²⁷⁶ ICC, Decision Requesting Information of the Preliminary Examination of the Situation in the Central African Republic, *Situation in the Central African Republic*, Case No. ICC-01/05-6, PTC III, 30 November 2006, p. 5. The PTC based its decision on Regulation 46 (2) of the Court Regulations.

²⁷⁷ D. SCHEFFER, A Review of the Experience of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence, in «Leiden Journal of International Law», Vol. 21, 2008, p. 158. See further ICC, Judge Fernández de Gurmendi’s Separate and Partially Dissenting Opinion in the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, *Situation in Côte d’Ivoire*, Case No. ICC-02/11-15 TC, ICC, 3 October 2011, par. 19–20 (“the Pre-trial Chamber is not an investigative chamber. The Pre-trial Chamber has no investigative powers of its own, nor is it responsible for directing the investigation of the Prosecutor”).

supervisory functions and for ensuring that the rights and interests of the Defence are respected during the investigation.²⁷⁸ This role of the Pre-Trial Chamber in ensuring the rights and interests of the Defence may not be underestimated. The ICC Appeals Chamber confirmed that “the Pre-Trial Chamber has the primary responsibility of ensuring the protection of the rights of the suspects during the investigation stage of proceedings.”²⁷⁹

The Pre-Trial Chamber may further intervene in the investigation to issue such orders and warrants requested by the Prosecutor for the purpose of the investigation or such orders or requests for state cooperation requested by the Defence.²⁸⁰ In addition, the Pre-Trial Chamber may intervene through the issuance of a warrant of arrest or of a summons to appear,²⁸¹ in case of challenges to the jurisdiction or the admissibility of a case, prior to the confirmation hearing,²⁸² or through the supervision over the deprivation of liberty.²⁸³

From the above, it appears that notwithstanding the extension of judicial control over the investigation, the Pre-Trial Chamber is not expected to exercise any functions akin to those of an investigative judge.²⁸⁴ Normally the Judges are not involved in the collection of evidence. There is no guaranteed intervention. Some exceptions were noted, including the powers of the Pre-Trial Chamber in relation to ‘unique investigative opportunities’. However, these powers are not comparable to the powers of an investigating judge since it is still the Prosecutor who is leading the investigation. It is not the function of the Pre-Trial Chamber to investigate crimes. The intervention aims at ensuring equality of arms and the rights of the Defence.²⁸⁵ The *functions* of judicial intervention at this stage are mainly to (1) safeguard the rights and

²⁷⁸ D. SCHEFFER, A Review of the Experience of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence, in «Leiden Journal of International Law», Vol. 21, 2008, p. 158. SCHEFFER remarks that the line between prudent oversight and activist interventionism has yet to be fully drawn “but that the Pre-Trial Chamber started drawing it in its decision of 17 February 2005.”

²⁷⁹ See ICC, Judgment on the Appeal of Mr. Katanga against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-2259 (OA 10), A. Ch., 12 July 2010, par. 40.

²⁸⁰ Art. 57 (3) (a) and (b) ICC Statute.

²⁸¹ Article 58 ICC Statute.

²⁸² Article 19 (6) ICC Statute.

²⁸³ See *infra*, Chapters 7 and 8.

²⁸⁴ See e.g. S. DE SMET, 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*, Leiden, Koninklijke Brill, 2009, p. 422.

²⁸⁵ E.g. F. GUARIGLIA and G. HOCHMAYR, Article 56: Role of the Pre-Trial Chamber in Relation to a Unique Investigative Opportunity, in O. TRIFFTERER, *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, München, C.H. Beck, 2008, pp. 1108-1109.

interests of the Defence, (2) to guarantee the rights of the suspect or accused and (3) to assist the parties in the preparation of their cases, for example through the issuance of orders and warrants or the ordering of specific investigations in ‘failed state’ scenarios.

I.3.3. The Extraordinary Chambers in the Courts of Cambodia

Following the preliminary investigation, the sending of the introductory submission by the Co-Prosecutors to the Co-Investigating Judges triggers the start of the judicial investigation. The ECCC agreement, ECCC Law and the ECCC IR do not define the ‘investigation’. It was previously noted that the threshold for sending the introductory submission and the commencement of the investigation proper is ‘reason to believe that crimes within the jurisdiction of the ECCC have been committed’.²⁸⁶ A judicial investigation is compulsory for all crimes that fall within the jurisdiction of the Extraordinary Chambers.²⁸⁷ The scope of the judicial investigation is limited to the facts (and the persons) named in the introductory submission by the Co-Prosecutors.²⁸⁸ The Co-Investigating Judges cannot themselves extend the scope (*‘saisine’*) of their investigation. When they discover new facts, they are to inform the Co-Prosecutors and can only investigate these facts when the Co-Prosecutors decide to file a supplementary submission.²⁸⁹ At any moment during the investigation, the Co-Investigating Judges can charge (*‘mettre en examen’*) suspects named in the introductory submission or any other person against whom they have ‘clear and consistent evidence indicating that such person may be criminally responsible for the commission of a crime mentioned in the introductory or supplementary submission(s)’.²⁹⁰ The Co-Investigating Judges conduct the investigation in an impartial manner and can undertake all investigative actions ‘conducive to ascertain the truth’.

Unlike at the ICC, the *ad hoc* Tribunals and the Special Court, a strict separation between the investigation and prosecution phase is provided for. This is in line with civil law criminal justice systems. Hence, there is a clear *end point* for the investigation phase. When the Co-Investigating Judges consider their work finished, they notify the parties who can request

²⁸⁶ Rule 53 (1) ECCC IR.

²⁸⁷ Rule 55 (1) ECCC IR.

²⁸⁸ Rule 55 (2) and (4) ECCC IR.

²⁸⁹ Rule 55 (3) ECCC IR.

²⁹⁰ Rule 55 (4) ECCC IR.

further investigative actions.²⁹¹ Consequently, the case file is sent back to the Co-Prosecutors. If the Co-Prosecutors decide that the investigation is concluded, they send a final submission to the Co-Investigating Judges to issue a closing order either indicting the person and sending him or her to trial or dismissing the case.²⁹² Re-opening the judicial investigation is possible when new evidence is discovered after a dismissal order has been issued.²⁹³ It is for the Co-Prosecutors to decide to re-open the judicial investigation. Where a closing order has been issued sending the person(s) to trial, additional investigations may only be ordered by the Trial Chamber.²⁹⁴ Under the same conditions as the Co-Investigating Judges, the Trial Chamber may conduct on-site visits, interview witnesses, conduct searches, seize any evidence and order expert opinions.²⁹⁵ However, it is clear that the procedural framework of the ECCC provides for a system whereby the investigation is expected to be completed before the start of the trial phase. To the extent that such set-up proofs are workable, it may offer valuable counter-arguments against the assumptions underlying the procedural frameworks of the other international criminal tribunals that on-going investigations until the end of proceedings are unavoidable, considering the scope and nature of the crimes within the jurisdiction of these tribunals.

The inquisitorial style of investigations also impacts on the investigative opportunities of other actors. No fully-fledged defence investigation is provided for. In principle, the charged person is not expected to conduct its own investigation. According to the Co-Investigating Judges:

²⁹¹ Rule 66 (1) ECCC IR. The parties have 15 days to request further investigative actions (such time limitation seemingly derives from Article 246 of the Cambodian Code of Criminal Procedure). However, in Case 002, the Co-Investigating Judges recognised the validity of requests that were filed late, as long as they were filed within 30 days after the notification of the parties. See ECCC, Order on Request for Adoption of Certain Procedural Measures, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 25 November 2009, par. 16. More generally, it may be doubted whether the 15 day period is reasonable, especially where no time limitation is provided for the Co-Investigating Judges to respond to requests for investigative actions, filed by the parties pursuant to Rule 55 (10) ECCC IR (it follows from Rule 66 (2) ECCC IR that where the Co-Investigating Judges decide to reject such a request for further investigative action, such order ‘shall also reject any remaining requests, filed earlier in the investigation, which had not yet been ruled upon by the Co-Investigating Judges’). Further, it may be doubted whether a 15 day period is adequate in light of the magnitude of the investigations conducted before the ECCC. Consider the similar argumentation by the Defence of Nuon Chea: ECCC, Request for Adoption of Certain Procedural Measures, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ, Defence, 5 November 2009, par. 45.

²⁹² Rule 66 (5) and 67 (1) ECCC IR.

²⁹³ Rule 70 ECCC IR. In this regard, consider also Articles 251 and 265 of the Cambodian Criminal Code.

²⁹⁴ Rule 93 ECCC IR.

²⁹⁵ These investigative acts may be delegated to the judicial police upon the issuance of a rogatory letter, see Rule 93 (3) ECCC IR.

“[b]efore this Court, the power to conduct judicial investigations is assigned solely to the two independent Co-Investigating Judges and not to the parties. There is no provision which authorizes the parties to accomplish investigative action in place of the Co-Investigating Judges, as may be the case in other procedural systems.”²⁹⁶

The Defence should avail itself of the ‘Rule 55 (10) ECCC IR (and Rule 58 (6)) mechanism’. It allows the Defence to request the Co-Investigating Judges to take an order or to undertake a certain investigative action. In having recourse to this mechanism, the Defence should (1) identify the specific action requested (‘specificity-requirement’), and (2) explain why the action is necessary for the investigation in ascertaining the truth (‘*prima facie* relevance-requirement’).²⁹⁷ These two requirements are cumulative. The Co-Investigating Judges enjoy broad discretion in the way they conduct their investigation nevertheless. Through the Rule 55 (10) vehicle, “the parties can suggest, but not oblige, the Co-Investigating Judges to undertake investigative actions.”²⁹⁸ Consequently, the Co-Investigating Judges will independently assess whether the requested investigative action is useful.²⁹⁹ Parties may conduct ‘preliminary inquiries as are strictly necessary for the effective exercise of their right to request investigative action’.³⁰⁰ The exact boundaries of what is to be considered ‘preliminary inquiries’, rather than an investigation, are to be determined in jurisprudence. For example, the Pre-Trial Chamber has clarified that the enquiry of non-public sources may amount to an investigation.³⁰¹

²⁹⁶ See the inter-office memorandum issued by the Co-Investigating Judges on 10 January 2008 as referred to in ECCC, Order Issuing Warning Under Rule 38, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 25 February 2010, par. 8; ECCC, Decision on Co-Prosecutor’s Appeal against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Proving the Charged Person’s Knowledge of the Crimes, *NUON Chea et al.*, Case No. 002/1909-2007-ECCC-OCIJ, PTC, 15 June 2010, par. 11.

²⁹⁷ ECCC, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC24), PTC, 18 November 2009, par. 44; ECCC, Decision on the Appeal against the ‘Order on the Request to Place on the Case [File] the Documents Relating to Mr. Khieu Samphan’s Real Activity’, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 63), PTC, 7 July 2010, par. 21 – 22.

²⁹⁸ ECCC, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC24), PTC, 18 November 2009, par. 22.

²⁹⁹ *Ibid.*, par. 22. The broad discretion of the Co-Investigating Judges is coupled with an obligation under Rule 55 (10) ECCC IR to set out the reasons, where they issue a rejection order.

³⁰⁰ ECCC, Order Issuing Warning Under Rule 38, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 25 February 2010, par. 8.

³⁰¹ ECCC, Decision on Co-Prosecutor’s Appeal against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Proving the Charged Person’s Knowledge of the Crimes, *NUON Chea et al.*, Case No. 002/1909-2007-ECCC-OCIJ, PTC, 15 June 2010, par. 12 (*in casu*, the Pre-Trial Chamber found that the action by the Co-Prosecutors “amounted to the request for admission of

Orders by the Co-Investigating Judges denying a Rule 55 (10) request can be appealed. The Cambodian Code of Criminal Procedure provides the ‘Investigating Chamber’ with broad powers on appeal, including the power to ‘order additional investigative action which it deems useful’.³⁰² In contrast, the ECCC Pre-Trial Chamber limited the scope of the appeal where the Internal Rules explicitly refer only to appeals lodged against orders by the Co-Investigating Judges denying a request, and thereby excluded the power to order additional investigative actions.³⁰³ According to the Pre-Trial Chamber, “[t]his departure is justified by the unique nature of the cases before the ECCC, which involve large scale investigations and extremely voluminous cases, and where the Pre-Trial Chamber has not been established and is not equipped to conduct investigations.”³⁰⁴ Therefore, the exercise of discretion will only be overturned where the decision rejecting the request for investigative action was: (1) based on an incorrect interpretation of the governing law, (2) based on a patently incorrect conclusion of fact, or was (3) so unfair or unreasonable as to constitute an abuse of the Co-Investigating Judges’ discretion.³⁰⁵

The procedural design outlined above may have several benefits over party-led investigations in relation to the investigation of international crimes. It may offer a solution to the persistent difficulties in collecting evidence and the cooperation challenges experienced by the Defence.³⁰⁶ However, several problems are associated with the possibility for the parties to request investigative actions pursuant to Rule 55 (10) ECCC IR. Firstly, it is problematic that this provision does not include a strict time limitation for the Co-Investigating Judges to

documents which had been the subject of identification as a result of permissible enquiries of public sources and not investigation”).

³⁰² Article 262 of the Cambodian Code of Criminal Procedure.

³⁰³ Rule 55 (10) and Rule 73 *juncto* Rule 74 (3) (b) ECCC IR.

³⁰⁴ ECCC, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC24), PTC, 18 November 2009, par. 24 (Where the decisions on requests for investigative action are discretionary, involving questions of fact, the Pre-Trial Chamber considered that the Co-Investigating Judges “are in the best position to assess the opportunity of conducting a requested investigative action in light of their overall duties and their familiarity with the case files.” The Pre-Trial Chamber added that “it would be inappropriate for the Pre-Trial Chamber to substitute the exercise of its discretion for that of the Co-Investigating Judges when deciding on an appeal against an order refusing a request for investigative action.” What is missing in this reasoning is a clarification why the Internal Rules would set aside this power provided for under the Code of Criminal Procedure. The reference to the fact that “the Appeals Chambers of international tribunals have a very limited scope of review when dealing with appeals against discretionary decisions of a first instance decision” is strictly speaking irrelevant).

³⁰⁵ *Ibid.*, par. 26.

³⁰⁶ J.D. CIORCIARI and A. HEINDEL, *Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal*, June 2013, p. 20 (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2269925, last visited 10 February 2014).

respond to requests for investigative action. The Internal Rules only provide for two cumulative conditions, when the Co-Investigating Judges reject such request. They should issue a rejection order as soon as possible and, in any event, before the end of the judicial investigation. This allows the Co-Investigating Judges to choose not to respond until the end of the judicial investigation.³⁰⁷ However, one member of the Office of the Co-Investigating Judges opined that sometimes the relevance of a request would only become clear at the end of the judicial investigation, after other investigative actions have been undertaken.³⁰⁸ Secondly, the fact that the parties are not always aware of what is happening in the judicial investigation negatively impacts on the parties' ability to request certain investigative actions.³⁰⁹ The magnitude of the case and the 'haphazard' way in which information would be placed on the case file reduce the usefulness of this mechanism.³¹⁰ Thirdly, the limited role of the Defence leads to broadly formulated requests for investigative action by the Defence, which may be difficult to respond to.³¹¹ Finally, defence counsels are sometimes reluctant to cooperate with the Co-Investigating Judges and to request investigative action insofar that this may reveal their strategy.³¹²

Neither the ECCC Agreement nor the ECCC Law expressly envisage the participation of victims in the investigation. However, it follows from Rule 23 (1) ECCC Internal Rules that civil parties, being 'parties' in the proceedings³¹³ have the right to '[p]articipate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by

³⁰⁷ Interview with Co-Investigating Judge Lemonde, ECCC-04, Phnom-Penh, 11 November 2009, p. 8 ("je suis prêt à admettre que ce n'est pas totalement satisfaisant du point de vue des droits de la défense. C'est vrai qu'en droit cambodgien ou en droit français, il y a des délais impératifs. Cela-dit, il faut aussi se mettre un peu à notre place, on est dans une situation qui est sans commune mesure avec celle d'un juge d'instruction français, ou d'un juge d'instruction cambodgien. Notamment, quand on est saisi de ces requêtes un peu ubuesques où on nous fait des demandes qui sont complètement décalées par rapport au droit applicable"); Interview with a member of the OCP, ECCC-11, Phnom-Penh, 9-11 November 2009, p. 16.

³⁰⁸ Interview with a member of the OCIJ, ECCC-03, Phnom-Penh, 16 November 2009, p. 15.

³⁰⁹ Interview with a Legal Officer of the SCSL, SCSL-12, The Hague, 4 February 2010, p. 4 ("how can the parties really ask for things when they did not really know what was happening in the investigation" (the interviewee has previous experience as a legal officer of the ECCC OCIJ)).

³¹⁰ Interview with a member of the OCP, ECCC-14, Phnom-Penh, 13 November 2009, p. 10 ("In theory, you have an independent investigating organ and then you make requests to that investigative organ and, because you have access to the file, as long as your requests are reasonable and conducive to ascertaining the truth, they're acted upon. And that actually is an honorable idea. In practice, in a massive case such as this, you have no idea what's happening. You can make investigative requests which are irrelevant or may already be being dealt with or, for any number of reasons, your requests might become irrelevant or not useful at that stage of the investigation, so there's a difficulty"); Interview with a Legal Officer of the SCSL, SCSL-12, The Hague, 4 February 2010, p. 4.

³¹¹ *Ibid.*, p. 5.

³¹² *Ibid.*, p. 5.

³¹³ See 'Glossary' annexed to the ECCC IR.

supporting the prosecution'.³¹⁴ This role reflects Cambodian criminal procedure.³¹⁵ Unlike at the trial stage, the civil parties participate on an individual basis.³¹⁶ Doubtless, their most important participatory right during the judicial investigation is their right to request the Co-Investigating Judges 'to interview [them], question witnesses, go to a site, order expertise or collect other evidence on his or her behalf' as well as to request to make such orders or undertake such investigative action as they consider useful pursuant to Rule 55 (10).³¹⁷ With regard to 'Article 55 (10)' requests, the observations formulated with regard to defence requests equally apply. Similarly, a reasoned rejection order by the Co-Investigating Judges is appealable as of right. Importantly, a request can only be granted insofar as the subject matter thereof falls within the scope of the judicial investigations, as determined by the introductory and any supplementary submissions.³¹⁸ However, when such a request concerns new facts, the Co-Investigating Judges are obliged to bring these new facts to the attention of the Co-Prosecutors. Like the charged person, civil parties lack the authority to expand the scope of the investigation. The Co-Investigating Judges can only investigate these new facts in case a supplementary submission is made by the Co-Prosecutors with regard to these facts.³¹⁹

The civil parties may also be requested by the Co-Investigating Judges to participate in a confrontation with a charged person.³²⁰ At such occasion, they may put questions to the charged person, with the authorisation of the Co-Investigating Judges. A refusal should be noted in the written record.³²¹ In addition, civil parties may request the Co-Investigating Judges to appoint additional experts to conduct new examinations or to re-examine a matter

³¹⁴ One commentator noted that such definition of the role of the civil parties ('supporting the Prosecution') is overly broad and may result in defendants facing several opponents. See J.P. BAIR, *From the Numbers who died to those who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia*, in «University of Hawaii Law Review», Vol. 31, 2009, p. 526.

³¹⁵ Consider, e.g. Articles 134, 137 – 139 of the Cambodian Code of Criminal Procedure.

³¹⁶ Rule 23 (3) ECCC IR.

³¹⁷ Rule 59 (5) and 55 (10) ECCC IR.

³¹⁸ Rule 55 (2) ECCC IR. Consider ECCC, Decision on Appeal of Co-Lawyers for Civil Parties against Order on Civil Parties' Request for Investigative Actions Concerning all Properties Owned by the Charged Persons, *Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 57), PTC, 4 August 2010, par. 14; ECCC, Decision on Appeal of Co-Lawyers for Civil Parties against Order Rejecting Request to Interview Persons Named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, *Nuon Chea et al.*, Case No. 002/19-09-2009-ECCC-OCIJ (PTC 52), PTC, 21 July 2010, par. 11; ECCC, Decision on Appeals against Co-Investigating Judges' Combined Order D250/3/3 Dated 13 January 2010 and Order D250/3/2 Dated 13 January 2010 on Admissibility of Civil Party Applications, *Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 47 & 48), PTC, 27 April 2010, par. 17.

³¹⁹ Rule 55 (3) ECCC IR; ECCC, Decision on Appeal of Co-Lawyers for Civil Parties against Order on Civil Parties' Request for Investigative Actions Concerning all Properties Owned by the Charged Persons, *Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 57), PTC, 4 August 2010, par. 14.

³²⁰ Rule 58 (4) ECCC IR.

³²¹ Rule 58 (5) ECCC IR.

already the subject of an expert report.³²² Further participatory rights include their right to appeal certain orders by the Co-Investigating Judges in the course of the investigation³²³ and to participate in proceedings relating to pre-trial appeals.³²⁴ Finally, the Pre-Trial Chamber clarified that civil parties hold the right to participate in provisional detention appeals, even when they are not allowed to participate in the hearing before the Co-Investigating Judges.³²⁵

It follows that the civil parties have active participation rights from the investigation onwards.³²⁶ However, such participatory rights are not automatic in nature and based on a request.³²⁷ The Pre-Trial Chamber emphasised that such understanding of the civil parties' role recognises the goal of reconciliation their participation is intended to serve.³²⁸

I.3.4. The Special Tribunal for Lebanon

Similar to the *ad hoc* tribunals, the STL RPE define the 'investigation' as encompassing '[a]ll activities undertaken by the Prosecutor under the Statute and Rules for the collection of information and evidence, whether before or after an indictment is confirmed'.³²⁹ This definition is identical to the definition that was found at the *ad hoc* tribunals. Therefore, the same observations apply here.³³⁰ In a similar vein, defence investigations seem excluded from the scope of this definition. A MoU that was signed between the tribunal's Defence Office and the Lebanese Ministry of Justice defines 'defence investigations' as encompassing "all activities undertaken by the defence teams under the Statute and Rules for the collection of information and evidence in the context of their mission to represent a suspect or accused."³³¹

³²² Rule 31 (10) ECCC IR.

³²³ Rule 74 (4) ECCC IR.

³²⁴ Rule 77 ECCC IR.

³²⁵ ECCC, Decision on Civil Party Participation in Provisional Detention Appeals, *Nuon Chea et al.*, Case No. ECCC-002/19-09-2007-ECCC/OCIJ (PTC 1), PTC, 20 March 2008, par. 36; Rule 63 (1) ECCC IR, see *infra*, Chapter 8.

³²⁶ ECCC, Decision on Civil Party Participation in Provisional Detention Appeals, *Nuon Chea et al.*, Case No. ECCC-002/19-09-2007-ECCC/OCIJ (PTC 1), PTC, 20 March 2008, par. 36.

³²⁷ C. YIM, Memorandum: Scope of Victim Participation before the ICC and the ECCC, Documentation Center of Cambodia, 2011, p. 30.

³²⁸ ECCC, Decision on Civil Party Participation in Provisional Detention Appeals, *Nuon Chea et al.*, Case No. ECCC-002/19-09-2007-ECCC/OCIJ (PTC 1), PTC, 20 March 2008, par. 37.

³²⁹ Rule 2 STL RPE.

³³⁰ See *supra*, Chapter 3, I.3.1.

³³¹ Article 1 (f) of the Memorandum of Understanding Between the Government of the Lebanese Republic and the Defence Office on the Modalities of their Cooperation, 28 July 2010.

It was concluded that the investigation is not preceded by a pre-investigation. Nevertheless, it has to be noted that the STL benefits from evidence which was previously collected by the United Nations International Independent Investigation Commission ('UNIIC') established by the Security Council and from evidence gathered and handed over by the national authorities of Lebanon.³³² Provision is made in the Statute and the RPE for the transition of the results of these investigations to the STL.³³³ To that extent, a request by the Pre-Trial Judge for deferral of the case of the attack against Prime Minister Rafiq Hariri and others shall be made upon application by the Prosecutor, within two months after assumption of office.³³⁴ The results of the investigations and a copy of the relevant court records and other probative material will be provided to the Prosecutor. This application was made on 27 March 2009.³³⁵ Also in relation to crimes connected to this attack, the Lebanese authorities should send the results of the investigation and the relevant court records to the tribunal upon its request. This information should allow the STL Prosecutor to subsequently decide whether these cases fall within the jurisdiction of the Court and to request the transfer of the case.³³⁶ With regard to the admissibility of evidence collected by UNIIC or the Lebanese authorities, Article 19 STL provides that the evidence collected 'shall be received' and that its admissibility will be decided on the basis of international standards on the collection of evidence.³³⁷

³³² The UNIIC was established pursuant to Security Council Resolution 1595, with the mandate "to assist the Lebanese authorities in their investigation of all aspects of this terrorist act, including to help identify its perpetrators, sponsors, organizers and accomplices." See UNSC Res. 1595 (2005), par. 1. According to Article 19 (2) STL Agreement, the Special Tribunal 'shall commence functioning on a date to be determined by the Secretary-General in consultation with the Government, taking into account the progress of the work of the International Independent Investigation Commission.'

³³³ See Article 17 (a) STL Agreement on the 'coordinated transition' of the activities previously conducted by the UNIIC and Article 4 STL Statute (and Rule 17 (A) (ii) STL RPE) on the transfer of the results of investigations conducted by the Lebanese judicial authorities.

³³⁴ Article 4 (2) STL Statute and Rule 17 (A) and (B) STL RPE.

³³⁵ STL, OTP, Application by the Prosecutor to the Pre-Trial Judge under Article 4(2) of the Statute and Rule 17 of the Rules of Procedure and Evidence, 25 March 2009; STL, Order Directing the Lebanese Judicial Authorities Seized with the Case of the Attack against Prime Minister Rafiq Hariri and Others to Defer to the Special Tribunal for Lebanon, Case No. CH/PTJ/2009/01, PTJ, 27 March 2009.

³³⁶ Article 4 (3) STL Statute, Rule 17 (E) and (F) STL RPE.

³³⁷ As far as evidence collected by the UNIIC is concerned, it should be noted that UN Security Resolution 1595 directed the Commission 'to determine the procedures for its investigation, taking into account the Lebanese law and judicial procedures.' See UNSC Res. 1595 (2005), par. 6. Consider also: Fourth report of the International Independent Investigation Commission established pursuant to Security Council Resolutions 1595 (2005), 1636 (2005) and 1644 (2005), U.N. Doc. S/2006/375, 10 June 2006, par. 7 ("During the reporting period, the Commission has also determined its own set of internal procedures, as provided in paragraph 6 of Security Council resolution 1595 (2005). It facilitates further standardization of the investigative work of the Commission and ensures due respect for applicable legal and professional standards. The procedure has, for example, standardized the conduct of interviews of witnesses and suspects, taking into account Lebanese law and relevant international standards, including international criminal procedure, so as to prepare for future legal proceedings before a tribunal, possibly of an international character").

With regard to the *end point* of the investigation, it appears that, in line with other international criminal tribunals under review, the investigation formally ends with the confirmation of the indictment.³³⁸ Again, the dividing line between the investigation phase and the prosecution phase is not absolute and several provisions indicate that investigations may continue after the start of the prosecution phase. Examples of this possibility of continued investigations include the possibility to amend the indictment after confirmation,³³⁹ under certain conditions, or the possibility for parties to introduce additional evidence before the Appeals Chamber.³⁴⁰

The twofold responsibility to investigate and prosecute persons responsible for crimes falling within the jurisdiction of the STL rests with the Prosecutor.³⁴¹ The Prosecutor should act independently in the conduct of investigations as a separate organ of the tribunal and not seek or receive instructions from any government or other source.³⁴² The powers of the Prosecution in the conduct of the investigation include the power to question suspects, victims and witnesses, to collect evidence, to conduct on-site investigations and to undertake ‘other measures as may appear necessary for the completing of the investigation and the conduct of the prosecution at trial’ (including measures for the protection of potential witnesses and informants).³⁴³ The Prosecution may be assisted by the Lebanese authorities.³⁴⁴ Further, the Prosecutor may seek assistance of states and international bodies and request such orders as are necessary from the Pre-Trial Judge or Chamber.³⁴⁵

Whereas the Defence is expected to conduct its own investigations, its respective investigative powers, duties and responsibilities are largely left undefined by the STL Agreement, the STL Statute and the RPE.³⁴⁶ The Defence may benefit from the assistance of the Defence Office in the collection of evidence.³⁴⁷ Notably, a MoU has been concluded between the Defence Office and the Lebanese authorities which sets forth that defence teams may freely carry out

³³⁸ Article 18 STL Statute and Rule 68 STL RPE.

³³⁹ Rule 71 STL RPE.

³⁴⁰ Rule 190 STL RPE.

³⁴¹ Article 11 (1) STL Statute.

³⁴² Article 11 (2) STL Statute.

³⁴³ Article 11 (5) STL Statute and Rule 61(i) and (ii) STL RPE.

³⁴⁴ Article 11 (5) STL Statute.

³⁴⁵ Rule 61 (iii) and (iv) STL RPE.

³⁴⁶ For example, ‘Part 4’ on the investigation and the rights of the suspects and accused persons, is drawn with the Prosecution investigations in mind. The suspects and accused are only mentioned insofar as they enjoy certain rights.

³⁴⁷ Article 13 (2) STL Statute.

investigations on the Lebanese territory as long as these do not include the use of coercive measures.³⁴⁸ This includes free access to sites, persons and documents necessary for the conduct of their investigations and the possibility directly to take the statements of witnesses and experts who have informed it of their willingness to testify.³⁴⁹ Further, the Defence may request the Pre-Trial Judge to issue such orders, summonses, subpoenas, warrants and transfer orders or requests as may be necessary for the purposes of the investigation.³⁵⁰ It follows from the MoU that such order should in particular be sought whenever the Defence needs assistance with regard to coercive measures, including a summons to appear or the execution of a search and seizure.³⁵¹ The Head of the Defence Office may seek cooperation from any state, entity or person to assist the Defence.³⁵² Lastly, the Head of the Defence Office may, upon request by the Defence, request the assistance of the Lebanese authorities to question witnesses, search premises, seize documents and other potential evidence, or undertake any other investigative measure in Lebanon, as long as these measures are necessary for the purpose of the investigation and as long as these requests are not frivolous or vexatious.³⁵³ These measures may be conducted by the Defence itself, by the Lebanese authorities or by a combination thereof.

The *Pre-Trial Judge* possesses exceptional yet important fact-gathering powers. These include powers in relation to ‘unique opportunities to gather evidence’ following the confirmation of the indictment as well as the power to collect evidence when a party or a victim participating in the proceedings, on a balance of probabilities, is not in a position to collect that evidence. The Judge may gather such evidence *proprio motu* when it is imperative to ensure the interests of justice.³⁵⁴ Further, he or she holds the power to question anonymous witnesses.³⁵⁵

³⁴⁸ Article 3 (1) of the Memorandum of Understanding Between the Government of the Lebanese Republic and the Defence Office on the Modalities of their Cooperation, 28 July 2010.

³⁴⁹ Article 3 (1) of the Memorandum of Understanding Between the Government of the Lebanese Republic and the Defence Office on the Modalities of their Cooperation, 28 July 2010.

³⁵⁰ Rule 77 (A) STL RPE and Rule 78 (B) STL RPE (summonses to appear).

³⁵¹ Article 5 (1) of the Memorandum of Understanding Between the Government of the Lebanese Republic and the Defence Office on the Modalities of their Cooperation, 28 July 2010.

³⁵² Rule 15 STL RPE.

³⁵³ Article 16 (C) STL RPE; Article 4 of the Memorandum of Understanding Between the Government of the Lebanese Republic and the Defence Office on the Modalities of their Cooperation, 28 July 2010.

³⁵⁴ Rule 89 (I); Rule 92 (A) and Rule 92 (C) STL RPE respectively. The decision of the Pre-Trial Judge to *proprio motu* gather evidence is appealable as of right.

³⁵⁵ Rule 93 STL RPE. See the analysis of this investigative function, *infra*, Chapter 5.

Unlike other tribunals that make provision for victims to participate in the investigation, the STL Statute and RPE clearly rule out any active role for the *victims* during the initial phase of proceedings.³⁵⁶ They can only participate *after* the review of the indictment, when most of the Prosecutor's investigations have been completed. Prior to the confirmation of the indictment, the victim may transmit to the Prosecutor any information he or she considers necessary to determine the truth. In turn, following the confirmation of the indictment, victims may conduct their own investigations or participate in investigative acts.³⁵⁷ Overall, victims do not participate in the proceedings as '*parties civiles*'.³⁵⁸ The absence of any participatory rights at the investigation stage of proceedings forms an important deviation from Lebanese procedure, where victims can already participate before the confirmation of the indictment.³⁵⁹ While provisions on the taking of depositions, the questioning of anonymous witnesses and the exceptional gathering of evidence by the Pre-Trial Judge refer to the participation of victims, these participatory rights should be understood as to only apply after the confirmation of the indictment.³⁶⁰

I.3.5. The Special Panels for Serious Crimes

In line with other international and hybrid criminal courts and tribunals, the TRCP defined the 'investigation' as encompassing 'all the activities conducted by the Public Prosecutor under the present regulation for the collection of information and evidence in a case whether before or after the indictment has been presented'.³⁶¹ With regard to the *starting point* of investigations, it was previously shown that no formal pre-investigation phase immediately preceded the investigation proper. Investigations were initiated by the Public Prosecutor

³⁵⁶ Rule 86 (A) STL RPE ('If the Pre-Trial Judge has confirmed the indictment under Rule 68, a person claiming to be a victim of a crime within the Tribunal's jurisdiction may request the Pre-Trial Judge to be granted the status of victim participating in the proceedings') *juncto* Article 17 STL Statute.

³⁵⁷ This follows from the right of the victims to call witnesses and tender evidence at trial (Rule 87 (B) STL RPE).

³⁵⁸ U.N., Report of the Secretary-General on the Establishment of the Special Tribunal for Lebanon, U.N. Doc. S/2006/863, 15 November 2006, par. 31; STL Rules of Procedure and Evidence (as of 25 November 2010): Explanatory Memorandum by the Tribunal's President, par. 15.

³⁵⁹ For example, under Lebanese law, the civil parties can set in motion the criminal proceedings. See Article 59 of the Lebanese Code of Criminal Procedure.

³⁶⁰ See Rules 92, 93 or 123 STL RPE respectively. Concurring, see J. DE HEMPTINNE, Challenges Raised by Victim Participation in the Proceedings of the Special Court for Lebanon, in «Journal of International Criminal Justice», Vol. 8, 2010, 172 (fn. 35).

³⁶¹ Section 1 (n) TRCP.

following the reporting of the crime.³⁶² The TRCP did not include a preference regarding the *notitia criminis*. Any person could report the commission of a crime to the Public Prosecutor.³⁶³ Additionally, a system of mandatory reporting of crimes for public officers was provided for.³⁶⁴

Whereas it followed from the definition that investigations could be on-going after an indictment was presented, it may be argued with regard to the *end point* of the investigation, that it should normally be completed at that stage. For example, this followed from the wording of Section 24: '[u]pon completion of the investigation, if the result so warrants, the Public Prosecutor shall present a written indictment of the suspect to the competent District Court'. At the time the indictment was presented to the Court, the Prosecutor was required to make copies of all documentary evidence, all statements of witnesses whose testimony the Prosecutor intended to present at trial as well as all exonerating evidence, available to the Defence.³⁶⁵

Both the competence to conduct criminal investigations and the competence to prosecute were vested in the Public Prosecutor.³⁶⁶ The Public Prosecutor held the exclusive competence to conduct criminal investigations.³⁶⁷ In order to fulfil this duty, the Public Prosecutor was empowered to: (a) collect and examine evidence, (b) request the presence of and question persons being investigated, victims and witnesses, and (c) seek cooperation of any authority in accordance with its respective competence.³⁶⁸ The Public Prosecutor could rely on the assistance of the police and 'any other competent body'.³⁶⁹ He or she had to conduct investigations independently, 'without improper influence, direct and indirect, from any source, whether within or outside the civil administration of East Timor'.³⁷⁰ At all times, he or she had to fully respect the rights of persons.³⁷¹

³⁶² Section 13.3 TRCP.

³⁶³ Section 13.1 TRCP.

³⁶⁴ Section 13.1 TRCP.

³⁶⁵ Section 24.4 TRCP.

³⁶⁶ Section 3.1 UNTAET Regulation 2000/16.

³⁶⁷ Section 7.1 TRCP.

³⁶⁸ Section 7.4 TRCP. According to Section 7.3 TRCP, the Public Prosecutor 'shall have all appropriate means to ensure the effective investigation and prosecution of crimes'.

³⁶⁹ Section 7.5 TRCP.

³⁷⁰ Section 4.2 UNTAET Regulation 2000/16.

³⁷¹ Section 7.6 TRCP.

Provided that the TRCP vested the exclusive responsibility to conduct investigations in the Public Prosecutor, and that he or she had a duty to investigate incriminating and exonerating circumstances equally, there seemed to be no room for a separate defence investigation.³⁷² Similar to the Defence at the Extraordinary Chambers, an important tool for the Defence was the possibility to request the Public Prosecutor or the Investigating Judge ‘to order or conduct specific investigations in order to establish his or her innocence’.³⁷³ Although this rarely took place in practice the Defence was not precluded from conducting its own investigations.³⁷⁴ No single defence witness was called in the first fourteen cases.³⁷⁵ In this regard, the absence of qualified defence counsel in East-Timor may be noted.³⁷⁶ Additionally, the Defence greatly suffered from institutional shortcomings, preventing in-depth defence investigations.³⁷⁷ Notably, a separate Defence Lawyers Unit would only be created in September 2002.³⁷⁸

Victims also held the right to request the Public Prosecutor to conduct certain investigative acts or to take specific measures to establish the guilt of the suspect.³⁷⁹ The Public Prosecutor was bound to ‘respect the interests and personal circumstances of victims and witnesses’ in

³⁷² For a confirming view, see e.g. JSMP, Digest of the Jurisprudence of the Special Panels for Serious Crimes, April 2007, p. 36: “in the practice of the SPSC the defence had no opportunity or resources to conduct independent professional investigations.”

³⁷³ Section 6.3 (e) TRCP.

³⁷⁴ K. KERR, Fair Trials at International Tribunals, Examining the Parameters of the International Right to Counsel, in «Georgetown Journal of International Law», Vol. 36, 2005, p. 1250.

³⁷⁵ D. COHEN, Indifference and Accountability: The United Nations and the Politics of Justice in East-Timor, in «East-West Center Special Reports», Nr. 9, 2006, p. 16.

³⁷⁶ See e.g. E. MACCARRICK, The Right to a Fair Trial in International Criminal Law (Rules of Procedure and Evidence in Transition from Nuremberg to East Timor), Conference Paper, p. 45 (<http://www.isrci.org/Papers/2005/MacCarrick.pdf>, last visited 17 January 2011); D. COHEN, Justice on the Cheap Revisited: The Failure of the Serious Crimes Trials in East Timor, in «East-West Center Issues», No. 80, May 2006, pp. 3, 5; A. SIMMONS et al., Mixed Tribunals, in M. BOHLANDER (ed.), Defense in International Criminal Proceedings: Cases, Materials and Commentary, Ardsley, Transnational Publishers, 2006, p. 704; S. LINTON, Cambodia, East Timor and Sierra Leone: Experiments in International Criminal Justice, in «Criminal Law Forum», Vol. 12, 2001, p. 203; S. DE BERTODANO, East Timor: Trials and Tribulations, in C.P.R. ROMANO, A. NOLLKAEMPER and J. KLEFFNER (eds.), Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia, Oxford, Oxford University Press, 2004, p. 86.

³⁷⁷ See e.g. C. REIGER and M. WIERDA, The Serious Crimes Process in Timor-Leste: In Retrospect, International Center for Transnational Justice, 2006, pp. 26 - 28 (<http://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf>, last visited 24 January 2014). At the beginning, a small Public Defenders Office was created, consisting of nine inexperienced Timorese public defenders. A separate Defence Lawyers Unit would only be created in September 2002, solely consisting of international lawyers. Consider also D. COHEN, Indifference and Accountability: The United Nations and the Politics of Justice in East-Timor, in «East-West Center Special Reports», Nr. 9, 2006, p. 38 (“In this context, the SCU represented an investigative “Goliath” in comparison with the paltry resources of the Defence Lawyers, which in April 2004, encompassed two UNV investigators and no other investigative support staff. It also lacked the kind of resources enjoyed by the Prosecution in regard to expert consultants on issues such as forensics, psychiatry, toxicology... and is thus limited in its ability to advance special defences or rebut scientific evidence adduced by the Prosecution”).

³⁷⁸ C. REIGER and M. WIERDA, The Serious Crimes Process in Timor-Leste: In Retrospect, International Center for Transnational Justice, 2006, p. 27.

³⁷⁹ Section 12.6 TRCP.

the conduct of the investigations.³⁸⁰ When the Public Prosecutor decided to dismiss a case, the alleged victim had to be informed thereof and held the right to request a copy of the case and to petition the General Prosecutor.³⁸¹ In turn, the General Prosecutor could either confirm the dismissal of the case or order the continuation of the investigation by another Prosecutor.³⁸²

Lastly, with regard to the *judicial role* during investigations, it should be mentioned that some investigative acts required a warrant or order by an Investigating Judge.³⁸³ Problematic was Section 10 of the TRCP, from which it followed that participation as an Investigating Judge of the SPSC did not disqualify the Judge from participating in the same matter as a trial Judge. This seems unacceptable since the Investigating Judge held some important powers during the investigation and decided on the deprivation of liberty. The extent and nature of these powers and responsibilities may imply that the Judge's further involvement in the case raises 'legitimate doubt' as to his or her impartiality. Pursuant to the case law of the ECtHR, an investigating judge will normally be prevented from sitting on the bench of the same case.³⁸⁴

§ Conclusion

From the above, it appears that at most tribunals under review, the Prosecutor is in charge of the investigation. One exception are the ECCC, where the Co-Investigating Judges jointly control the judicial investigation. Those tribunals where the Prosecutor leads the investigation usually (with the exception of the ICC, where no definition was found in the statutory documents) define the investigation as comprising all investigative activities undertaken by *the Prosecutor* for the collection of information or evidence. This is surprising. Taking into

³⁸⁰ Section 7.3 TRCP.

³⁸¹ Section 19A.8 and 25.1 TRCP.

³⁸² Section 25.2 TRCP.

³⁸³ See *infra*, Chapter 6. Overall, the role of the Investigating Judge was not clearly defined in the TRCP. Such was particularly problematic where no figure of an investigating judge was provided for under the Indonesian criminal justice system. Consider C. REIGER and M. WIERDA, *The Serious Crimes Process in Timor-Leste: In Retrospect*, International Center for Transnational Justice 2006, p. 25; S. LINTON, *Rising from the Ashes: The creation of a viable Criminal Justice System in East Timor*, in «Melbourne University Law Review», Vol. 25, 2001, pp. 139 – 140.

³⁸⁴ On several occasions, the Court concluded to a violation of the Article 6 (1) ECHR (objective impartiality) where an investigative judge had previously been involved as an investigating judge in the same case. See e.g. ECtHR, *De Cubber v. Belgium*, Application No. 9186/80, Series A, No. 86, 26 October 1986; ECtHR, *Hauschildt v. Denmark*, Application No. 10486/83, Series A, No. 154, 24 May 1989. However, what matters to the Court is the extent and nature of the pre-trial measures undertaken by the judge. For example, the Court confirmed that the judge can be involved at the pre-trial stage, and can undertake certain pre-trial measures, where those are of a preparatory nature and designed to complete the case file before the hearing. See ECtHR, *Fey v. Austria*, Application No. 14396/88, Series A, No. 255-A, Judgment of 24 February 1993.

consideration the more adversarial style of proceedings of most of these courts and tribunals, both parties are required to gather their own evidence.³⁸⁵

The procedural frameworks of the tribunals under review equally fail to provide for the necessary investigative powers, this matter being unregulated. This further disregards the obligation for the Defence to collect its own evidence and information. In the archetypical adversarial ‘dispute model’, a partisan Prosecutor, who investigates a prosecution case, should be confronted by a Defence having procedurally equal investigative tools in order to enable it to autonomously investigate its case.³⁸⁶ In the absence of such explicit regulation, the right for the Defence to conduct its own investigations derives from several other principles, including the equality of arms principle and the general right of the accused to have adequate time and facilities for the preparation of his or her defence. At least to a certain extent, imbalances between the Prosecutor and the Defence in the collection of evidence and information are restored by the possibility for the Defence to request a Judge or Chamber for assistance.

Only at the ECCC, defence investigations going beyond what is understood to be ‘preliminary inquiries’ were found to be prohibited. Such prohibition should be understood in light of the inquisitorial style of investigations. Traditionally, inquisitorial systems limit the role of the Defence during investigations since it is held that optimal investigative strategies require an independent viewpoint, instead of a narrow partisan perspective.³⁸⁷ This is based on the belief

³⁸⁵ J. JACKSON, Finding the Best Epistemic Fit for International Criminal Tribunals, in «Journal of International Criminal Justice», Vol. 7, 2009, pp. 24 – 25; M. LANGER, The Rise of Managerial Judging in International Criminal Law, in «American Journal of Comparative Law», Vol. 53, 2005, p. 859 (noting with regard to the *ad hoc* tribunals that the “the Rules generally made the parties the most active actors in the criminal proceedings, in charge of developing their own pre-trial investigations and cases at trial”).

³⁸⁶ As far as defence investigations are concerned, it should be noted that the ‘expectation’ that the defence conducts a separate investigation, does not mean that such corresponds to the actual practice. Consider in that regard: S. FIELD and A. WEST, Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pre-Trial Criminal Law Process, in «Criminal Law Forum», Vol. 14, 2003, pp. 261 – 262 (referring to research conducted in England showing a failure by defence counsel “to play the extensive, autonomous investigative role the adversarial system demanded of them”). See M. MCCONVILLE, J. HODGSON, L. BRIDGES and A. PAVLOVIC, Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain, Oxford, Clarendon Press, 1994.

³⁸⁷ M.R. DAMAŠKA, The Faces of Justice and State Authority: A Comparative Approach to the Legal Process, New Haven and London, Yale University Press, 1986, pp. 161- 162 (Damaška adds that “officials in charge of the proceedings will refuse to rely exclusively, or even principally, upon informational channels carved by persons whose interests are affected by the prospective decision”). This does not imply that in all inquisitorial criminal justice systems, all defence investigations will be prohibited. On Germany, consider e.g. T. WEIGEND and F. SALDITT, The Investigative Stage of the Criminal Process in Germany, in E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN, Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union, Antwerpen – Oxford, Intersentia, 2007, p. 91 (noting that, although the criminal code is silent on this issue, the Defence is not prevented from conducting its own investigations, may

that the 'objective truth' can only be established when the investigation is assigned to non-partisan investigators.³⁸⁸ Rather than expecting the Defence to organise a fully-fledged investigation, the role of the Defence during the investigation is restricted to safeguarding the interests of the suspect or accused person and checking whether state officials stick to the rules.

Solely the ECCC and the SPSC were found to provide for the possibility for the Defence to request the (Co-)Investigating Judge(s) or the Public Prosecutor to undertake certain investigative acts. This further reflects the primarily civil law-nature of pre-trial proceedings at these tribunals.³⁸⁹ In light of the existing inequalities between the parties in the proceedings before other international(ised) criminal tribunals (ICC, the *ad hoc* tribunals and the SCSL), it may be asked whether the adoption of this traditional civil law-feature by other tribunals may be worth our consideration. However, it is evident that this feature is at tension with the more adversarial pre-trial arrangements which can be found at these tribunals. It encompasses a limitation of the 'two investigations' approach and presupposes a Prosecutor which does not solely act as a partisan actor in the conduct of investigations. It will be explained further on in this chapter that the ICC Prosecutor is bound by a principle of objectivity in the conduct of investigations.³⁹⁰ Hence, and in the absence of any express provision for the Defence to address requests for investigative action to the Prosecutor, honouring such requests would not conflict with the role of the ICC Prosecutor in the conduct of investigations.

With regard to the temporal limitation of the investigation, it was found that at these tribunals where the Prosecution heads over the investigation, he or she is, under certain conditions,

interview witnesses before trial or summon them at trial. When compulsory measures are required, the Defence may request the *Ermittlungsrichter* or the Prosecutor to take evidence).

³⁸⁸ Underlying the concept of 'objective truth' lies the belief that an objective construction of the reality is possible. Consider GRANDE, who speaks in this regard of the 'ontological truth' (which is distinguished from the 'interpretive truth', based on the belief that "a truly non-partisan approach in searching for the truth is unachievable in the human world"). See E. GRANDE, *Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth*, in J. JACKSON, M. LANGER and P. TILLERS (eds.), *Crime, Procedure and Evidence in a Comparative and International Context. Essays in Honour of Professor Mirjam Damaška*, Oxford and Portland, Oregon, Hart Publishing, 2008, p. 147.

³⁸⁹ M. LANGER, *The Rise of Managerial Judging in International Criminal Law*, in «American Journal of Comparative Law», Vol. 53, 2005, p. 840; N. JÖRG, S. FIELDS and C. BRANTS, *Are Inquisitorial and Adversarial Systems Converging?*, in P. FENNELL, C. HARDING, N. JÖRG and B. SWART (eds.), *Criminal Justice in Europe, a Comparative Study*, Oxford, Clarendon Press, 1995, p. 47. For Belgium, consider Article 61 *quinquies* of the *Code d'instruction criminelle – Wetboek van Strafvordering (Sv.)* (right of the suspect and the *partie civile* (burgerlijke partij) to request additional investigative actions); for France, consider Article 81-9 of the C.P.P.

³⁹⁰ See *infra*, Chapter, 3, III.

allowed to continue its investigations after the start of the prosecution phase proper. In particular, sufficient care should be taken that the rights of the defendant are respected.

Where the ICC provides several avenues for victims to participate in the investigation stage, their legal representatives are not allowed to independently gather information and evidence. In turn, where victims at the ECCC can participate in the judicial investigation as *parties civiles*, their limited role has been defined in the Internal Rules. Finally, at the STL, victims are precluded from participating in the investigation phase. Nevertheless, they may gather information and evidence after the confirmation of the indictment.

Further, it appears that at most tribunals, the level of judicial control over the investigation is limited.³⁹¹ Exceptions are the ECCC, where the investigation is led by the Co-Investigating Judges as well as the SPSC, where judicial authorisation is required for the use of coercive measures by the Public Prosecutor.³⁹² With regard to the other international(ised) criminal tribunals, a trend can be noted towards more judicial intervention. As an example, although the Pre-trial Chamber (ICC) and the Pre-Trial Judge (STL) mostly intervene on the request of one of the parties, several self-standing powers were identified. For example, the Pre-Trial Chamber and the Pre-Trial Judge may, in case of a ‘unique investigative opportunity’ or ‘unique opportunities to gather evidence’ respectively, gather evidence *proprio motu*, when certain conditions are fulfilled. Such judicial powers share the same function in so far as they assist the parties with the preparations of their respective cases. The recognition by the ICC’s case law of the primary responsibility of the ICC Pre-Trial Chamber in ensuring the protection of the rights of the suspects during the investigation stage of proceedings is even more important.

I.4. Reactive vs. proactive investigations

As a consequence of the fight against organised crime and terrorism, *national criminal justice systems* have evolved. Law enforcement is no longer purely reactive in nature and

³⁹¹ See also C. BUISMAN, *Ascertainment of the Truth in International Criminal Justice*, 2012, p. 356 (“The powers of the judiciary remain, however, limited in conducting investigations”).

³⁹² On this issue, see also *infra*, Chapter 6.

increasingly becomes proactive.³⁹³ Criminal law has been mobilised to serve preventive functions. Many national criminal justice systems allow for the use of certain investigative measures or techniques to investigate crimes *ante-delictum*.³⁹⁴ This evolution goes hand in hand with an evolution towards the expansion of the criminalisation of preparatory acts.³⁹⁵ Here, proactive investigations are narrowly defined as those investigations regarding crimes that have not yet been committed.³⁹⁶ These investigations are specifically useful to map criminal organisations.³⁹⁷ Currently, there is agreement that the attribution of such a preventive function to criminal justice systems is acceptable.³⁹⁸ At the core of this evolution are new investigative techniques, such as covert (or secret) surveillance, which lend themselves to proactive application.³⁹⁹ These new techniques are often covert in nature and risk infringing upon the personal rights of persons affected or third persons (the right to

³⁹³ Consider *e.g.* C. BRANTS and S. FIELD, *Les méthodes d'enquête proactive et le contrôle des risques*, in «*Déviante et Société*», Vol. 21, 1997, p. 401; C. BRANTS, *Developments in the Protection of Fundamental Human Rights in Criminal Process: Introduction*, in «*Utrecht Law Review*», Vol. 5, 2009, p. 4; J.A.E. VERVAELE, *Special Procedural Measures and the Protection of Human Rights*, in «*Utrecht Law Review*», Vol. 5, 2009, p. 72; S. BRONITT, *The law in Undercover Policing: A Comparative Study of Entrapment and Covert Interviewing in Australia, Canada and Europe*, in «*Common Law World Review*», Vol. 33, 2004, p. 35; I. ONSEA, *De bestrijding van georganiseerde misdaad: de grens tussen waarheidsvinding en grondrechten*, Antwerpen, Intersentia, 2008, p. 87; M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, pp. 541-542 (noting an 'acceleration' in its development since the 9/11 events, which resulted in a separate investigatory framework with specific characteristics allowing it to clearly distinguish it).

³⁹⁴ It should be noted that some countries still prohibit the use of proactive coercive measures by law enforcement officials. Proactive investigative fall outside the realm of criminal investigations. "These countries seem to adhere to a clear-cut distinction between criminal law (reactive) and police/administrative law [intelligence] (proactive)." See J.A.E. VERVAELE, *Special Procedural Measures and the Protection of Human Rights*, in «*Utrecht Law Review*», Vol. 5, 2009, p. 82.

³⁹⁵ See *e.g.* M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, p. 210.

³⁹⁶ Consider *e.g.* C. BRANTS and S. FIELD, *Les méthodes d'enquête proactive et le contrôle des risques*, in «*Déviante et Société*», Vol. 21, 1997, p. 403. Other definitions are possible. Another approach is to look at proactive investigations as those investigations concerning crimes that have not yet been committed or have not yet been discovered. Such approach is used in Belgian criminal procedural law (see *infra*, fn. 403 and accompanying text). It follows that investigations into crimes that have been committed but have not been discovered are also considered proactive in nature. In such instances, investigations are not a reaction to a crime. See B. VANGEEBERGEN and D. VAN DAELE, *De uitholling van de proactieve recherche*, in «*Nullum Crimen*», Vol. 3, 2008, p. 328. Yet another approach is to define proactive investigations in terms of the special investigative techniques that are applied. However, such definition is not correct, where proactive investigations are not necessarily limited to these techniques. See *ibid.*, p. 329. Lastly, proactive investigation may refer to criminal investigative activities before there is a reasonable suspicion that a crime has been committed. See *e.g.* M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, p. 85.

³⁹⁷ I. ONSEA, *De bestrijding van georganiseerde misdaad: de grens tussen waarheidsvinding en grondrechten*, Antwerpen, Intersentia, 2008, p. 87.

³⁹⁸ As concluded by M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, p. 606.

³⁹⁹ J.E. ROSS, *The Place of Covert Surveillance in Democratic Societies: a Comparative Study of the United States and Germany*, in «*American Journal of Comparative Law*», Vol. 55, 2007, p. 495.

respect for the private life).⁴⁰⁰ Additionally, these investigations take place when no suspects have yet been identified.⁴⁰¹ Before addressing the availability (or not) of such proactive powers at the international echelon, a brief overview of national approaches is useful. Below, the evolution towards anticipative criminal investigations will shortly be illustrated from a comparative perspective. As a caveat, this overview is limited to law enforcement and does not discuss the availability of proactive powers to the intelligence community, nor does it address the possibility or not to transfer and exchange of information between law enforcement services and the intelligence community.

In Belgium, proactive investigative efforts are allowed for during the preliminary investigation (*'information'* or *'opsporingsonderzoek'*).⁴⁰² The Belgian Code of Criminal Procedure defines proactive investigations as the 'collection, registration and processing of data and information with regard to crimes that have not yet been committed or have not yet been discovered'.⁴⁰³ Several conditions apply. These include a 'reasonable suspicion' requirement and a proportionality requirement, in that proactive investigations are only allowed with regard to those crimes that are committed or will be committed by a criminal organisation or those crimes for which a wiretap is allowed.⁴⁰⁴ Hence, proactive investigative efforts are limited to the most serious crimes.⁴⁰⁵ Further, a prior written authorisation by the *Procureur du Roi* is required. Lastly, all proactive efforts should have a judicial purpose. They should have the prosecution of criminals as their aim. However, this does not imply that every proactive investigation should necessarily lead to a prosecution. As part of proactive investigative efforts, special (secret) investigative measures can be used, including

⁴⁰⁰ C. BRANTS and S. FIELD, Les méthodes d'enquête proactive et le contrôle des risques, in «Déviance et Société», Vol. 21, 1997, p. 402 («Elles ont ceci en commun : elles ne sont efficaces que si elles restent secrètes»).

⁴⁰¹ In this regard, several authors speak of "criminal law without suspects". See e.g. J.A.E. VERVAELE, Special Procedural Measures and the Protection of Human Rights, in «Utrecht Law Review», Vol. 5, 2009, p. 76; I. ONSEA, De bestrijding van georganiseerde misdaad: de grens tussen waarheidsvinding en grondrechten, Antwerpen, Intersentia, 2008, p. 95.

⁴⁰² See Article 28bis § 2 Sv., as introduced by the law of 12 March 1998. This phase of proceedings is to be distinguished from the 'verkennd onderzoek'. While such phase is not expressly provided for in Belgium, such phase is referred to in a confidential circular. It only comprises of the consultation of literature, open sources, etc. and is passive in nature. See 'vertrouwelijke gemeenschappelijke omzendbrief COL 04/2000 van de Minister van Justitie en het College van Procureurs-generaal betreffende proactieve recherche, 2 mei 2000', as referred to by ONSEA. See I. ONSEA, De bestrijding van georganiseerde misdaad: de grens tussen waarheidsvinding en grondrechten, Antwerpen, Intersentia, 2008, pp. 98-99.

⁴⁰³ Article 28bis § 2 Sv. (author's translation).

⁴⁰⁴ Article 28bis § 2 Sv.

⁴⁰⁵ Nevertheless, the list of crimes for which the use of proactive investigations are allowed is getting longer. See P. DE HERT and A. JACOBS, National Report: Belgique, in «Revue internationale de droit pénal», Vol. 80, 2009, p. 54 (CD-Rom Annex).

observation, the use of infiltration, undercover agents or the use of informants.⁴⁰⁶ These measures can be ordered by the *Procureur du Roi*. Where some special investigative measures require the authorisation by an Investigating Judge, they cannot be used in the course of proactive investigations.⁴⁰⁷ It appears that additional material requirements of legality, proportionality and subsidiarity (reactive investigative acts do not suffice) are to be found in a confidential circular letter.⁴⁰⁸

Similarly, the Dutch CCP envisages proactive investigations.⁴⁰⁹ This includes the possibility to investigate criminal acts that are being organised or indications that terrorist offences will be committed. More than in Belgium, the Dutch normative framework on proactive

⁴⁰⁶ Consider Article 47ter – undecies Sv. In case special investigative measures are used proactively the elements required by Article 28bis §2 Sv. should be present. Consider e.g. Articles 46ter §1 and 47sexies §3 (1°) Sv. For some time, the use of special investigative measures, during the reactive or proactive phase of criminal investigations, was not expressly regulated (with the exception of the interception of communications). In general, see e.g. H. BERKMOES and D. LYBAERT, *Proactieve politie bevoegdheden en (bijzondere) middelen in de strijd tegen de georganiseerde criminaliteit*, in «Custodes», 1999 (1), pp. 33–52. A legislative framework was only adopted in 2003. See *Loi concernant les méthodes particulières de recherche et quelques autres méthodes d'enquête* - Wet 6 Januari 2003 betreffende de bijzondere opsporingsmethoden en enige andere onderzoeksmethoden, M.B. - B.S., 12 May 2003.

⁴⁰⁷ These include the 'systematic observation with the use of technical means to look inside private dwellings' or 'discrete visual checks' (entering of a private place, without the knowledge of the inhabitant). See Article 56bis Sv. Originally, Article 27septies Sv. allowed for the Prosecutor to request the investigative judge to authorise the observation with the use of technical means to look inside private dwellings, without the need to open a judicial investigation and to transfer the dossier to the investigating judge (*mini-instruction* or *mini-instructie*). However, the Constitutional Court concluded that where the impact of such investigative measure on privacy rights is comparable to that of the search of a private home or the use of a wiretap -which coercive measures necessitate the opening of a judicial investigation- the opening of a judicial investigation should be required for the observation with the use of technical means to look inside private dwellings. See GH, arrest Nr. 202/2004, 21 December 2004, B.5.7.3 – B.5.7.8. As a consequence, Article 28septies Sv. was replaced. In a similar vein, the Constitutional Court found that discrete visual checks (Article 89ter Sv.) require the opening of a judicial investigation. See *ibid.*, B.13.5 – B.13.10.

⁴⁰⁸ I. ONSEA, *De bestrijding van georganiseerde misdaad: de grens tussen waarheidsvinding en grondrechten*, Antwerpen, Intersentia, 2008, p. 123.

⁴⁰⁹ Article 132a Sv. Note that until 2007, this provision stated that investigations could be proactive in nature and that the criminal investigation commences when there is a reasonable suspicion that a crime has been planned or committed while these crimes result in a serious infringement of the legal order. However, following the Act of 2006 to Broaden the Possibilities to Investigate and Prosecute Terrorist Crimes, the threshold was removed from Article 132a Sv. See M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, p. 76, fn. 163; p. 121.

The possibility also exists of a proactive '*verkennend onderzoek*' ('preliminary investigation') prior to that stage (Art. 126gg Sv.). This refers to a preparatory stage preceding the criminal investigation of Article 132a Sv., in case indications follow from acts and circumstances that within groups of persons crimes are being planned or committed for which detention on remand is allowed. However, this phase is exploratory in nature. See in general G.J.M. Corstens, *Het Nederlands strafprocesrecht* (7th ed.), Deventer, Kluwer, 2011, p. 176. Hence, if information is not sufficient to start a criminal investigation in the sense of Article 132a Sv., a preliminary investigation can be started on the basis of information that crimes are being committed or planned within groups of persons. See M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, p. 86.

investigations is the direct result of past abuses.⁴¹⁰ It was clear that the traditional reactive form of investigations was ill-suited to fight organised crime.⁴¹¹ Notably, a number of special investigative techniques can be resorted to with regard to organised crime, once there exists a ‘reasonable suspicion that offences are being planned or being committed’ and ‘which crimes result in a serious infringement of the legal order considering their nature or relation with other crimes and for which crimes pre-trial detention can be imposed as to the law’.⁴¹² The latter part of this formulation in fact embodies the principle of proportionality. These investigative measures can be imposed proactively. Furthermore, the threshold for the use of a number of special coercive measures has further been lowered in relation to terrorist offences.⁴¹³ ‘Indications’ suffice for the application of these special investigative measures, which include observation or infiltration, with regard to the prevention of terrorist crimes.⁴¹⁴ In addition, new proactive investigative techniques were made available specifically for the investigation of terrorist crimes.⁴¹⁵ These include the possibility to request information from databases⁴¹⁶ as well as the possibility to request stored identification material.⁴¹⁷ From the foregoing, it follows that the use of coercive measures, including special investigative methods, is possible during the proactive investigation, against non-suspects.⁴¹⁸ Proactive

⁴¹⁰ See e.g. T. PRAKKEN, *Chronique scandaleuse van het Strafprocesrecht*, in «NJB», 1990, pp. 1815 – 1822; M. VAN TRAA, *Enquête Opsporingsmethoden: Eindrapport*, 1996, p. 413 (referring to a ‘crisis in the investigation’); S. BRAMMERTZ, *La recherche proactive en droit comparé et dans les instruments internationaux*, in «Custodes», 1999 (1), p. 129. However, it has been argued that in many jurisdictions, the regulation of the proactive phase of investigations is a result of ‘incidents’. See P.J.P. TAK, G.A. VAN EIKEMA HOMMES, E.R. MANUNZA and C.F. MULDER, *De normering van bijzondere opsporingsmethoden in buitenlandse rechtsstelsels*, Den Haag, Ministerie van Justitie, 1996, p. 16.

⁴¹¹ M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, p. 82.

⁴¹² See Chapter V Sv., in particular Article 126o Section 1 Sv.

⁴¹³ See Title Vb, Article 126za - 126zs Sv., inserted following the Act of 20 November 2006 to expand proactive investigations with regard to the prevention of terrorist crimes.

⁴¹⁴ See e.g. Article 126zd section 1 under a (observation) Sv. and Article 126ze (infiltration) Sv. ‘Indications’ require the availability of information suggesting the actual or future commission of a terrorist offence. They may include rumours, anonymous information or can be the result of a general risk assessment by the intelligence. See e.g. P. BAL, M. KUIJER and K. VEEGENS, *Netherlands*, in «Revue internationale de droit pénal», Vol. 80, 2009, p. 236 (CD-Rom Annex); J.A.E. VERVAELE, *Special Procedural Measures and the Protection of Human Rights*, in «Utrecht Law Review», Vol. 5, 2009, p. 84; M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, pp. 173 – 174 (adding that ‘terrorist thoughts’ per se would not be sufficient).

⁴¹⁵ M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, pp. 168, 177.

⁴¹⁶ Article 126hh Sv. (the authorisation of the examining magistrate is required).

⁴¹⁷ Article 126ii Sv.

⁴¹⁸ J.A.E. VERVAELE, *Special Procedural Measures and the Protection of Human Rights*, in «Utrecht Law Review», Vol. 5, 2009, p. 85.

investigative efforts should aim at ‘making prosecutorial decisions’ and hence, should aim at initiating criminal proceedings.⁴¹⁹

In Germany, the police, rather than the prosecutor, are in charge of proactive investigations (*Vorfelddermittlung*) which precede the criminal investigation. In turn, the criminal investigation is headed over by the prosecutor. This phase of proceedings, including the competences of the police, is not regulated in the StPO, but in the laws on police conduct which exists at the level of the different *Länder*.⁴²⁰ However, while proactive investigations are limited to serious crimes, it is not clear what facts justify proactive investigative acts.⁴²¹ In turn, the distinction between proactive and reactive investigations is determined by the presence or not of *Anfangsverdacht*, from which moment the principle of legality dictates the opening of a preliminary investigation.⁴²² From this moment, the dossier has to be transferred from the police to the prosecutor. German law expressly provides for the formal and material requirements for proactive investigative acts.⁴²³

Not all civil law jurisdictions provide for proactive investigations as part of criminal law enforcement. As an example, one can refer to France, which nowhere explicitly regulates proactive investigations.⁴²⁴ Proactive investigative acts are considered part of administrative law, rather than criminal prosecutions.

In common law criminal justice systems, proactive investigative efforts are traditionally considered less problematic. These criminal justice systems often do not distinguish between

⁴¹⁹ Article 132a Sv.

⁴²⁰ S. BRAMMERTZ, *La recherche proactive en droit comparé et dans les instruments internationaux*, in «Custodes», 1999 (1), p. 131; I. ONSEA, *De bestrijding van georganiseerde misdaad: de grens tussen waarheidsvinding en grondrechten*, Antwerpen, Intersentia, 2008, p. 108; P.J.P. TAK, G.A. VAN EIKEMA HOMMES, E.R. MANUNZA and C.F. MULDER, *De normering van bijzondere opsporingsmethoden in buitenlandse rechtsstelsels*, Den Haag, Ministerie van Justitie, 1996, p. 109.

⁴²¹ I. ONSEA, *De bestrijding van georganiseerde misdaad: de grens tussen waarheidsvinding en grondrechten*, Antwerpen, Intersentia, 2008, pp. 136 -137.

⁴²² On the principle of legality, see *infra*, Chapter 3, II.1.

⁴²³ S. BRAMMERTZ, *La recherche proactive en droit comparé et dans les instruments internationaux*, in «Custodes», 1999 (1), p. 131; I. ONSEA, *De bestrijding van georganiseerde misdaad: de grens tussen waarheidsvinding en grondrechten*, Antwerpen, Intersentia, 2008, p. 132, p. 137 (referring to the example of *Nordrhein-Westfalen*, where the *Polizeigesetz* states that the principle of proportionality should be respected in the conduct of proactive investigations).

⁴²⁴ I. ONSEA, *De bestrijding van georganiseerde misdaad: de grens tussen waarheidsvinding en grondrechten*, Antwerpen, Intersentia, 2008, p. 135; J. PRADEL, *De l'enquête pénale proactive: Suggestions pour un statut légal*, in «Recueil Dalloz», 1998, p. 58; S. BRAMMERTZ, *La recherche proactive en droit comparé et dans les instruments internationaux*, in «Custodes», 1999 (1), p. 130.

reactive and proactive investigations.⁴²⁵ This should be understood, as was discussed earlier, in light of the absence of codification. What is not explicitly prohibited by law the police is allowed to do.⁴²⁶ In turn, in civil law criminal justice systems, every infringement on fundamental rights needs a basis in the law.⁴²⁷

As far as the US is concerned, criminal investigations are traditionally reactive in nature.⁴²⁸ The proactive application of investigative methods such as searches or wiretapping which fall under the Fourth Amendment is restricted by the ‘probable cause’ requirement that a crime *has been* committed or *is being* committed. Nevertheless, other avenues are available.⁴²⁹ For example, a powerful investigative tool which can be applied proactively and secretly is found in Title III of the Omnibus Crime Control and Safe Streets Act (‘Wiretap Act’).⁴³⁰ It allows for secret surveillance, in case there exists a ‘probable cause’ that serious crimes *are about to be committed*. In such a case, a federal judge may issue a warrant allowing surveillance.⁴³¹ Hence, Title III allows for the use of invasive surveillance techniques in a proactive manner with regard to serious felonies.⁴³² Later, the U.S. Patriot Act expanded the list of crimes for which surveillance is possible under Title III as well as the techniques and instances in which Title III powers can be relied upon.⁴³³ Further, when information is intercepted by means of an informant or undercover agent, the consent of this informant or undercover agent does away with these requirements under Title III.⁴³⁴ This consent deprives the other party of a reasonable expectation of privacy. Therefore, these techniques can be used without fulfilling the requirements of the Fourth amendment.⁴³⁵

⁴²⁵ I. ONSEA, *De bestrijding van georganiseerde misdaad: de grens tussen waarheidsvinding en grondrechten*, Antwerpen, Intersentia, 2008, p. 135.

⁴²⁶ See *supra*, Chapter 2, VI.

⁴²⁷ C. BRANTS and S. FIELD, *Les méthodes d’enquête proactive et le contrôle des risques*, in «*Déviance et Société*», Vol. 21, 1997, p. 404.

⁴²⁸ *Ibid.*, p. 285.

⁴²⁹ The electronic interception of communications falls within the ambit of the Fourth Amendment. See *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Berger v. United States*, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967).

⁴³⁰ 18 U.S.C. §§ 2510-20 (2000) (hereinafter ‘Title III’).

⁴³¹ 18 U.S.C. § 2518 (1) (b) (i).

⁴³² M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, p. 325.

⁴³³ *Ibid.*, pp. 452, 521. On the list of crimes, See Sections 201 and 202, amending 18 U.S.C. § 2518 (1) (q).

⁴³⁴ *United States v. White*, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971); J.E. ROSS, *The Place of Covert Surveillance in Democratic Societies: a Comparative Study of the United States and Germany*, in «*American Journal of Comparative Law*», Vol. 55, 2007, p. 512.

⁴³⁵ M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, pp. 313, 325.

A similar trend towards anticipative investigations can be witnessed at the international (regional) level. As an example, one can refer to the Schengen Information System (SIS) in Europe, which lends itself to proactive application.⁴³⁶ Data may be entered into this database in relation to persons and vehicles for the purpose of discreet surveillance or of specific checks. This alert may relate to instances ‘where there is clear evidence that the person concerned *intends to commit* or is committing numerous and extremely serious criminal offences or where an overall assessment of the person concerned, in particular on the basis of past criminal offences, gives reason to suppose *that that person will also commit extremely serious criminal offences in the future.*’⁴³⁷

No parallel evolution can yet be noticed in the law of international criminal procedure. International criminal justice is mostly reactive in nature.⁴³⁸ Traditionally, international(ised) criminal tribunals are set up in the wake of a conflict.⁴³⁹ This is different with regard to the ICC, which may come into play much earlier, at a moment in time when the conflict is still ongoing. The Statute’s preamble emphasised that the Court is:

‘[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes’.⁴⁴⁰

This preambular paragraph seems to appeal to the preventive effects of the Court. These effects may not only include the specific and general deterrence of sentences imposed by the Court but also the possibility of the Court investigating crimes in a proactive manner. The idea of such proactive role for the Court may surprise in light of the subsidiary nature of the Court.⁴⁴¹ On the other hand, as convincingly argued by one author, it is clear that such an

⁴³⁶ Other examples can be thought of. For example, Article 46 of the Convention Implementing the Schengen Agreement allows for the autonomous exchange of information between police regarding the ‘combat of future crime and prevent[ion of] offences against or threats to public policy and public security’. Such information may be gathered proactively.

⁴³⁷ Article 99 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (‘Convention implementing the Schengen Agreement’), 19 June 2000, Official Journal L 239, 22/09/2000 P. 0019 – 0062 (emphasis added).

⁴³⁸ See e.g. C. BASSIOUNI, Introduction to International Criminal Law, Ardsley, Transnational Publishers, 2003, pp. 583, 588.

⁴³⁹ However, on a closer look, it appears that at the ICTY, investigations were conducted while the conflict was still raging.

⁴⁴⁰ Fifth preambular paragraph ICC Statute (emphasis added).

⁴⁴¹ H. VAN DER WILT, Boekbespreking (bespreking van: H. Olásolo, The Role of the International Criminal Court in Preventing Atrocity Crimes Through Timely Intervention: From the Humanitarian Intervention

approach may serve a useful purpose with regard to crimes within the jurisdiction of international criminal courts insofar that these require the presence of “a collective effort” and of an “organisational context”.⁴⁴² Hence, it is worthwhile to examine whether, and to what extent, the ICC Prosecutor may be proactive in the conduct of investigations.

At the outset, it should be clarified that the present undertaking does not seek to answer the question to what extent the ICC contributes to general crime prevention.⁴⁴³ Also not discussed here is proactivity as a guiding principle that informs the Prosecution’s interpretation and application of complementarity. Likewise, the Prosecutor’s interactions with domestic jurisdictions (‘positive complementarity’ (assistance to states in complying with their duties to investigate and prosecute) and ‘cooperative complementarity’ (division of the burden of adjudication in cases of substantial capacity problems)) are not at issue here.⁴⁴⁴ Finally, also not discussed here is the potential of the inclusion of certain preparatory crimes, such as incitement to genocide, in the ICC Statute for the prevention of the commission of further crimes.⁴⁴⁵ Leaving these questions apart, it appears that the proactive application by the ICC Prosecutor of his or her investigative powers has not received much attention.

Doctrine and Ex Post Facto Judicial Institutions to the Notion of Responsibility to Protect and the Preventative Role of the International Criminal Court (Oratie Utrecht), in «Delikt en Delinkwent», Vol. 83, 2011, p. 1.

⁴⁴² H. OLÁSULO, The Role of the International Criminal Court in Preventing Atrocity Crimes Through Timely Intervention: From the Humanitarian Intervention Doctrine and Ex Post Facto Judicial Institutions to the Notion of Responsibility to Protect and the Preventative Role of the International Criminal Court, Inaugural Lecture as Chair in International Criminal Law and International Criminal Procedure at Utrecht University, 18 October 2010, (<http://responsibilitytoprotect.org/Professor-Olasolo-Inaugural-Lecture-at-Utrecht-University-English-Version.pdf>, last visited 10 February 2014).

⁴⁴³ See e.g. D. BOSCO, The International Criminal Court and Crime Prevention: Byproduct or Conscious Goal, in «Michigan State Journal of International Law», Vol. 19, 2011, pp. 163 – 200; P. AKHAVAN, Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?, in «American Journal of International Law», Vol. 95, 2001, pp. 7 – 31; A. MARSHALL, Prevention and Complementarity in the International Criminal Court: A Positive Approach, in «Human Rights Brief», Vol. 17, 2010, pp. 21 – 26.

⁴⁴⁴ Consider e.g. K.A. MARSHALL, Prevention and Complementarity in the International Criminal Court: A Positive Approach, in «Human Rights Brief», Vol. 17, 2010, p. 21; H.OLÁSULO, The Role of the International Criminal Court in Preventing Atrocity Crimes Through Timely Intervention: From the Humanitarian Intervention Doctrine and Ex Post Facto Judicial Institutions to the Notion of Responsibility to Protect and the Preventative Role of the International Criminal Court, Inaugural Lecture as Chair in International Criminal Law and International Criminal Procedure at Utrecht University, 18 October 2010, (<http://responsibilitytoprotect.org/Professor-Olasolo-Inaugural-Lecture-at-Utrecht-University-English-Version.pdf>, last visited 10 February 2014), p. 8; W.W. BURKE-WHITE, Implementing a Policy of Positive Complementarity in the Rome System of Justice, in «Criminal Law Forum», Vol. 19, 2008, pp. 59 – 85; W.W. BURKE-WHITE, Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice, «Harvard International Law Journal», Vol. 49, 2008, pp. 53 – 108.

⁴⁴⁵ Critical is H. VAN DER WILT, Boekbespreking (bespreking van: H. Olásulo, The Role of the International Criminal Court in Preventing Atrocity Crimes Through Timely Intervention: From the Humanitarian Intervention Doctrine and Ex Post Facto Judicial Institutions to the Notion of Responsibility to Protect and the Preventative Role of the International Criminal Court (Oratie Utrecht), in «Delikt en Delinkwent», Vol. 83, 2011, p. 2. The author points out that there are no precedents for the prosecution (or conviction on the basis of)

Looking at this issue in a chronological order, the first question which arises is whether (and to what extent) the ICC Prosecutor can be proactive during the pre-investigation phase. At first, it appears that this question should be answered in the negative. It is to be recalled that the investigative measures at the Prosecutor's disposal at that stage of the proceedings are very limited with the notable exception of the receipt of oral and/or written witness evidence at the seat of the Court.⁴⁴⁶ However, it was concluded that these powers have been interpreted broadly by the Prosecutor so as to also allow for regularly conducting field missions, receiving delegations in The Hague or entering into a dialogue with different stakeholders.⁴⁴⁷ These actions fall short of the use of typical proactive investigative techniques such as covert surveillance nevertheless. Clearly, these forms of investigative measures are not at the Prosecutor's disposal during the pre-investigation phase.

While the Prosecutor is so prevented at this stage from using proactive investigative techniques, nothing prevents him or her from analysing information that has been acquired through the use of such methods by states or other organisations. Indeed, the type of information the Prosecutor may seek or receive at this pre-investigative stage is not further determined.⁴⁴⁸ Moreover, the source of the information received by the Prosecutor is irrelevant under Article 15.⁴⁴⁹ Consequently, such information may include information that was gathered by States or other actors as a result of proactive investigative efforts. It may consist of intelligence information or information gathered by law enforcement officials through proactive investigative efforts. Such a finding is important, as anticipative investigative efforts at the national level are often triggered by intelligence information.⁴⁵⁰ It will be important in this regard to know whether or not the Prosecutor is in a position to conclude 'confidentiality agreements' (pursuant to Article 54 (3) (e) ICC Statute), or cooperation agreements (pursuant to Article 54 (3) (d) ICC Statute) with information providers at that stage. A textual interpretation seems to contradict such a view. Article 54

incitement to genocide. It would be strange for the Prosecutor to focus the office's limited resources towards the prosecution of these crimes.

⁴⁴⁶ Article 15 (2) ICC Statute. See *supra*, Chapter 3, I.2.

⁴⁴⁷ See *supra*, Chapter 3, I.2.

⁴⁴⁸ Consider in this regard OTP, Informal Expert Paper: Fact-Finding and Investigative Functions of the Office of the Prosecutor, Including International Cooperation, 2003, par. 21 ("Although apparently limited in scope, the sources described under this rule are potentially rich in terms of the information they may in practice be able to provide").

⁴⁴⁹ M. BERGSMO and J. PEJIĆ, Article 15, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 586.

⁴⁵⁰ M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, pp. 542, 543.

regulates the duties and powers of the Prosecutor with regard to ‘investigations’. Hence, the powers enumerated in Article 54 only become available after the commencement of the ‘full’ investigation. This may well prove to be an important handicap for the Prosecutor, and render illusory any prospects of receiving intelligence information.

As stated above, the Prosecutor should analyse all information received.⁴⁵¹ While the Prosecutor may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organisations, pursuant to Article 15 (2) ICC Statute, it is to be recalled that Part 9 of the ICC Statute does not apply to such requests by the Prosecutor. Hence, it follows that it is for the information provider to decide what information is submitted to the Prosecutor.

The Prosecutor’s powers at this stage are limited to the powers above. There is no room for a more active investigative role for the Prosecutor. In sum, it appears that the proactive investigative tools at the Prosecutor’s disposal during this phase of proceedings are slim. This is not to say that some of these powers may not reveal to be powerful tools to prevent the commission of further crimes. To the contrary, the knowledge that the Prosecution is monitoring the situation may have an important impact on the ground.⁴⁵² For example, in case the Prosecutor receives ‘substantiated’ information that the commission of a crime within the jurisdiction of the court is attempted, this would require the Prosecutor to sanction the opening of a preliminary examination. During this preliminary examination, the Prosecutor may take into consideration in how far national authorities take steps to prevent the completion of these crimes.⁴⁵³ In this regard, the Prosecutor may use Article 25 (3) (f) ICC Statute as a carrot towards the authorities, according to which:

‘a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the

⁴⁵¹ See *supra*, Chapter 3, I.2.

⁴⁵² H. OLÁSULO, *The Role of the International Criminal Court in Preventing Atrocity Crimes Through Timely Intervention: From the Humanitarian Intervention Doctrine and Ex Post Facto Judicial Institutions to the Notion of Responsibility to Protect and the Preventative Role of the International Criminal Court*, Inaugural Lecture as Chair in International Criminal Law and International Criminal Procedure at Utrecht University, 18 October 2010, (<http://responsibilitytoprotect.org/Professor-Olasolo-Inaugural-Lecture-at-Utrecht-University-English-Version.pdf>, last visited 10 February 2014), p. 7 (Olásulo gives the example of Afghanistan, where the opening of a preliminary examination resulted in a change of the airstrike policy of the NATO and the United States and into the United States’ reaffirmation of support to internal investigation mechanisms).

⁴⁵³ *Ibid.*, p. 6.

attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.’

During the investigation phase *sensu stricto*, things are more complicated. Before moving from the pre-investigative to the investigation stage, several factors have to be considered by the Prosecutor or by the Pre-Trial Chamber in authorising a request by the Prosecutor to *proprio motu* open an investigation into a situation.⁴⁵⁴ It follows from Article 53 (1) (a) ICC Statute that in initiating an investigation into a situation, the Prosecutor shall consider whether ‘information [...] provides a reasonable basis to believe that a crime within the jurisdiction of the Court *has been or is being committed*’. A textual interpretation of this provision seems to exclude any basis for proactive investigations. According to the definition provided, proactive investigative efforts precede the commission of the crime. Hence, as an example, the situation when a crime ‘is about to be committed’ seems excluded from the realm of the provision. Prior to the moment in time when a crime within the jurisdiction of the Court is or is being committed, there is no possibility to proceed to the investigation proper. Only the limited investigative powers referred to in the preceding paragraphs are at the Prosecutor’s disposal. In a similar vein, the wording of Article 13 (a) and (b) and Article 14 (1) ICC Statute, with respect to referrals, refers to situations in which one or more crimes within the jurisdiction of the Court appear to *have been* committed.

The French text of Article 53 (1) ICC Statute refers to ‘*une base raisonnable pour croire qu’un crime relevant de la compétence de la Cour a été ou est en voie d’être commis.*’ The latter part of this phrase ‘en voie de’ indicates “*que quelque chose est en cours et se modifie dans un sens déterminé*” (‘in the process of being committed’).⁴⁵⁵ While one could argue that such a formulation is somewhat broader than the English version of the ICC Statute, it is clear that such phrase is not sufficiently broad as to include crimes that will likely be committed (‘*des crimes qui probablement seront commis*’). It follows that a full-blown investigation in a situation cannot be initiated before crimes within the jurisdiction of the Court have been committed or are being committed. In other words, no investigation into a situation can be *fully* proactive in nature.

⁴⁵⁴ These factors will be discussed at length, see *infra* Chapter 3, II.4.2.

⁴⁵⁵ Consider Trésor de la langue française informatisé (last visited, 28 October 2012).

The follow-up question then is whether, and to what extent investigations *sensu stricto* can be *partly* proactive in nature. It is important here to refer back to the question whether cases (within an existing situation) may also include crimes that were committed after the date a situation was referred to the Court. It was concluded above that the interpretation by Pre-Trial Chambers I and III stands to be preferred, allowing such an inclusion, as long as there exists a sufficient *nexus* with the ‘situation of crisis’ that was referred.⁴⁵⁶ Notably, it was held that such interpretation better responds to the on-going conflicts the ICC may be dealing with.⁴⁵⁷ This interpretation also better serves the Court’s preventive functions. It opens the door for a shift from reactive to proactive investigative efforts. When the jurisdiction of the Court is triggered with regard to a situation of crisis, the Prosecutor may proactively monitor the situation. Notably, this preventive function of the Court’s Statute was recently emphasised by the Appeals Chamber when it interpreted Article 12 (3) ICC Statute as to not prevent the *prospective* acceptance of jurisdiction by a state, giving the Court jurisdiction in respect of any future events that may constitute crimes within the jurisdiction of the Court.⁴⁵⁸

As will be discussed, the Prosecutor’s powers are couched in broad terms.⁴⁵⁹ Hence, nothing prevents him or her from resorting to special investigative techniques, including the use of covert surveillance in conducting investigations. From the commencement of the investigation proper, the full gamut of investigative powers (some of whom will be discussed in depth in the following chapters) is at the Prosecutor’s disposal. For now, it suffices to point out that the broad evidence-gathering powers at the Prosecutor’s disposal do not prevent the use of *covert* coercive measures in a proactive manner.⁴⁶⁰ However, as will be explained later, that the Prosecutor can only exceptionally execute such covert coercive measures directly on the territory of the state concerned should be considered. Even in the exceptional (failed state) scenario, such direct execution is only possible with the authorisation of the Pre-Trial Chamber.⁴⁶¹ Even then, it may be difficult for the Prosecutor to conduct investigations on the ground. The ICC additionally allows the Prosecutor to conduct certain on-site investigations

⁴⁵⁶ See *supra*, Chapter 4, I.3.

⁴⁵⁷ See *supra*, Chapter 4, I.3., fn. 195 and accompanying text.

⁴⁵⁸ ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I on Jurisdiction and Stay of Proceedings, *Prosecutor v. Gbagbo, Situation in Côte d’Ivoire*, Case No. ICC-02/11-01/11-321 (OA 2), A. Ch., 12 December 2012, par. 83. Note that an Article 12 (3) declaration does not ‘trigger’ the Court’s jurisdiction.

⁴⁵⁹ See *infra*, Chapters 4-6.

⁴⁶⁰ Article 54 (3) ICC Statute.

⁴⁶¹ Article 57 (3) (d) and Article 99 (4) ICC Statute. See *infra*, Chapter 6.

directly on the territory of the state concerned when such can be done on a voluntary basis.⁴⁶² However, this scenario seems not to apply in the case covert investigative techniques are resorted to, as the person is by nature unaware of these investigative measures being used.⁴⁶³

Admittedly, whether the scenario outlined above is strictly proactive in nature, rather than reactive, is open to discussion. After all, the *initiation* of the investigation was reactive in nature and based on the consideration that crimes within the jurisdiction of the Court appeared to have been committed or are being committed. The statutory threshold for the commencement of the investigation proper prevents fully proactive investigations. However, this threshold is ‘selective’, in the sense that once this threshold has been established, nothing prevents the Prosecutor from investigating other crimes within the jurisdiction of the Court, as long as these crimes are sufficiently connected to the situation of crisis. The triggering of jurisdiction with regard to ‘situations’, rather than with regard to crimes in fact is a distinguishing feature of the ICC’s procedural framework.

The ICC Prosecutor can even enlarge the proactive impact of his or her investigations. One can take the example where the Prosecutor receives information that an inchoate offence (for example incitement to genocide⁴⁶⁴) within the jurisdiction of the Court has been committed by the authorities of a certain state. If proactive efforts by the Prosecutor during the preliminary examination, seeking to prevent the completion of this crime have no effect, the Prosecutor may seek the opening of a full investigation. This is possible upon the finding that there is a reasonable basis to believe that certain preparatory offences, such as incitement to genocide, or an attempt to commit a crime within the jurisdiction of the Court, has been or are being committed. In the above example, once there is a reasonable basis to believe that the authorities incite to genocide, the Prosecutor should see whether the other requirements for the opening of an investigation have been fulfilled and seek to open an investigation *proprio motu*. From the moment the Pre-Trial Chamber authorises the start of an investigation, the full gamut of prosecutorial powers becomes available and may be used proactively in preventing

⁴⁶² Article 99 (4) ICC Statute.

⁴⁶³ See A. ALAMUDDIN, Collection of Evidence, in K.A.A. Khan et al. (eds.), Principles of Evidence in International Criminal Justice, Oxford, Oxford University Press, 2010, p. 258, fn. 146.

⁴⁶⁴ Article 25 (3) (e) ICC Statute. However, consider DAVIES who does not agree that incitement to genocide is an inchoate offence under the ICC Statute. He argues that it follows from its inclusion in Article 25 that it is only a mode of liability. Hence, the prosecution of incitement to genocide is not possible when the genocide has not been completed. See T.E. DAVIES, How the Rome Statute Weakens the International Prohibition on Incitement to Genocide, in «Harvard Human Rights Journal», Vol. 22, 2009, pp. 246, 270.

the possible future completion of the crime of genocide. In a similar vein, States Parties or the Security Council may refer situations in which one or more preparatory offences with regard to crimes within the jurisdiction of the Court appear to have been committed. This course of action enhances the proactive capabilities of the Prosecutor. Of course, as a caveat, it should be realised that such a course of action may not be realistic in light of the scarce resources available to the Prosecutor.⁴⁶⁵

Nothing withholds the Prosecutor from not proceeding with a prosecution upon completion of the investigation.⁴⁶⁶ Hence, if a person attempts the commission of a crime but, as a consequence of the Prosecutor's investigation, later abandons this effort (scenario of Article 25 (3) (f) ICC Statute), then there is no ground to proceed.

One important consequence of the criminalisation of preparatory offences is that investigations become more *reactive* in nature. Hence, investigations instigated on the basis of a reasonable basis to believe that one of these preparatory offences has been committed are reactive in nature, but at the same time serve proactive goals, to know the prevention of future crimes. This illustrates that the line between proactive and reactive investigations cannot neatly be drawn. While these investigations are reactive in nature, nothing prevents them from turning into proactive ones. From a chronological perspective, it is difficult to precisely indicate the moment investigations may become proactive in nature. While in national jurisdictions such a proactive phase would precede the reactive investigation, it is clear that at the ICC, a partly proactive investigation should always follow a reactive pre-investigative phase.

The proactive application of investigative measures may have certain consequences that were not envisaged. Article 55 (2) of the ICC Statute reserves certain procedural rights to persons against whom 'there are grounds to believe that [the] person has committed a crime within the jurisdiction of the Court'.⁴⁶⁷ These safeguards would not apply to proactive investigative acts.

⁴⁶⁵ H. VAN DER WILT, Boekbespreking (bespreking van: H. Olásolo, *The Role of the International Criminal Court in Preventing Atrocity Crimes Through Timely Intervention: From the Humanitarian Intervention Doctrine and Ex Post Facto Judicial Institutions to the Notion of Responsibility to Protect and the Preventative Role of the International Criminal Court (Oratie Utrecht)*, in «Delikt en Delinkwent», Vol. 83, 2011, (p. 2). On the scarcity of resources, see *infra*, Chapter 3, II.8.

⁴⁶⁶ Article 53 (2) ICC Statute.

⁴⁶⁷ These persons will be referred to with the more general term 'suspects'.

Hence, persons that are affected by these acts should not be informed, prior to questioning, that here are grounds to believe that they have committed a crime within the jurisdiction of the Court, nor should they be informed that they hold the right to remain silent, or that they have the right to assistance by counsel and to be questioned in the presence of counsel. Persons that are affected by proactive investigative techniques only benefit from the rights of persons during an investigation that are to be found in Article 55 (1) of the ICC Statute. As a caveat, it is not unthinkable that persons that are targeted by proactive investigative measures qualify as being ‘substantially affected’ in the autonomous meaning of the ECtHR’s jurisprudence and hence enjoy the safeguards of Article 6 ECHR. In such a case they would for example enjoy a right to remain silent.

Whereas the discussion above solely focused on the use proactive investigative techniques with regard to the ICC, it may be asked in how far proactive powers could serve any useful purpose with regard to other international(ised) criminal tribunals. For most tribunals under review, the question should be answered in the negative, provided that their jurisdiction *ratione materiae* is limited to past abuses. At the ICTY, covert coercive investigative techniques which lend themselves to proactive application have been relied upon. Reference can be made to the practice of using informants to gather evidence.⁴⁶⁸ However, the proactive use of this technique is prevented by the Prosecutor’s interpretation of the ‘sufficient basis to proceed’ threshold for the commencement of the investigation and hence for the availability of the Prosecutor’s investigative powers.⁴⁶⁹ Furthermore, Article 15 ICTY Statute excludes such a possibility by limiting the Prosecutor’s authority to the ‘investigation and prosecution of persons responsible for serious violations of international humanitarian law committed...’

From the foregoing, it follows that the jurisprudence of the ICC could be interpreted as allowing for investigations into situations to become partly proactive in nature. If one subscribes to this (limited) proactive potential of ICC criminal investigations, one should enquire what rules or principles should guide the proactive application of the Prosecutor’s powers. The importance thereof is easily understood. It is clear that the proactive use of certain special investigative measures may be a delicate issue in the absence of any express regulation and where no minimum threshold (‘reasonable suspicion’) exists with regard to the

⁴⁶⁸ ICTY Manual on Developed Practice, p. 20 (“The informant is an individual who will provide confidential information but who will not be expected to be called as a witness”).

⁴⁶⁹ See *supra*, Chapter 3, I.1.

proactive application of these coercive investigative techniques by the ICC Prosecutor. The only threshold which is provided at this stage is the one required to move from the pre-investigative to the investigative stage and which has ‘situations’ as its object. This is the ‘reasonable basis to proceed’ threshold, which was discussed earlier, and which is grounded, among others, on the existence of a ‘reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed’.⁴⁷⁰ As will be discussed further on, no specific threshold applies in general to the use of non-custodial coercive investigative measures.⁴⁷¹

Guidance as to what should be considered the guiding principles for the proactive application of investigative measures at the international level may be found in a resolution adopted by the participants of the XVIIIth International Congress of Penal Law (‘AIDP Resolution’), as well as in human rights law.⁴⁷² The AIDP Resolution firstly requires that it is made clear that anticipative investigative efforts aim to establish reasonable grounds in order to initiate a criminal investigation against the organisation and/or its members.⁴⁷³ Hence, all proactive investigative efforts should have a judicial purpose. This requirement was also identified in the foregoing comparative overview of national approaches.⁴⁷⁴ If the ICC’s procedural framework is understood as to allow for anticipative investigative efforts, then this requirement would not cause difficulties. Proactive investigative efforts would in any case remain limited by the required *nexus* with the situation of conflict. In this manner, general and unlimited forms of information gathering in the absence of a judicial purpose would effectively be prevented.

Secondly, where and insofar as these investigations interfere with the right to privacy, it will be necessary for such proactive investigative powers to be precisely defined. In the absence of *any* provision on proactive investigative efforts in the ICC’s Statute or RPE, it is clear that the current regulation is not in conformity with such legality requirement. This issue will be discussed in great detail further on, when the coercive powers of the ICC Prosecutor are

⁴⁷⁰ See *supra*, Chapter 3, I.1.

⁴⁷¹ See *infra*, Chapter 6.

⁴⁷² X, Special Procedural Measures and Protection of Human Rights: Resolution, in «Revue Internationale de Droit Pénal», Vol. 80, 2009/3, pp. 547 – 552.

⁴⁷³ *Ibid.*, p. 549 (par. 10).

⁴⁷⁴ See *supra*, Chapter 3, I.4. (consider e.g. the discussion of the Belgian and Dutch approaches to proactive investigations).

addressed.⁴⁷⁵ In addition, the resolution notes that since proactive investigative efforts interfere with the right to privacy, it follows that investigative efforts should be proportionate to the aims pursued, require judicial approval (normally *ex ante*), and should be in conformity with a principle of subsidiarity.⁴⁷⁶ Further on in this study, it will be shown that these are formal and material conditions which generally apply to the use coercive measures.⁴⁷⁷ Nevertheless, there is absolutely no reason why investigative measures which seriously affect human rights should not be subject to the same stringent safeguards (judicial authorisation, proportionality, subsidiarity) when they are used during a proactive phase of the criminal investigation, rather than during the reactive phase of the criminal investigation.

Additionally, the AIDP Resolution requires independent and impartial judicial supervision over the anticipative use of intrusive measures.⁴⁷⁸ On the one hand, in the context of the ICC, it would seem logical to confer such supervising role to the Pre-Trial chamber. As the ICC Appeals Chamber held, “the Pre-Trial Chamber has the primary responsibility of ensuring the protection of the rights of the suspects during the investigation stage of proceedings.”⁴⁷⁹ The general power the Pre-Trial Chamber holds to issue, at the request of the Prosecutor “such orders and warrants as may be required for the purposes of an investigation” may then be interpreted as providing the legal basis for such requirement. On the other hand, it seems unlikely that states would agree to such understanding of the Pre-Trial Chamber’s role, since it would disturb the compromise reached in Rome. The AIDP Resolution further suggests that every person who has been the subject anticipative investigative efforts is to be duly notified thereof and that a judicial remedy is installed.⁴⁸⁰

To a certain extent, these ‘guiding principles’ are in line with requirements that follow from human rights law. It is self-evident that proactive investigative efforts are often intrusive in

⁴⁷⁵ See *infra*, Chapter 6.

⁴⁷⁶ See the Resolution reached by the participants at the XVIIIth International Congress of Penal Law (Istanbul, Turkey, 20-27th September 2009): X, Special Procedural Measures and Protection of Human Rights: Resolution, in «Revue Internationale de Droit Pénal», Vol. 80, 2009/3, p. 549.

⁴⁷⁷ See *infra*, Chapter 6.

⁴⁷⁸ X, Special Procedural Measures and Protection of Human Rights: Resolution, in «Revue Internationale de Droit Pénal», Vol. 80, 2009/3, p. 549 (par. 10).

⁴⁷⁹ ICC, Judgment on the Appeal of Mr. Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, *Situation in the DRC, Prosecutor v. Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07-2259 (OA 10), A. Ch., 12 July 2010, par. 40.

⁴⁸⁰ X, Special Procedural Measures and Protection of Human Rights: Resolution, in «Revue Internationale de Droit Pénal», Vol. 80, 2009/3, p. 550 (par. 16).

nature. Where use is made of covert investigative techniques, it is easily understood that proactive investigative efforts impact upon the right to a private life.⁴⁸¹ The impact of proactive investigative efforts on the right to privacy was considered by the ECtHR in the *Lüdi v. Switzerland* case.⁴⁸² This judgment can be interpreted as allowing for the use of coercive measures (eavesdrop) in the context of proactive investigative efforts.⁴⁸³ It concerned the interception of communications and the pseudo-purchase of drugs by an undercover agent. These investigative acts were conducted proactively, during “the preliminary stage of an investigation, where there is good reason to believe that criminal offences are about to be committed.”⁴⁸⁴ While the Commission first held that the use of the undercover agent lacked sufficient legal basis,⁴⁸⁵ the ECtHR concluded that the use of an undercover agent, alone or together with the interception of communications, did not violate Article 8 ECHR. Rather, the Court concluded that there was no violation of the right to privacy because the person involved knew he was engaged in a criminal act.⁴⁸⁶ It seems to follow from this reasoning that a person forfeits his or her right to privacy whenever engaging in a criminal activity. It implies that when an individual is involved in a criminal activity, he or she cannot reasonably expect the protection of this right. This limitation of the right to privacy is known in the US jurisprudence as the ‘reasonable expectation of privacy’ doctrine.⁴⁸⁷

However, this interpretation is entirely problematic with regard to proactive investigations. These investigative efforts aim at preventing the future commission of crimes. The information law enforcement personnel seeks, should (*ex post*) justify the intrusions on the

⁴⁸¹ The right to privacy can be found in Article 17 ICCPR, Article 8 ECHR and Article 11 of the ACHR (see also Article 12 of the UDHR and Article 7 of the EU Charter of Fundamental Rights). The right is not included in the ACHPR.

⁴⁸² ECtHR, *Lüdi v. Switzerland*, Application No. 12433/86, Judgment of 15 June 1992.

⁴⁸³ Confirming, I.G.M. MEIJERS, *Over Lüdi tegen Zwitserland*, EHRM 15 juni 1992, in «Delikt and Delinkwent» 1994, pp. 272 – 277.

⁴⁸⁴ ECtHR, *Lüdi v. Switzerland*, Application No. 12433/86, Judgement of 15 June 1992, par. 39.

⁴⁸⁵ *Ibid.*, par. 36.

⁴⁸⁶ *Ibid.*, par. 40 (“Mr. Lüdi must therefore have been aware from then on that he was engaged in a criminal act punishable under Article 19 of the Drugs Law and that consequently he was running the risk of encountering an undercover police officer whose task would in fact be to expose him”).

⁴⁸⁷ The doctrine was first introduced by Judge Harlan in his concurring opinion in the *Katz* case. He argued that for there to be a right to privacy, a twofold requirement must be fulfilled: “first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable’.” See *Katz* 389 US 347 (1967). Consider also: T. BLOM, *Privacy*, EVRM en (straf)rechtshandhaving, in C.H. BRANTS, P.A.M. MEVIS and E. PRAKKEN (eds.), *Legitieme strafvordering, Rechten van de mens als inspiratie in de 21e eeuw*, Intersentia, Groningen – Antwerpen, 2001, pp. 119 – 137.

privacy of the individuals concerned.⁴⁸⁸ The concept of ‘reasonable expectation of privacy’ should be faulted insofar that it starts from the criminal intentions (or not) of the person concerned. The consequence thereof is that in a case where the proactive investigation would not result in information on the criminal activities of the person concerned, this may entail that the person had a ‘reasonable expectation of privacy’ and that therefore, a violation of the right to privacy took place.⁴⁸⁹ Hence, this ‘reasonable expectation of privacy’ doctrine should be abandoned.⁴⁹⁰ Every individual enjoys a right to privacy, and such irrespective of the question whether or not the person concerned should have had a reasonable expectation of privacy or not.

Overall, with regard to intrusions to the right to a private life (Article 8 ECHR), it appears that the ECtHR does not distinguish between intrusions by proactive coercive investigative measures and the use of coercive measures in reactive investigations. Instead, the Court focuses on the question whether the persons involved were offered sufficient protection against arbitrary interferences with their right to privacy as guaranteed under Article 8 ECHR.

Equally problematic with regard to the proactive application of investigative measures is that it remains unclear to what use information so gathered may be put. For example, what should happen with information gathered through proactive investigative methods when no criminal proceedings ensue? This information, including the way it was gathered by the Prosecution, will never be scrutinised in the course of trial proceedings.⁴⁹¹ Also here, human rights law may prove instructive.

On several occasions, the storing, retention and use of personal data by law enforcement officials has been scrutinised by the ECtHR.⁴⁹² In the leading *Marper v. UK* case, the Grand

⁴⁸⁸ I. ONSSEA, *De bestrijding van georganiseerde misdaad: de grens tussen waarheidsvinding en grondrechten*, Antwerpen, Intersentia, 2008, p. 155.

⁴⁸⁹ *Ibid.*, p. 155.

⁴⁹⁰ *Ibid.*, pp. 155 – 156 (the author underscores the potential negative effect of such doctrine, where it may encourage law enforcement officials to resort to fishing expeditions); S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, p. 556.

⁴⁹¹ C. BRANTS and S. FIELD, *Les méthodes d’enquête proactive et le contrôle des risques*, in «*Déviance et Société*», Vol. 21, 1997, p. 404.

⁴⁹² Consider for example ECtHR, *Van der Velden v. the Netherlands*, Application No. 29514/05, Reports 2006-XV, Decision of 7 December 2006, par. 2 (the systematic retention of DNA material in the form of the taking of a mouth swab to obtain cellular material from a person amounts to an interference with the right to privacy); ECtHR, *P.G. and J.H. v. The United Kingdom*, Application No. 44787/98, Judgment of 25 September 2001 (finding, *inter alia*, that a permanent record of a person’s voice which is subject to a process of further analysis

Chamber of the ECtHR held that “the mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8.” The Court has found several forms of personal information stored, including fingerprints, cellular samples or DNA profiles to constitute ‘data relating to the private life’ and hence to constitute an interference of Article 8 ECHR.⁴⁹³ While the retention of such personal data usually serves a legitimate purpose since it aims at the prevention of crime, the Court has emphasised in its case law that the private character of information stored calls for strict control by the Strasbourg Court over the storage and use of the personal data without the person’s consent.⁴⁹⁴ The retention of personal data should be proportionate and should strike a fair balance between public and private interests.⁴⁹⁵

In any case, a legal basis, offering adequate legal protection against arbitrariness, is required.⁴⁹⁶ Clear and detailed rules, both on the scope and application of measures are required.⁴⁹⁷ Appropriate safeguards must be provided to prevent any use of information gathered which is inconsistent with Article 8 ECHR.⁴⁹⁸ This requires detailed regulations as to the types of information that are stored and a clear regulation as to the categories of people against whom surveillance measures, such as the gathering and keeping of information may be taken. Moreover, the circumstances in which such information may be taken should be detailed and strict limitations as to the length such information can be stored should be

amounts to an interference with Article 8 ECHR); ECtHR, *Rotaru v. Romania*, Application No. 28341/95, Reports 2000-V, Judgment (Grand Chamber) of 4 May 2000, par. 46 (holding that “both the storing by a public authority of information relating to an individual’s private life and the use of it and the refusal to allow an opportunity for it to be refuted amount to interference with the right to respect for private life secured in Article 8 § 1”); ECtHR, *Amann v. Switzerland*, Application No. 27798/95, Judgment (Grand Chamber) of 16 January 2000 par. 65 – 67 (storing of personal information amounted to an interference with Article 8 ECHR); ECtHR, *Leander v. Sweden*, Application No. 27798/95, Reports 2000-II, Judgment (Grand Chamber) of 16 February 2000, par. 48 (both the storing and release of information on the person’s private life as well as the denial to the person concerned of an opportunity to refute the data constituted an interference with the right to privacy); ECtHR, *S. and Marper v. The United Kingdom*, Application Nos. 30562/04 and 30566/04, Judgment (Grand Chamber) of 4 December 2008, par. 66 – 86 (holding that “the mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8” and that retention of both cellular samples and DNA profiles as well as the use and storage of fingerprints concern data relating to the private life and hence constitute an interference with the right to privacy).

⁴⁹³ See the references in fn. 492 above.

⁴⁹⁴ ECtHR, *S. and Marper v. The United Kingdom*, Application Nos. 30562/04 and 30566/04, Judgment (Grand Chamber) of 4 December 2008, par. 104.

⁴⁹⁵ *Ibid.*, par. 118.

⁴⁹⁶ *Ibid.*, par. 95.

⁴⁹⁷ *Ibid.*, par. 95.

⁴⁹⁸ ECtHR, *Rotaru v. Romania*, Application No. 28341/95, Reports 2000-V, Judgment (Grand Chamber) of 4 May 2000, par. 59.

provided for.⁴⁹⁹ The ECtHR has underlined the special importance of these safeguards with regard to the automatic processing of information, not least when such data is used for police purposes.⁵⁰⁰ Such guarantees should ensure that data is relevant and not excessive and that information does not permit identification for a longer period than required for the purpose for which information is stored. Furthermore, they should offer sufficient protection against misuse or abuse thereof and should indicate the persons authorised to consult the files, the nature of the files and the use that can be made of the information obtained.⁵⁰¹

More detailed guidance in this regard may be found at the regional level. The 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ('Data Protection Convention') of the Council of Europe has the protection of the right to privacy with regard to the automated processing of personal data as its purpose.⁵⁰² It contains a number of basic principles regarding the storing of personal data, including requirements that information gathered is adequate, relevant and not excessive in relation to the purpose for which it is stored. This implies a principle of subsidiarity.⁵⁰³ Information should be accurate, obtained and processed fairly and lawfully, and stored for specific purposes. It may not be used in a manner which is incompatible with this purpose.⁵⁰⁴ Moreover, the information may not be stored longer than necessary for the purpose for which the information is stored in an identifiable form.⁵⁰⁵

Within the EU, Directive 95/46/EC of 24 October 1995 with regard to the processing of personal data and on the free movement of such data ('Data Directive') should be

⁴⁹⁹ *Ibid.*, par. 57.

⁵⁰⁰ ECtHR, *S. and Marper v. The United Kingdom*, Application Nos. 30562/04 and 30566/04, Judgment (Grand Chamber) of 4 December 2008, par. 103.

⁵⁰¹ *Ibid.*, par. 103.

⁵⁰² Article 1 of the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ('Data Protection Convention'), CoE, ETS No. 108, 28 January 1981. The Data Protection Convention defines 'personal data' as 'any information relating to an identified or identifiable individual ("data subject")'.

⁵⁰³ E. DE BUSSE, Examples and Assumptions: Transatlantic Data Protection in Criminal Matters, in «Journal of Internet Law», Vol. 15, 2012, p. 5. A proposed amendment of the Convention foresees the inclusion of an express principle of proportionality. See EU council (DG 1), The Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data [ETS No. 108], T-PD-BUR(2012)01EN, 18 January 2012.

⁵⁰⁴ Article 5 (a) – (d) Data Protection Convention.

⁵⁰⁵ Article 5 (e) Data Protection Convention.

mentioned.⁵⁰⁶ Similar to the Data Protection Convention, this Directive has the protection of the right to privacy as its object. Furthermore, a Framework Decision regulates the protection of personal data in criminal matters. Notably, it expressly includes the principles of legality, legitimate purpose and proportionality.⁵⁰⁷

It is evident that there is no such adequate legal basis for the storage of proactively gathered information within the procedural framework of the ICC. From the ICC RPE, it follows that the Prosecutor is responsible for the retention, storage and security of information or evidence obtained in the course of investigations by his or her office.⁵⁰⁸ Moreover, the ICC Statute outlines the Prosecutor's general power to take or to request the taking of measures to ensure the preservation of evidence.⁵⁰⁹ All information or evidence collected by the Prosecution is subsequently stored in an evidence database, within the OTP.⁵¹⁰ However, further safeguards on how this information and evidence is to be stored and to what use this information and evidence can be put to are entirely lacking.

For example, it is unclear how long information will stay within the OTP's evidence database (for example after an acquittal) and what use can be made of the information stored therein. This lack of clarity is particular problematic with regard to the disprove of suspicions or the discontinuance of proceedings against a person and with regard to acquittals. In *Marper v. UK*, the Grand Chamber of the ECtHR concluded that the indiscriminate retention of personal data of persons suspected but not convicted of criminal offences, irrespective of the gravity or nature of the offence, in the absence of any time limitation and with only limited possibilities for having data removed upon acquittal, was disproportionate.⁵¹¹ Within Europe, the UK was the only country allowing for the indefinite and systematic storage of personal data and cellular material of persons who had been acquitted or, in respect of whom, criminal

⁵⁰⁶ Directive 95/46/EC of the European Parliament and Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal of the European Communities L 281, 23 November 1995, pp. 31–50.

⁵⁰⁷ Article 3 of the Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, Official Journal of the European Union L 350, 30 December 2010, pp. 60–71.

⁵⁰⁸ Rule 10 ICC RPE.

⁵⁰⁹ Article 54 (3) (f) ICC Statute.

⁵¹⁰ Regulation 23 of the Regulations of the OTP. Every item or page should be given an evidence information number.

⁵¹¹ ECtHR, *S. and Marper v. The United Kingdom*, Application Nos. 30562/04 and 30566/04, Judgment (Grand Chamber) of 4 December 2008, par. 105–126.

proceedings had been discontinued.⁵¹² In most European states, this material should, leaving aside some exceptions, be removed immediately or shortly after a discharge or acquittal.⁵¹³ The retention of personal data after an acquittal or after proceedings are discontinued would likewise violate the basic principles of data protection in Europe which were outlined above. Personal data cannot longer be stored than necessary in light of the purpose for which it was stored. After the acquittal or discontinuance of the prosecution, it seems that the purpose for which the data was gathered disappears.

In a similar vein, the retention of evidence and information upon the conviction of the accused may violate the right to privacy. The principles outlined above, in particular the principle of proportionality, are again important in this respect. One commentator argues that since the danger of repetition “can never be totally ruled out”, the storage and retention for a certain amount of time would be acceptable.⁵¹⁴ Indeed, especially since it follows from the ICC’s fifth preambular paragraph that the future prevention of crimes within the jurisdiction of the Court is one of the goals of the prosecutions, the storage and retention of information for a limited amount of time should be allowed for. However, it will be necessary to introduce time limitations, otherwise the retention and storage may become disproportional. For example, the EU Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters requires ‘appropriate time limits [...] for the erasure of personal data or for a periodic review of the need for the storage of data’.⁵¹⁵

II. PROSECUTORIAL DISCRETION

II.1. Introduction

Divergent approaches exist in national criminal justice systems with regard to the question whether the Prosecutor is under a duty or holds discretion in investigating and prosecuting cases.⁵¹⁶ Two different understandings are respectively referred to as the ‘principle of

⁵¹² *Ibid.*, par. 47.

⁵¹³ *Ibid.*, par. 108.

⁵¹⁴ C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, p. 284.

⁵¹⁵ Article 5 of the Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.

⁵¹⁶ Consider A. PERRODET, *The Public Prosecutor*, in M. DELMAS-MARTY and J.R. SPENCER (eds.), *European Criminal Procedure*, Cambridge, Cambridge University Press, 2002, p. 441 (adding that such depends “on whether the public interest in prosecuting and the general will as expressed by the rules of criminal law are considered to be the same thing or two different things”).

opportunity' (or the 'principle of expediency') and the 'principle of legality' and will be briefly discussed below.⁵¹⁷ It will be shown how these two approaches do not correspond to the traditional common law/civil law divide.

The subsequent section tries to elucidate which of these two approaches prevails in international criminal procedure. It is not the purpose here to provide a detailed discussion on the selection of cases at the different tribunals under review. However, in order to provide a clear understanding of the approach in international criminal procedure, some attention will be paid to the role of judges and other actors in the exercise of prosecutorial discretion.

The principle of legality (also known as the *Legalitätsprinzip*) compels the prosecuting authority to investigate upon the communication of the *notitia criminis* and to prosecute whenever sufficient evidence is available.⁵¹⁸ It implies that the investigation and prosecution are considered to be quasi-jurisdictional functions, and not a means to implement policies.⁵¹⁹ It is the approach which is typically found in many civil law countries, including Germany or Italy. In all systems where the principle of mandatory prosecution reigns, various exceptions limit its application nevertheless.⁵²⁰ In Italy, this principle has been constitutionally anchored.⁵²¹ However, the system has in practice led to a 'prioritisation' of cases notwithstanding the obligation to prosecute all cases and discretion is present in many of the

⁵¹⁷ A. MCDONALD and R. HAVEMAN, Prosecutorial Discretion – Some Thoughts on 'Objectifying' the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC, Expert Consultation Process on General Issues Relevant to the ICC Office of the Prosecutor, 15 April 2003, p. 2 (the author labels the principle of legality 'yes, if' and prosecutorial discretion as the option of 'no, unless').

⁵¹⁸ H. OLÁSOLO, The Prosecutor of the ICC before the Initiation of Investigations, in «International Criminal Law Review», Vol. 3, 2003, p. 111; C.J.M. SAFFERLING, Towards an International Criminal Procedure, Oxford, Oxford University Press, 2001, p. 173 (referring to § 160 (I) StPO and 152 (II) StPO).

⁵¹⁹ H. OLÁSOLO, The Prosecutor of the ICC before the Initiation of Investigations, in «International Criminal Law Review», Vol. 3, 2003, p. 115.

⁵²⁰ K. AMBOS, The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports, in «European Journal of Crime, Criminal Law and Criminal Justice», Vol. 8/2, 2000, p. 100 (illustrating how even national criminal justice systems that strictly adhere to the principle of legality provide for mechanisms allowing discretion where "prosecutors are not able to prosecute every minor offence in the adequate time"); A.M. DANNER, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, in «American Journal of International Law», Vol. 97, 2003, p. 512 (on the German system).

⁵²¹ Cf. Article 112 of the Italian Constitution. Confirming, see G. ILLUMINATI, Italy, in L. ARBOUR, A. ESER, K. AMBOS and A. SANDERS, The Prosecutor of an International Criminal Court: International Workshop in Co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR), Freiburg im Breisgau, Max-Planck Institut für ausländisches und internationales Strafrecht, 2000, p. 371. Before the adoption of a new Criminal Procedure Code in 1989, Italy strictly adhered to the principle of legality, which resulted in huge judicial backlogs. See Y. MA, Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany and Italy: A Comparative Perspective, in «International Criminal Justice Review», Vol. 12, 2002, p. 39.

acts undertaken by the Prosecutor in the prosecution of a case.⁵²² Exceptions exist for a number of less serious offences, where there exists only a limited public interest or where prosecution is only mandatory following a specific application (*querela*) by the victim.⁵²³ As a corollary to the principle of compulsory prosecution, the Prosecutor is prevented from closing the investigation him or herself.⁵²⁴ The principle is equally familiar to the German criminal justice system, where the *Strafprozeßordnung* obliges the public Prosecutor to prosecute all offences capable of being prosecuted, save those treated otherwise by the law, as soon as the facts are sufficiently established.⁵²⁵ The principle is rooted in the objective to ensure equality before the law and in the prevention of arbitrary prosecution.⁵²⁶ Generally speaking, the principle of mandatory prosecution helps ensuring the independence of the Prosecutor by preventing outside pressure. However, several provisions limit the application of this principle.⁵²⁷ Notably, for example, the dropping of less serious cases is possible, provided that the judge consents and provided that the culpability is minor and there is no public interest in prosecuting.⁵²⁸ Furthermore, Section 153a (1) StPO allows for a conditional dispensing with the prosecution of the case provided that the accused person agrees. Moreover, proceedings may be discontinued with regard to ‘insignificant secondary

⁵²² A. PERRODET, The Public Prosecutor, in M. DELMAS-MARTY and J.R. SPENCER (eds.), *European Criminal Procedure*, Cambridge, Cambridge University Press, 2002, p. 447. Critical, consider G. ILLUMINATI, Italy, in L. ARBOUR, A. ESER, K. AMBOS and A. SANDERS (eds.), *The Prosecutor of an International Criminal Court: International Workshop in Co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, Freiburg im Breisgau, Max-Planck Institut für ausländisches und internationales Strafrecht, 2000, p. 372 (arguing that “[s]ince many of the lesser offences cannot be tried before the expiry of the time limits, in some respects this system could be regarded as a surreptitious way to introduce a principle of expediency in prosecution”).

⁵²³ *Ibid.*, p. 371.

⁵²⁴ *Ibid.*, p. 372.

⁵²⁵ Section 152 (2) StPO.

⁵²⁶ C.J.M. SAFFERLING, *Towards an International Criminal Procedure*, Oxford University Press, Oxford, 2001, p. 172 (the author notes that underlying is the belief that it is for the government to prescribe rules and to criminalise certain behaviour. The Prosecutor, himself or herself resorting under the executive, merely enforces these rules. It is a further expression of the *Rechtstaatprinzip*); A.M. DANNER, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, in «*American Journal of International Law*», Vol. 97, 2003, p. 537. As noted by STAHN, the principle insulates the Prosecutor from political pressure. See C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years on*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 254. Consider also R. CRYER, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge, Cambridge University Press, 2005, p. 192.

⁵²⁷ Therefore, some authors prefer to label the German system a combination of the principle of legality and the principle of opportunity and noted that a gradual move towards the principle of opportunity can be noticed. See A. PERRODET, *The Public Prosecutor*, in M. DELMAS-MARTY and J.R. SPENCER (eds.), *European Criminal Procedure*, Cambridge, Cambridge University Press, 2002, p. 449.

⁵²⁸ Section 153 (1) StPO. Besides the creation of exceptions to the principle of legality, other mechanisms to cope with the number of cases include increasing the personnel of the Prosecutor’s office and the decriminalisation of minor offences. See C.J.M. SAFFERLING, *Towards an International Criminal Procedure*, Oxford University Press, Oxford, 2001, p. 173.

penalties', where a penalty would be insignificant in comparison with the punishment for another offence committed by the accused.⁵²⁹ Hence, the principle of legality is not as strict and leaves some discretion, albeit limited, with the Prosecutor.⁵³⁰

In turn, the principle of opportunity leaves discretion whether or not to investigate and/or prosecute a crime to the prosecuting authority (*opportunité des poursuites*). This principle is traditionally found in common law countries, leaving broad discretion to the Prosecutor whether or not to prosecute a case.⁵³¹ For example, in England and Wales the decision to prosecute is left with the police in the first stage and discretion is subsequently left with the CPS to decide whether there exists sufficient evidence and whether or not the 'public interest' requires a prosecution.⁵³² The exercise of this discretion is structured by the Code for Crown Prosecutors, issued by the Director of Public Prosecutions.⁵³³ These guidelines are intended to ensure the coherence and transparency of the penal policy of the prosecution service.⁵³⁴ They include criteria that limit the discretion with regard to the evidence available (by requiring an objective assessment of the presence of a 'realistic prospect of conviction', not only regarding the admissibility and reliability of the prosecution evidence, but also the implicit consideration of possible defences that might be raised) and of the public interest in the prosecution (based on criteria that denote proportionality and the weighing of arguments in favour and against prosecution).⁵³⁵ According to PERRODET, in practice the prosecution mostly leaves the decision to the police on the basis of their closer relationship with the local

⁵²⁹ Sections 154 and 154a StPO.

⁵³⁰ C.J.M. SAFFERLING, *Towards an International Criminal Procedure*, Oxford University Press, Oxford, 2001, p. 174; P. MORRÉ, National Report: Germany, in L. ARBOUR, A. ESER, K. AMBOS and A. SANDERS (eds.), *The Prosecutor of an International Criminal Court: International Workshop in Co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, Freiburg im Breisgau, Max-Planck Institut für ausländisches und internationales Strafrecht, 2000, p. 343.

⁵³¹ K. AMBOS, *The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports*, in «European Journal of Crime, Criminal Law and Criminal Justice», Vol. 8/2, 2000, p. 98. Similarly, the Prosecutor may decide to stop an investigation that has already been initiated, e.g. because of lack of public interest in prosecuting the case (*ibid.*, p. 98).

⁵³² Section 23 (III) PACE (1984). At the moment the CPS receives the case, the investigation will normally already have been closed. Similarly, the public Prosecutor in the United States enjoys nearly unfettered discretion whether or not to bring charges against a suspect. See L.F. HORTON, *Prosecutorial Discretion Before International Criminal Courts and Perceptions of Justice: How Expanded Prosecutorial Independence Can Increase the Accountability of International Actors*, in «Eyes on the ICC», Vol. 7, 2010-2011, p. 8.

⁵³³ Section 10 of the Prosecution of Offences Act (POA) 1985.

⁵³⁴ A. PERRODET, *The Public Prosecutor*, in M. DELMAS-MARTY and J.R. SPENCER (eds.), *European Criminal Procedure*, Cambridge, Cambridge University Press, 2002, p. 442.

⁵³⁵ *Ibid.*, pp. 442 – 443; A. SANDERS, *England and Wales (United Kingdom)*, in L. ARBOUR, A. ESER, K. AMBOS and A. SANDERS (eds.), *The Prosecutor of an International Criminal Court: International Workshop in Co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, Freiburg im Breisgau, Max-Planck Institut für ausländisches und internationales Strafrecht, 2000, p. 298.

community and probably also because of the close cooperation between the prosecution and the police.⁵³⁶ While in the ideal-type inquisitorial system, neither side has any right to drop the case, to bargain about the outcome or the way in which it will be tried, prosecutorial discretion is equally to be found in some ‘French-styled’⁵³⁷ civil law countries; for example, in France, Belgium and The Netherlands.⁵³⁸ These systems have in common that the Prosecutor hierarchically resorts under the executive.

Several advantages have been associated with the principle of opportunity, including the greater fairness of this principle (by avoiding unworthy prosecutions), the greater efficiency (avoiding backlogs) as well as the greater transparency (in all criminal justice systems, choices have to be made, but only in systems adhering to the principle of legality, these choices are hidden).⁵³⁹

The introductory comparative overview above illustrates that national criminal justice systems never apply the principle of legality in its purest form, and that varying levels of prosecutorial discretion exist.⁵⁴⁰ All countries to some extent allow for prosecutorial discretion. Nevertheless, the modalities and scope of such discretion varies widely. One scholar in this regard discerns six variables, to know (1) the actor in charge of pre-investigations, (2) the point when the pre-investigation is triggered, (3) the entity responsible for taking the decision in the start of the investigation, (4) the level of discretion involved in the initiation of a formal investigation, (5) the circumstances under which investigations can be dismissed and (6) the control of the decision by another body.⁵⁴¹ As will emerge from the analysis below, different

⁵³⁶ A. PERRODET, *The Public Prosecutor*, in M. DELMAS-MARTY and J.R. SPENCER (eds.), *European Criminal Procedure*, Cambridge, Cambridge University Press, 2002, p. 443.

⁵³⁷ R. CRYER, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge, Cambridge University Press, 2005, p. 192.

⁵³⁸ N. JÖRG, S. FIELDS and C. BRANTS, *Are Inquisitorial and Adversarial Systems Converging?*, in P. FENNEL, C. HARDING, N. JÖRG and B. SWART (eds.), *Criminal Justice in Europe, a Comparative Study*, Oxford, Clarendon Press, 1995, p. 48. Consider Article 40-1 CPP (France) and Article 58^{quater} Sv. (Belgium). On The Netherlands, consider M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, p. 42.

⁵³⁹ P. WEBB, *The ICC Prosecutor’s Discretion not to Proceed in the “Interests of Justice”*, in *«Criminal Law Quarterly»*, Vol. 50, 2005, p. 312.

⁵⁴⁰ *Ibid.*, p. 310 (the author discerns a trend in state practice towards discretionary rather than obligatory prosecution); Similarly, M.M. DEGUZMAN, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, in *«Michigan Journal of International Law»*, Vol. 33, 2012, p. 276; H.B. JALLOW, *Prosecutorial Discretion and International Criminal Justice*, in *«Journal of International Criminal Justice»*, Vol. 3, 2005, p. 145 (calling prosecutorial discretion “a necessary and fundamental concept in the administration of criminal justice” and “essential to any system of criminal justice”).

⁵⁴¹ I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 370.

levels of prosecutorial discretion can similarly be discerned at the various international criminal tribunals. This may be surprising where in practice all national criminal justice systems provide for a ‘principle of legality’, *at least as far as the most serious crimes are concerned*, since it would not be in the ‘public interest’ to leave these crimes without prosecution.⁵⁴²

Hence, the question arises whether and to what extent the concepts outlined above are applicable to prosecutions at the international echelon. As will be illustrated later, for various reasons, the necessity of at least some form of prosecutorial discretion in initiating investigations and prosecuting crimes holds all the more true at the international level. This diminishes the value of drawing comparisons with the prosecution of (serious) crimes at the national level. As ARBOUR convincingly points out, domestic criminal justice systems are never called upon to be selective in the prosecution of serious crime.⁵⁴³ STAHN takes issue with such justification for the necessity of prosecutorial discretion in international criminal proceedings. He discerns a paradox in the argument that the number of potential cases necessitates prosecutorial discretion and “should justify the absence or a lesser degree of objective scrutiny of prosecutorial discretion.”⁵⁴⁴ Nevertheless, this stretches the argument by ARBOUR too far. She only argues that whereas in domestic criminal justice, all ‘serious cases’ will normally be prosecuted, provided that sufficient evidence is available, the differing nature of international criminal prosecutions does not allow to do so, necessitating the Prosecutor to be selective and operate in a manner which complements national jurisdictions.⁵⁴⁵ At no point, she touches on the issue of (judicial) control over such prosecutorial discretion.

⁵⁴² C.J.M. SAFFERLING, *Towards an International Criminal Procedure*, Oxford, Oxford University Press, 2001, p. 178.

⁵⁴³ L. ARBOUR, *Progress and Challenges in International Criminal Justice*, in «Fordham International Law Journal», Vol. 21, 1997-1998, p. 534. For a similar argument, consider A.M. DANNER, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, in «American Journal of International Law», Vol. 97, 2003, p. 521 (“Even in domestic systems that vest prosecutors with significant discretion, there is a clear assumption that the most serious crimes, like murder, will be prosecuted”).

⁵⁴⁴ C. STAHN, *Judicial Review of Prosecutorial Discretion: on Experiments and Imperfections*, in G. SLUITER and S. VASILIEV, *International Criminal Procedure: Towards a Coherent Body of Law*, London, CMP Publishing, 2009, p. 243; similarly, consider C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years on*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 256.

⁵⁴⁵ L. ARBOUR, *Progress and Challenges in International Criminal Justice*, in «Fordham International Law Journal», Vol. 21, 1997-1998, p. 534.

The argumentation by ARBOUR can be agreed with. At the national level, prosecutors are expected to investigate and prosecute serious crimes. Irrespective of whether a principle of opportunity or of legality prevails in a national criminal justice system, only rarely will serious crimes not be prosecuted. However, at the international echelon, international criminal tribunals will only investigate and prosecute a few cases. Hence, any comparison is flawed from the outset.⁵⁴⁶

II.2. The *ad hoc* tribunals: broad discretion

Pursuant to Article 18 (1) ICTY Statute and Article 17 (1) ICTR Statute, it is for the Prosecutor to determine whether there is ‘sufficient basis to proceed’ with an investigation. Hence, as confirmed by the case law, the Prosecutor enjoys broad discretion in initiating investigations.⁵⁴⁷ No obligation to investigate all crimes can readily be discerned (*opportunit  des poursuites*). However, at least one author holds the view that the ICTY and ICTR Statute express an obligation to assess every case and to assess the level of suspicion, in line with the principle of legality.⁵⁴⁸

In turn, the wording of Article 18 (4) ICTY Statute (and equivalent Article 17 (4) ICTR Statute) which deals with the decision to prosecute, seems to betray a *duty to prosecute* (‘shall’). This viewpoint is shared by the doctrine.⁵⁴⁹ This suggests that from the moment that

⁵⁴⁶ For a similar argumentation, see M.M. DEGUZMAN, Choosing to Prosecute: Expressive Selection at the International Criminal Court, in «Michigan Journal of International Law», Vol. 33, 2012, p. 269 (“Prosecutors are expected to prosecute the vast majority of cases; and, on the rare occasions when a prosecutor’s decision whether or not to prosecute a case is controversial, such debates are generally limited to the particular case.”) Further, she argues with regard to national prosecutions that “only very exceptionally will a selection decision spark challenges to the legitimacy of the entire criminal justice system”); *ibid.*, p. 277 (“national courts usually enjoy much greater parity between available resources and the conduct the community wants to punish than does the ICC”); A.K.A. GREENAWALT, Justice Without Politics? Prosecutorial Discretion and the International Criminal Court, in «NYU Journal of International Law & Politics», Vol. 39, 2007, p. 610 (the author notes that “in many domestic systems [...] the system can at least aspire toward something approximating universal prosecution, at least in the context of the most serious, violent crimes”).

⁵⁴⁷ ICTY, Judgement, *Prosecutor v. Delali *, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 602 (“It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments”); ICTR, Decision on Ntabakuze Petition for a Writ of Mandamus and Related Defence Requests, *Prosecutor v. Bagosora et al.*, T. Ch. I, 18 April 2007, par. 6 (the Trial Chamber states that “the Prosecutor has independence and unfettered discretion to decide which investigations and prosecutions to pursue”).

⁵⁴⁸ C.J.M. SAFFERLING, Towards an International Criminal Procedure, Oxford, Oxford University Press, 2001, p. 176.

⁵⁴⁹ I. STEGMILLER, The Pre-Investigation Stage of the ICTY and the ICC Compared, in T. KRUESSMANN (ed.), ICTY: Towards a Fair Trial?, Wien–Graz, Neuer Wissenschaftlicher Verlag, 2008, p. 329; D.D.N. NSEREKO, Prosecutorial Discretion before National Courts and International Tribunals, in «Journal of

the Prosecutor has evidence which amounts to a *prima facie* case, he or she *should* prosecute. At that moment, he or she should prepare and submit an indictment to the Trial Chamber. In this regard, the Trial Chamber may be said to exercise a supervisory function, restricting the discretion of the Prosecutor. However, case law of the ICTY confirmed that no requirement exists to prosecute in all cases where sufficient evidence is available.⁵⁵⁰ Moreover, no judicial review is provided for if the Prosecutor decides not to present an indictment (*nolle prosequi*).⁵⁵¹ Furthermore, the absence of a duty to prosecute in all such cases (principle of strict legality) clearly follows from the concept of concurring jurisdiction.⁵⁵² It is for the Prosecutor, as *dominus litis*, to decide on the selection of cases and crimes for investigation and prosecution.⁵⁵³

The existence of discretion should be understood in light of Article 16 (1) ICTY Statute which refers to ‘persons responsible for serious violations of international humanitarian law

International Criminal Justice», Vol. 3, 2005, pp. 135 - 136 (noting that regarding the decision to prosecute, the Prosecutors only have limited discretion).

⁵⁵⁰ ICTY, Judgement, *Prosecutor v. Delalić*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 602 (“In the present context, indeed in many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted”); ICTY, Decision on Motion Challenging Jurisdiction, *Prosecutor v. Strugar*, Case No. IT-01-42-PT, T. Ch., 7 June 2002, par. 29; ICTY, Reasons for Refusal of Leave to Appeal from Decision to Time Limit, *Prosecutor v. Milošević*, Case No. IT-02-54-AR73, Bench of the A. Ch, 16 May 2002, par. 12; M. BERGSMO, C. CISSÉ and C. STAKER, *The Prosecutors of the International Tribunals: The Case of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared*, in L. ARBOUR, A. ESER, K. AMBOS and A. SANDERS (eds.), *The Prosecutor of an International Criminal Court: International Workshop in Co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, Freiburg im Breisgau, Max-Planck Institut für ausländisches und internationales Strafrecht, 2000, p. 135; C. ANGERMAIER, *Case Selection and Prioritization Criteria in the Work of the International Criminal Tribunal for the Former Yugoslavia*, in M. BERGSMO (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Oslo, Torkel Opsahl Academic EPublisher, 2010, p. 29 (“In submitting the indictment the Prosecutor *selects* a case for prosecution before the ICTY” (emphasis added)); L. REYDAMS, *The ICTR Ten Years On: Back to the Nuremberg Paradigm?*, in «Journal of International Criminal Justice», Vol. 3, 2005, p. 983, fn. 27 (noting that the suggestion by Ntanda Nsereko that a ‘duty to prosecute’ exists “would lead to an untenable situation”); H.B. JALLOW, *Prosecutorial Discretion and International Criminal Justice*, in «Journal of International Criminal Justice», Vol. 3, 2005, pp. 147-148 (“the Statute vests authority in the Prosecutor to exercise his discretion and judgment as to whether an indictment should be filed”).

⁵⁵¹ Where the Prosecutor is solely responsible for prosecutions, he or she may withdraw the indictment without prior judicial leave, until the indictment has been confirmed. After an indictment has been confirmed, the indictment may only be withdrawn with leave from the Judge who confirmed the indictment, a Judge assigned by the President or by motion before the Trial chamber to which the case has been assigned (Rule 51 (A) ICTY and ICTR RPE).

⁵⁵² Consider Article 9 ICTY Statute and Article 8 ICTR and SCSL Statute; Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, par. 64.

⁵⁵³ C. STAHN, *Judicial Review of Prosecutorial Discretion: on Experiments and Imperfections*, in G. SLUITER and S. VASILIEV, *International Criminal Procedure: Towards a Coherent Body of Law*, London, CMP Publishing, 2009, p. 241.

committed in the territory of the former Yugoslavia since 1991'.⁵⁵⁴ This broad formulation of the task of the tribunal includes thousands of potential cases.⁵⁵⁵

While a selection is thus necessary, the statutory frameworks of the *ad hoc* tribunals do not contain criteria for the selection/prioritisation of cases. This implies that a decision of what *criteria* to consider is left to the Prosecutor. The Prosecutor's selection of cases is not subject to judicial scrutiny since the Trial Chamber cannot decline to confirm an indictment when it disagrees with the Prosecutor's decision to bring a case.⁵⁵⁶

§ *Limitations to prosecutorial discretion*

Several factors limit the prosecutorial discretion in investigating and prosecuting cases. These limitations on prosecutorial discretion can be categorised as follows. In the first category, limitations can be grouped which derive from the conception and understanding of the role of the Prosecutor at the *ad hoc* tribunals. A second class of limitations follows from the implementation of the completion strategy.

As far as the first group of limitations is concerned, it should firstly be noted that the concepts of prosecutorial independence and prosecutorial discretion are closely related. The Prosecutor's independence prevents him or her from (actively) seeking or (passively) receiving instructions from any government or any other source on how to exercise his or her discretion.⁵⁵⁷ Secondly, the Appeals Chamber in *Delalić et al.* clarified that the prosecutorial

⁵⁵⁴ Emphasis added.

⁵⁵⁵ L. CÔTÉ, International Criminal Justice : Tightening Up the Rules of the Game, in «International Review of the Red Cross», Vol. 88, 2006, pp. 139.

⁵⁵⁶ ICTY, Judgment, *Prosecutor v. Jelisić*, Case No. IT-95-10-A, A. Ch., 5 July 2001, Partial Dissenting Opinion of Judge Wald, par. 4 (“Nowhere in the Statute is any Chamber of the ICTY given authority to dismiss an indictment or any count therein because it disagrees with the wisdom of the Prosecutor's decision to bring the case”); C. ANGERMAIER, Case Selection and Prioritization Criteria in the Work of the International Criminal Tribunal for the Former Yugoslavia, in M. BERGSMO (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Oslo, Torkel Opsahl Academic EPublisher, 2010, p. 29 (clarifying that Article 19 ICTY Statute “does not allow the judges to review the application of extra-evidentiary criteria for the selection of cases”).

⁵⁵⁷ Article 16 (2) ICTY Statute; Article 15 (2) ICTR Statute and Article 15 (1) SCSL Statute. See ICTY, Judgement, *Prosecutor v. Delalić*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 603: the ICTY Appeals Chamber affirmed the close relationship between prosecutorial discretion and prosecutorial independence, which one author describe as “opposite sides of the same coin.” See L. CÔTÉ, Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law, in «Journal of International Criminal Justice», Vol. 3, 2005, p. 174; L. WALDORF, “A mere Pretense of Justice”: Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal, in «Fordham International Law Journal», Vol. 33, 2010, p. 1261. JALLOW goes one

discretion is further circumscribed by his or her position as an “official vested with specific duties imposed by the Statute or the Tribunal.”⁵⁵⁸ This entails that the Prosecutor should exercise his functions “with full respect of the law”, including with full respect of the recognised principles of human rights.⁵⁵⁹ Two of these principles which constitute an important limiting factor are the *principle of non-discrimination* and the *principle of equality*.⁵⁶⁰ They require that all persons are treated equal by the tribunal. These principles can be found in international human rights law, and in Additional Protocol I to the Geneva Conventions.⁵⁶¹ These principles address the tension that may exist “between individual prosecutorial decisions and protection from arbitrary state action.”⁵⁶²

An accused may claim that his or her prosecution was selective. The importance of such a defence lies where no control mechanism exists for the review of a decision not to prosecute.⁵⁶³ Indeed, originally, judicial control over prosecutorial discretion was limited to this issue of selective charging.⁵⁶⁴ The ICTY Appeals Chamber qualified the principle that all persons are equal before the tribunal as “central to the principle of due process of law” and a “firmly established principle of international law.”⁵⁶⁵ The principle requires the Prosecutor not to discriminate in the selection of cases for investigation and prohibits indictment on impermissible motives such as race, religion, opinion, national or ethnic origin.⁵⁶⁶ Proof is

step further calling prosecutorial discretion “an indispensable element of prosecutorial independence.” See H.B. JALLOW, *Prosecutorial Discretion and International Criminal Justice*, in «Journal of International Criminal Justice», Vol. 3, 2005, p. 146.

⁵⁵⁸ See ICTY, Judgement, *Prosecutor v. Delalić*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 604.

⁵⁵⁹ *Ibid.*, par. 604.

⁵⁶⁰ Article 21 (1) and (4) ICTY Statute; Article 20 (1) and (4) ICTR Statute and Article 17 (1) and (4) SCSL Statute.

⁵⁶¹ Article 14 (1) ICCPR and 26 ICCPR; Article 7 UDHR; Article 8 (2) ACHR; Article 14 ECHR (in relation to other rights and freedoms in the ECHR); Article 75 (1) Additional Protocol I GC.

⁵⁶² A.M. DANNER, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, in «American Journal of International Law», Vol. 97, 2003, p. 518.

⁵⁶³ L. WALDORF, “A mere Pretense of Justice”: Complementarity, Sham Trials, and Victor’s Justice at the Rwanda Tribunal, in «Fordham International Law Journal», Vol. 33, 2010, p. 1258.

⁵⁶⁴ C. STAHN, *Judicial Review of Prosecutorial Discretion: on Experiments and Imperfections*, in G. SLUITER and S. VASILIEV, *International Criminal Procedure: Towards a Coherent Body of Law*, London, CMP Publishing, 2009, p. 246.

⁵⁶⁵ ICTY, Judgement, *Prosecutor v. Delalić*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 605.

⁵⁶⁶ *Ibid.*, par. 605. Where an accused alleges that the principle of equality has been violated by the decision to investigate and prosecute his or her case, he or she bears the burden of proof. Given the breadth of the prosecutorial discretion and the prosecutor’s independence, a presumption exists that the principle of equality has been respected. To rebut the presumption, the accused should bring evidence to establish that the discretion has in fact not been executed in accordance with the Statute. According to the Appeals Chamber, this “require[s] evidence from which a clear inference can be drawn that the Prosecutor was motivated in that case by a factor inconsistent with that principle [principle of equality].” It necessarily involves a comparison with other similarly situated persons (*ibid.*, par. 611 – 619). For the ICTR, consider ICTR, Judgement, *Prosecutor v. Akayesu*, Case No. ICTR-96-4, A. Ch., A. Ch., 1 June 2001, par. 94 - 96; ICTR, Decision on Urgent Oral Motion for a Stay of

required, rather than a mere assertion, that (1) the Prosecutor has exercised his or her discretion unlawful or improper (including discriminatory) and (2) that in prosecuting the persons he or she did prosecute, the Prosecutor left out persons similarly situated.⁵⁶⁷ It does not suffice to show that only one group is selectively targeted while another is not.⁵⁶⁸ In *Delalić et al. (Čelebići case)*, the Appeals Chamber required a ‘clear inference that the Prosecutor was motivated in that case by a factor inconsistent with principles such as equality before the law’, given the *presumption of regularity*.⁵⁶⁹ A high burden is thus set to establish abuse of prosecutorial discretion.⁵⁷⁰ For the Defence, such threshold may even prove insurmountable in practice, since it may lack access to necessary prosecutorial information.⁵⁷¹ Further, it remains unclear what the proper remedy would be if the Chamber would conclude to a violation of the principle of equality. In *Delalić*, the Appeals Chamber only indicated that the reversing of the conviction of the accused “would be an entirely disproportionate response.”⁵⁷²

the Indictment, or in the Alternative a Reference to the Security Council, *Prosecutor v. Nindiliyimana*, Case No. ICTR-2000-56-I, T. Ch. II, 26 March 2004, par. 26.

⁵⁶⁷ ICTY, Judgement, *Prosecutor v. Delalić*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 611; ICTR, Judgement, *Prosecutor v. Akayesu*, Case No. ICTR-96-4, A. Ch., 1 June 2001, par. 94 - 96; ICTR, Judgement, *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10, A. Ch., 21 February 2003, par. 870-871; ICTR, Decision on Defence Motions for Stay of Proceedings and for Adjournment of the Trial, Including Reasons in support of the Chamber’s Oral Ruling Delivered on Monday 20 September 2004, *Prosecutor v. Bizimungu et al.*, Case No. ICTR-2000-56-T, T. Ch. II, 24 September 2004, par. 26; ICTR, Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council, *Prosecutor v. Nindiliyimana*, Case No. ICTR-2000-56-I, T. Ch. II, 26 March 2004, par. 25.

⁵⁶⁸ *Ibid.*, par. 26; ICTR, Judgement, *Prosecutor v. Akayesu*, Case No. ICTR-96-4, A. Ch., 1 June 2001, par. 95 (finding that the “failure to prosecute crimes against the Hutu population” is insufficient in itself to prove that the Prosecutor’s policy is discriminatory). It has been argued that, as far as the ICTR is concerned, the accused, “appear to have equated the Prosecutor’s exercise of prosecutorial discretion with selective discretion, and have generally argued as if selective prosecution is the same or similar to the discredited defence of *tu quoque*.” See A. OBOTE-ODORA, Case Selection and Prioritization Criteria at the International Criminal Tribunal for Rwanda, in M. BERGSMO (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Oslo, Torkel Opsahl Academic EPublisher, 2010, p. 46.

⁵⁶⁹ ICTY, Judgement, *Prosecutor v. Delalić*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 611.

⁵⁷⁰ C. STAHN, *Judicial Review of Prosecutorial Discretion: on Experiments and Imperfections*, in G. SLUITER and S. VASILIEV (eds.), *International Criminal Procedure: Towards a Coherent Body of Law*, London, CMP Publishing, 2009, pp. 248, 249.

⁵⁷¹ *Ibid.*, p. 249. The author notes that the protection of victims and witnesses or the protection of confidential information may legally prevent the Prosecutor from disclosing such information. Besides, the Prosecutor may argue that ‘similarly situated persons’ are the subject of ongoing investigations and may be prosecuted in the future. Similarly, consider L. REYDAMS, *The ICTR Ten Years On: Back to the Nuremberg Paradigm?*, in «Journal of International Criminal Justice», Vol. 3, 2005, p. 986 (arguing that “[t]he effect of the second prong may be to make the hurdle impossible to surmount”).

⁵⁷² ICTY, Judgement, *Prosecutor v. Delalić*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 618.

Thirdly, a *gravity threshold* has been read in the Statutes of the *ad hoc* tribunals where their jurisdiction is limited to ‘serious violations of international humanitarian law’.⁵⁷³ However, such a formulation falls short of a threshold, comparable to the limitation of the IMT’s jurisdiction to ‘major’ war criminals. Rather, “the drafting process arguably suggests that there was a deliberate choice *not* to limit the jurisdictional mandate to senior persons.”⁵⁷⁴ More recently, as will be discussed further on, a threshold has effectively been introduced into the framework of the *ad hoc* tribunals as part of their respective completion strategies. Finally, limitations to prosecutorial discretion follow from the Prosecutor’s duty to be impartial.⁵⁷⁵

Further limitations on prosecutorial discretion follow from the growing exercise of judicial review over prosecutorial discretion; the mechanisms for such judicial review being expanded over the lifespan of the *ad hoc* tribunals. Whereas in the beginning judicial review over prosecutorial discretion was characterised by an “abstentionist” approach and such discretion considered to be closely linked to prosecutorial independence, the focus on the completion strategy led prosecutorial discretion to be considered an “impediment to the expeditiousness of proceedings.”⁵⁷⁶ Rule amendments ensured the division of labour between the tribunals and the domestic criminal justice systems. Consequently, as previously noted, the non-permanent

⁵⁷³ Article 1 ICTY and ICTR Statute. Consider also the reference to ‘serious violations’ in Article 16 (1) ICTY Statute and Article 15 (1) ICTR Statute. It was argued by CASSESE that these provisions include a gravity threshold. Consider A. CASSESE, *The ICTY, a Living and Vital Reality*, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 587 (“True, the Nuremberg Charter explicitly entrusted the International Military Tribunal (IMT) with the task of trying the ‘major’ war criminals. However, the ICTY Statute was also substantially based on the same assumption, for it insisted on the need to prosecute persons responsible for ‘serious’ violations.”); L.D. JOHNSON, *Ten Years Later: Reflections on the Drafting*, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 369 (“[T]he Security Council did not follow the Nuremberg example, which referred to the trial of ‘major’ war criminals, with ‘minor’ ones being left to other courts [...]. Domestic courts were to have concurrent jurisdiction but be subject to the ‘primacy’ of the Tribunal, which could require domestic courts to defer to its competence. *The Security Council did, however, introduce a qualitative phrase in that persons to be prosecuted were those who were responsible for ‘serious’ violations of international humanitarian law*” (emphasis added)); H.B. JALLOW, *Prosecutorial Discretion and International Criminal Justice*, in «Journal of International Criminal Justice», Vol. 3, 2005, p. 151 (noting that the reference to ‘serious’ violations of international humanitarian law indicates that the tribunal was not intended to prosecute every violation”).

⁵⁷⁴ C. ANGERMAIER, *Case Selection and Prioritization Criteria in the Work of the International Criminal Tribunal for the Former Yugoslavia*, in M. BERGSMO (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Oslo, Torkel Opsahl Academic EPublisher, 2010, p. 28.

⁵⁷⁵ Article 13 *juncto* Article 21 (1) ICTY Statute; Article 12 *juncto* Article 20 (1) ICTR Statute and Article 13 (1) *juncto* Article 17 (4) SCSL Statute.

⁵⁷⁶ C. STAHN, *Judicial Review of Prosecutorial Discretion: on Experiments and Imperfections*, in G. SLUITER and S. VASILIEV, *International Criminal Procedure: Towards a Coherent Body of Law*, London, CMP Publishing, 2009, p. 240 and following (referring to the evolution of judicial review by dividing it into three stages, moving from an ‘abstentionist’ approach, towards a ‘managerial’ conception thereof in the context of the completion strategy).

character of the *ad hoc* tribunals may be considered to have heavily impacted upon the exercise of prosecutorial discretion.⁵⁷⁷

Rule amendments were the direct result of mounting pressure from the UN Security Council. Notably, in June 2002, then ICTY President Claude Jorda presented a report to the Secretary-General, signed by the three tribunal organs and suggesting that the ICTY should focus on the highest-ranking political and military leaders ('completion strategy').⁵⁷⁸ Other cases involving perpetrators at intermediary-level positions should be referred to national courts.⁵⁷⁹ The report proposed the adoption of an amended Rule 11*bis*. The possibility for referral of cases should be broadened and criteria adopted for the referral of cases. Rule 11*bis* was eventually amended in September 2002.⁵⁸⁰

Consequently, on 28 August 2003, Security Council Resolution 1503 was adopted which reaffirmed that the ICTY should focus on the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction and urged the ICTR to also adopt a completion strategy.⁵⁸¹ In response, a completion strategy was adopted by the ICTR, including several factors to be considered in the exercise of prosecutorial discretion, such as the alleged status and extent of participation of the individual, the alleged connection of the accused with other cases, the need to cover the major geographical areas where crimes were allegedly committed, the availability of evidence, the concrete possibility of arresting the

⁵⁷⁷ As noted by H.B. JALLOW, *Prosecutorial Discretion and International Criminal Justice*, in «Journal of International Criminal Justice», Vol. 3, 2005, p. 150.

⁵⁷⁸ U.N., Letter dated 17 June 2002 from the Secretary General Addressed to the President of the Security Council, U.N. Doc. S/2002/678, 19 June 2002, and the attached Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts.

⁵⁷⁹ *Ibid.*, par. 32.

⁵⁸⁰ *Ibid.*, par. 38. Amended Rule 11*bis* as adopted at the special Plenary Session of 30 September 2002 (IT/32/Rev. 25); Tenth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/58/297 - S/2003/829, 20 August 2003, par. 13 and 32.

⁵⁸¹ Security Council Resolution 1503, U.N. Doc S/RES/1503, 28 August 2003, preambular paragraphs 7 and 8. The Security Council further reaffirmed that other cases should be referred to national courts and that the capacity of the national courts to deal with such cases should be strengthened. The Prosecutors and Presidents of the *ad hoc* tribunals were further requested to focus on the completion strategy in their national reports (*ibid.*, preambular paragraph 7 and operative paragraph). In turn, this Resolution was followed by SC Resolution 1534, in which the Security Council reaffirmed the importance of the full implementation of SC Resolution 1503. See Security Council Resolution 1534, U.N. Doc. S/RES/1534, 26 March 2004.

individual or the availability of investigative material for transmission to a state for national prosecution.⁵⁸²

The ICTY saw the amendment of the RPE, introducing a pre-indictment review process under Rule 28 (A) ICTY RPE. It entails that prior to the sending of the indictment to the reviewing Judge, the President sends the indictment to the Bureau, which should determine ‘whether the indictment, *prima facie*, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal’.⁵⁸³ A similar rule amendment was not adopted by the ICTR.⁵⁸⁴ This consideration of the gravity of the crimes charged and the level of responsibility of the accused is also required in cases where the Referral Bench considers the referral of a case pursuant to Rule 11*bis* ICTY RPE.⁵⁸⁵

Following the confirmation of the indictment, prosecutorial discretion is reduced.⁵⁸⁶ The powers of the ICTY Trial Chamber under Rule 73*bis* (D) and (E) should be noted.⁵⁸⁷ They equip the Judges with significant supervisory powers over the work of the Prosecutor, allowing them to direct the Prosecutor to reduce the number of counts charged or the number of incidents or crime sites comprised in one or more of the charges. In this regard, the

⁵⁸² Consider the Completion Strategy of the International Criminal Tribunal for Rwanda, Annex to U.N., Letter Dated 30 April 2004 from the President of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of the Rwanda and Rwandan Citizens Responsible for Genocide and Other such Violations Committed in the Territory of the Neighbouring States between 1 January and 31 December 1994 Addressed to the President of the Security Council, U.N. Doc. S/2004/341, 3 May 2004, par. 14.

⁵⁸³ Rule 28 (A) ICTY RPE (IT/32Rev.30). According to Rule 23 (A) ICTY RPE, the Bureau is composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers. Consider Security Council Resolution 1534, U.N. Doc. S/RES/1534, 26 March 2004, par. 5 (“Calls on each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503 (2003)”). Following Security Council Resolution 1534, an extraordinary plenary session was organised on 6 April 2004, at which occasion Rule 28 was amended to address the criteria indicated in the SC Resolution 1534. Consider the Eleventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/59/215 - S/2004/627, 16 August 2004, par. 37.

⁵⁸⁴ See D. A. MUNDIS, The Judicial Effects of the “Completion Strategies” on the *Ad Hoc* International Criminal Tribunals, in «American journal of International Law», Vol. 99, 2005, p. 148 (noting that the ICTR Judges refused to adopt the amendment because they considered it to be a violation of the ICTR Statute where it limits the independence of the Prosecutor).

⁵⁸⁵ Rule 11*bis* (C) ICTY RPE. A similar provision is absent from Rule 11*bis* ICTR RPE.

⁵⁸⁶ M.M. DEGUZMAN and W.A. SCHABAS, Initiation of Investigations and Selection of Cases, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 138.

⁵⁸⁷ Rule 73*bis* (D) and (E) ICTY RPE as amended on the extraordinary plenary session of 30 May 2006 (IT/32/Rev. 38); Compare with the powers of the SCSL Trial Chamber pursuant to Rule 73*bis* (G) SCSL RPE: Rule 73*bis* (G) SCSL RPE as amended on 13 May 2006 at the occasion of the seventh Plenary Meeting of the Judges.

provisions introduce an additional *filter*. In the past, the Prosecution has strongly objected to such amendment, holding that it infringes upon its prosecutorial discretion.⁵⁸⁸

These amendments have resulted in the extension of judicial control over prosecutorial discretion. To some extent, these changes remain in tension with the prosecutorial independence and encroach upon the prosecutorial discretion of whom to indict, which is firmly embedded in the jurisprudence of the *ad hoc* tribunals.⁵⁸⁹ Nevertheless, overall, the Prosecutor remains solely responsible for the decision to investigate or not and to prosecute or not.⁵⁹⁰ In line with national criminal justice systems, judicial review of the exercise of prosecutorial discretion remains very limited.⁵⁹¹

§ *Criteria for the selection and prioritisation of cases*

An in-depth discussion of the strategy of the Prosecutor of the ICTY and the ICTR in selecting cases for investigation and prosecution certainly surpasses the aims of the present analysis. However, a brief outline of the *criteria* relied upon by the Prosecutors in the exercise of their discretion may be useful to get a better understanding of the manner in which discretion has been exercised in practice. Generally speaking, the first ICTY Prosecutor (Goldstone) adopted a strategy to focus on the lower level perpetrators and from there, to build the cases against persons bearing the greatest responsibility (the so-called ‘bottom-up approach’).⁵⁹² The Judges objected to such prosecutorial strategy, and issued a public

⁵⁸⁸ Consider *e.g.* ICTY, Tribunal’s Prosecutor Addresses Security Council on Completion Strategy Progress, Press Release, AN/MOW/1085e, 7 June 2006.

⁵⁸⁹ Article 16 (1) and 18 (1) ICTY Statute; Article 15 (1) and Article 17 (1) ICTR Statute; Article 15 (1) SCSL Statute. Consider *e.g.* D. A. MUNDIS, The Judicial Effects of the “Completion Strategies” on the *Ad Hoc* International Criminal Tribunals, in «American journal of International Law», Vol. 99, 2005, p. 148 (on the tension between the role played by the ICTY Judges in the determination of who will be prosecuted and the ICTY’s Statute reserving this role to the Prosecutor). Consider Letter Dated 21 May 2004 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Addressed to the President of the Security Council, U.N. Doc. S/2004/420, 24 May 2004, Enclosure II: Assessment of Carla del Ponte, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, Provided to the Security Council Pursuant to Paragraph 6 of Security Council Resolution 1534 (2004), par. 13 (calling the amendment of Rule 28 ICTY contrary to the Statute and unnecessary given the prosecutorial independence).

⁵⁹⁰ Compare L. REYDAMS, The ICTR Ten Years On: Back to the Nuremberg Paradigm?, in «Journal of International Criminal Justice», Vol. 3, 2005, p. 983.

⁵⁹¹ J.K. STEWART, International Criminal Prosecutions. The Ideal Prosecutor: Status, Means and Discretion, in H. DUMONT (ed.), *La voie vers la Cour Pénale Internationale: tous les chemins mènent à Rome: les Journées Maximilien-Caron* 2003, Montreal, Éditions Thémis, 2004, p. 27.

⁵⁹² Consider the prosecution of Tadić (ICTY) and Akayesu (ICTR) respectively. Regarding the prosecution of Tadić, SCHRAG recalls that “[i]n the fall of 1994, mindful of the importance of our being able to present

statement saying so, which Goldstone felt encroached on his prosecutorial independence.⁵⁹³ With hindsight, it is clear that the decision to indict lower level perpetrators was not solely based on the availability of evidence but equally on “legitimate political considerations.”⁵⁹⁴ Ultimately, a shift in focus could be noted.

Neither of the *ad hoc* tribunals has published the criteria for the selection of cases;⁵⁹⁵ a decision which can be criticised on transparency grounds.⁵⁹⁶ Throughout the lifespan of the ICTY, no single focused investigation and prosecution strategy or criteria for the selection of cases can be discerned.⁵⁹⁷ However, the ICTY adopted internal selection criteria as early as 1995.⁵⁹⁸

evidence as soon as possible in a public trial, we asked the Tribunal judges to request that German prosecution defer our investigation.” See M. SCHRAG, *The Yugoslav Crimes Tribunal: A Prosecutor’s view*, in «Duke Journal of Comparative and International Law, Vol. 6, 1995-1996, p. 192.

⁵⁹³ Then President Cassese recalls that an *in camera* meeting between the Judges and the Prosecutor was organised at which occasion the Prosecutor explained his ‘pyramidal strategy’. As the Judges (common law as well as civil law judges) considered the strategy to be flawed, they considered it necessary to react and issued a press release (see Press Release: The Judges of the Tribunal for the Former Yugoslavia Express their Concern Regarding the Substance of their Programme of Judicial Work for 1995, 1 February 2005, available at <http://www.icty.org/sid/7251>, last visited 10 February 2014). The Judges considered that the tribunal should “immediately target the military and political leaders or other high ranking commanders, based on the notion of command responsibility.” See A. CASSESE, *The ICTY, a Living and Vital Reality*, in «Journal of International Criminal Justice», Vol. 2, 2004, pp. 587 - 588. Cassese considered that the judges’ action was necessary where no procedural mechanism existed to ensure that the Prosecutor acted in accordance with the goals laid down in the ICTY Statute. Besides, the Judges’ reaction did not interfere with specific cases but only entailed a review of the general case selection strategy adopted by the Prosecutor. In turn, Goldstone considered that the Judges’ action could be explained by their eagerness to start their judicial work, which “led to a determined attempt by the Judges to become involved in the work and politics of the Office of the Prosecutor.” He adds that “at times, I became concerned that the independence guaranteed to me by the Security Council was being impugned.” See R. GOLDSTONE, *A View from the Prosecution*, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 381.

⁵⁹⁴ L. CÔTÉ, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, in «Journal of International Criminal Justice», Vol. 3, 2005, pp. 169-170. The author in particular refers to a book published by former Prosecutor Goldstone (*For Humanity, Reflections of a War Crimes Investigator*), in which Goldstone referred to the pressure to have “at least one indictment [...] issued [...] to demonstrate that the system was working and that the tribunal was worthy of financial support.” Consider also R.J. GOLDSTONE, *Prosecuting Rape as a War Crime*, in «Case Western Reserve Journal of International Law», Vol. 34, 2002, p. 281 (Goldstone seems to concede and acknowledges that Nikolić was not an appropriate first person for an indictment by the first international war crimes tribunal. However, he immediately adds that “[i]n order for the work to continue, we had to get out an indictment quickly”).

⁵⁹⁵ Critical, consider e.g. L. CÔTÉ, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, in «Journal of International Criminal Justice», Vol. 3, 2005, pp. 171-172.

⁵⁹⁶ See *infra*, Chapter 3, II.8.

⁵⁹⁷ C. ANGERMAIER, *Case Selection and Prioritization Criteria in the Work of the International Criminal Tribunal for the Former Yugoslavia*, in M. BERGSMO (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Oslo, Torkel Opsahl Academic EPublisher, 2010, p. 27 (“Although there were initiatives in the Office of the Prosecutor to establish a framework and criteria for the selection of cases, it appears that a focused case selection policy was not consistently pursued”).

⁵⁹⁸ See M. BERGSMO, K. HELVIG, I. UTMELIDZE and G. ŽAGOVEC, *The Backlog of Core International Crimes Cases in Bosnia and Herzegovina* (2nd ed.), Torkel Opsahl Academic EPublisher, Oslo, 2010, pp. 98-99; H. TAKEMURA, *Prosecutorial Discretion in International Criminal Justice: Between Fragmentation and*

These internal criteria were non-binding and comprised a set of factors, including the seriousness of the offence, policy considerations including the advancement of international jurisprudence, the symbolic value of prosecution as well as public perceptions concerning impartiality and balance.⁵⁹⁹ In 1998, the ICTY indictments were re-assessed following an internal memorandum. As a consequence, charges against 14 accused were withdrawn.⁶⁰⁰ The aim of the revision was to put additional emphasis on persons in leadership positions and on persons who had been personally responsible for exceptionally brutal or otherwise extremely serious offences.⁶⁰¹

At the ICTR, the primary focus has been on the prosecution of the governmental, political and military leadership which planned and oversaw the execution of the genocide.⁶⁰² Other criteria considered include (i) the extent of participation of the accused or suspect, (ii) the nature and gravity of the offences (including a focus on sexual violence, destruction of pregnant women and the killing of infants and on the role of the media), (iii) the need for geographic spread with regard to targets and incidents and (iv) the prospects for dealing with the suspect or accused otherwise than by prosecution at the ICTR.⁶⁰³ Additionally, according to Chief Prosecutor Jallow, reconciliation is considered to be a relevant consideration.⁶⁰⁴

The selection criteria of the ICTR thus focus on the leaders who planned the Rwandan genocide. In this manner, it appears that the crimes allegedly committed by the RPF are not

Unification, in L. VAN DEN HERIK and C. STAHN (eds.), *The Diversification and Fragmentation of International Criminal Law*, Leiden, Martinus Nijhoff Publishers, 2012, p. 637.

⁵⁹⁹ M. BERGSMO, K. HELVIG, I. UTMELIDZE and G. ŽAGOVEC, *The Backlog of Core International Crimes Cases in Bosnia and Herzegovina* (2nd ed.), Torkel Opsahl Academic EPublisher, Oslo, 2010, p. 100 *et seq.*; C. ANGERMAIER, *Case Selection and Prioritization Criteria in the Work of the International Criminal Tribunal for the Former Yugoslavia*, in M. BERGSMO (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Oslo, Torkel Opsahl Academic EPublisher, 2010, pp. 31 – 34.

⁶⁰⁰ M. BERGSMO, K. HELVIG, I. UTMELIDZE and G. ŽAGOVEC, *The Backlog of Core International Crimes Cases in Bosnia and Herzegovina* (2nd ed.), Torkel Opsahl Academic EPublisher, Oslo, 2010, p. 108; C. ANGERMAIER, *Case Selection and Prioritization Criteria in the Work of the International Criminal Tribunal for the Former Yugoslavia*, in M. BERGSMO (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Oslo, Torkel Opsahl Academic EPublisher, 2010, p. 34. Consider the press statement by the Prosecution of 8 May 1998, CC/PIU/314-E, to be found at <http://www.icty.org/sid/7671>, last visited 10 February 2014; consider also the reference in ICTY, Judgement, *Prosecutor v. Delalić*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 614.

⁶⁰¹ Press statement by the Prosecution of 8 May 1998, CC/PIU/314-E, to be found at <http://www.icty.org/sid/7671>, last visited 10 February 2014; ICTY, Judgement, *Prosecutor v. Delalić*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 614.

⁶⁰² H.B. JALLOW, *Prosecutorial Discretion and International Criminal Justice*, in «*Journal of International Criminal Justice*», Vol. 3, 2005, p. 152.

⁶⁰³ *Ibid.*, p. 152 *et seq.*

⁶⁰⁴ *Ibid.*, p. 154.

considered serious enough to justify prosecution. This internal decision not to prosecute any crimes allegedly committed by the RPF has been criticised by many authors.⁶⁰⁵ However, allegations of crimes committed by the RPF were investigated by Del Ponte.⁶⁰⁶ At one point, she indicated that indictments against RPF officers should be issued by the end of 2001.⁶⁰⁷ This resulted in travel restrictions being imposed, preventing witnesses from travelling to Arusha to testify, causing ongoing trials to be stalled.⁶⁰⁸ No indictments would be issued by the time she left the tribunal.⁶⁰⁹

In June 2008, Del Ponte's successor, ICTR Prosecutor Jallow announced that RPF case files would be transferred to Rwanda.⁶¹⁰ The domestic trial that followed was monitored by the OTP and the Prosecutor concluded that fair trial standards had been upheld.⁶¹¹ However, strong criticisms were voiced regarding the OTP's monitoring of the trial and its conclusion

⁶⁰⁵ Consider, among others: L. REYDAMS, The ICTR Ten Years On: Back to the Nuremberg Paradigm?, in «Journal of International Criminal Justice», Vol. 3, 2005, p. 977 (calling this “a regrettable return to the Nuremberg paradigm of international criminal justice”, a paradigm that “stands for victor’s justice, prohibition of the *tu quoque* defence, and clear separation between victims and perpetrators”); C. DE YCAZA, Victor’s Justice in War Crimes Tribunals: A Study of the International Criminal Tribunal in Rwanda, in «New York International Law Review», Vol. 23, 2010, pp. 53 - 81 (concluding that the lack of RPF indictments “provides evidence of a victor’s justice approach to the tribunal” (*ibid.*, p. 81)); L. HASKELL and L. WALDORF, The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences, in «Hastings International and Comparative Law Review», Vol. 34, 2011, pp. 49 – 85 (concluding that the decision by the ICTR Prosecutor not to pursue any cases against the RPF “sets a terrible precedent for the future of international justice” (*ibid.*, p. 85)); C. BUISMAN, Ascertainment of the Truth in International Criminal Justice, 2012, (available at: <http://bura.brunel.ac.uk/handle/2438/6555>, last visited 18 November 2013), p. 172.

⁶⁰⁶ See ICTR, Press Release: Prosecutor Outlines Future Plans, ICTR/INFO-9-2-254, 13 December 2000. These investigations are often referred to as the ‘Special Investigations’.

⁶⁰⁷ L. HASKELL and L. WALDORF, The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences, in «Hastings International and Comparative Law Review», Vol. 34, 2011, p. 56.

⁶⁰⁸ In reaction, the Security Council would “[Call] on all States, especially Rwanda, Kenya, the Democratic Republic of the Congo, and the Republic of the Congo, to intensify cooperation with and render all necessary assistance to the ICTR, including on investigations of the Rwandan Patriotic Army”, See Security Council Resolution 1503, U.N. Doc S/RES/1503, 28 August 2003, par. 3; L. HASKELL and L. WALDORF, The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences, in «Hastings International and Comparative Law Review», Vol. 34, 2011, p. 57.

⁶⁰⁹ C. DE YCAZA, Victor’s Justice in War Crimes Tribunals: A Study of the International Criminal Tribunal in Rwanda, in «New York International Law Review», Vol. 23, 2010, p. 70; V. PESKIN, International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation, Cambridge, Cambridge University Press, 2008, p. 224 (recalling that Del Ponte told the author during an interview that while she had a draft indictment at the end of 2002, she wanted indictments to be trial ready, rather than to simply having a *prima facie* case).

⁶¹⁰ Statement by Justice Hassan B. Jallow, Prosecutor of the ICTR, to the U.N. Security Council, 4 June 2008. The Prosecutor communicated that it had been able to establish a *prima facie* case that on the 5th of June 1994 RPF soldiers killed some thirteen clergymen, including five bishops and two other civilians at the Kabgayi Parish in Gitarama.

⁶¹¹ Statement by Justice Hassan B. Jallow, Prosecutor of the ICTR, to the U.N. Security Council, U.N. Scor, 64th Session, 6134th meeting, U.N. Doc. S/PV.6134, 4 June 2009, p. 33.

on the fairness of the trial.⁶¹² After concluding that fair trial standards had been upheld, ICTR Prosecutor Jallow announced that no RPF would be prosecuted.⁶¹³

II.3. The Special Court for Sierra Leone (SCSL): ‘guided’ discretion

In line with the *ad hoc* tribunals, the Prosecutor is solely responsible for investigations and prosecutions and acts independently as a separate organ of the Court.⁶¹⁴ In further similarity with the *ad hoc* tribunals, it follows from Article 15 (1) SCSL Statute that it is for the Prosecutor to determine whether there is ‘sufficient basis to proceed’ with an investigation. This provision betrays broad discretion. Nevertheless, unlike the *ad hoc* tribunals, the SCSL Statute and the SCSL Agreement explicitly limit the Special Court’s competence to serious violations of international humanitarian law or Sierra Leonean Law committed by persons bearing ‘the greatest responsibility’.⁶¹⁵ Such wording resembles that of the ECCC, limiting jurisdiction to ‘senior leaders’ and ‘those most responsible for the crimes’.⁶¹⁶

In the CDF (*Norman et al.*) case, Fofana’s Defence argued (1) that Article 1 (1) SCSL Statute should be understood as a limitation (the interpretation of which is unclear) of the Court’s personal jurisdiction and (2) that the Court did not have jurisdiction over Fofana insofar that he did not belong to the category of persons bearing the greatest responsibility.⁶¹⁷ The Trial Chamber considered that the different formulation of the Special Court’s competence,

⁶¹² For a strong criticism of this trial, see L. HASKELL and L. WALDORF, *The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences*, in «Hastings International and Comparative Law Review», Vol. 34, 2011, p. 50 (speaking of “a sham trial that ignored crucial evidence in an apparent attempt to shield senior RPF members from criminal responsibility”); HRW, *Letter to the Prosecutor of the International Criminal Tribunal for Rwanda Regarding the Prosecution of RPF Crimes*, 26 May 2009 (to be found at: <http://www.hrw.org/news/2009/05/26/letter-prosecutor-international-criminal-tribunal-rwanda-regarding-prosecution-rpf-c>, last visited 10 February 2014) (calling the trial “a political whitewash and a miscarriage of justice”).

⁶¹³ Statement by Justice Hassan B. Jallow, Prosecutor of the ICTR, to the U.N. Security Council, U.N. Scor, 64th Session, 6134th meeting, U.N. Doc. S/PV.6134, 4 June 2009, p. 33.

⁶¹⁴ Article 15 (1) SCSL Statute.

⁶¹⁵ Article 1 and 15 of the SCSL Statute; Article 1 (1) SCSL Agreement. More precisely, Article 1 (1) SCSL Statute limits the court’s jurisdiction to those persons who bear “the greatest responsibility for serious violations of international humanitarian and Sierra Leonean law”, including those leaders “who, in committing such crimes, have threatened the establishment and implementation of the peace process in Sierra Leone.” At the outset, it should be noted that the focusing on those bearing ‘the greatest responsibility’ has been criticised. Consider *e.g.* T. PERRIELLO and M. WIERDA, *The Special Court for Sierra Leone under Scrutiny*, ICTJ, March 2006, p. 28 (noting that the standard will allow too many key actors to remain at large and, of particular concern, in the army).

⁶¹⁶ Article 2 new ECCC Statute, see *infra*, Chapter 3, II.5.

⁶¹⁷ SCSL, *Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction filed on Behalf of Accused Fofana, Prosecutor v. Norman et al.*, Case No. SCSL-04-14-PT, T. Ch., 3 March 2004, par. 1.

compared to the jurisdiction of the *ad hoc* tribunals, should have some bearing on the scope of its respective competence. According to Trial Chamber I, firstly, the *travaux préparatoires* reveal that Article 1 (1) SCSL Statute should be understood in a broad manner, not only including the political or military leadership. Others down the chain of command may also be included judging on the severity of the crime or its massive scale.⁶¹⁸ Furthermore, the phrase ‘persons who bear the greatest responsibility’ in Article 1 (1) SCSL Statute is a *jurisdictional* requirement and does not solely articulate prosecutorial discretion.⁶¹⁹ The Trial Chamber further held that the drafters intended the category of persons that the Court would have personal jurisdiction over to be limited. By limiting its personal jurisdiction to “persons who bear the greatest responsibility” rather than “persons most responsible”, the Security-Council intended that “the fact that an individual held a leadership role should be the primary consideration; the severity of a crime or the massive scale of a particular crime should not be

⁶¹⁸ U.N., Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, 4 October 2000, par. 30: “‘Most responsible’ [...] denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime. It must be seen, however, not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases.”

⁶¹⁹ SCSL, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction filed on Behalf of Accused Fofana, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-PT, T. Ch., 3 March 2004, par. 27; SCSL, Judgement, *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T, T. Ch. I, 2 August 2007, par. 91. Several U.N. Documents support this conclusion. First, the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone (U.N. Doc. S/2000/915) shows that the Secretary-General initially disagreed with the term ‘greatest responsibility’ which originates from Security Council Resolution 1315 (Security Council Resolution 1315, U.N. Doc. S/RES/1315, 14 August 2000). As an alternative, the formulation ‘persons most responsible’ was proposed, which was clearly intended “not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases.” However, the Security Council held the view that the personal jurisdiction of the Court should be restricted and that the ‘most responsible’ formulation should be changed by the concept of ‘greatest responsibility’. See Letter Dated 22 December 2000 from the President of the Security-Council addressed to the Secretary-General, U.N. Doc. S/2000/1234, 22 December 2000, par. 1 (where it is argued that the Special Court “should have personal jurisdiction over persons who bear the greatest responsibility for the commission of crimes, including crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone”); Letter Dated 12 January 2001 from the President of the Security Council Addressed to the Security-Council, U.N. Doc. S/2001/40, 12 January 2001, par. 2-3 (stating that the members of the Security-Council preferred the view of “extending the personal jurisdiction of the Court to “persons who bear the greatest responsibility”, thus limiting the focus of the Special Court to those who played a leadership role.” “However, the wording of subparagraph (a) of article 1 of the draft Statute, as proposed by the Security Council, does not mean that the personal jurisdiction is limited to the political and military leaders only. Therefore, the determination of the meaning of the term “persons who bear the greatest responsibility” in any given case falls initially to the Prosecutor and ultimately to the Special Court itself.” Besides, the view is expressed that the reference in Article 1 (1) SCSL Statute to “those leaders who [...] threaten the establishment of and implementation of the peace process” should be understood as offering guidance to the Prosecutor); Letter Dated 31 January 2001 from the President of the Security-Council Addressed to the Secretary-General, U.N. Doc. S/2001/95, 31 January 2001, par. 1 (endorsing the interpretation provided by the Secretary-General in its letter of 12 January 2001).

the primary consideration.”⁶²⁰ The criterion should be considered by the Confirming Judge in reviewing the indictment and the accompanying material but it is not a material element that the Prosecutor needs to prove beyond reasonable doubt.⁶²¹

Based on the drafting history of the Statute, Trial Chamber II arrived at a different conclusion in the AFRC case. On the basis of a wrong interpretation of a letter by the UN Secretary General, it concluded that the drafters of the SCSL Statute never intended to create an additional jurisdictional threshold through the insertion of the ‘greatest responsibility’ concept in Article 1 (1) SCSL Statute.⁶²² The Prosecution disputed the jurisdictional character of the ‘greatest responsibility’ requirement and argued that such a determination is part of its prosecutorial discretion; this discretion only being reviewable in extreme cases such as abuse of process. This discretion could not be exercised by the Chamber insofar that it would not have all the evidence gathered by the Prosecution before it.⁶²³ In turn, the *Kanu* Defence argued, in line with the argumentation of Trial Chamber I in the CDF case, that the ‘greatest responsibility’ concept should be understood as imposing a jurisdictional limitation.⁶²⁴ The Trial Chamber held that the ‘greatest responsibility’ requirement “solely purports to

⁶²⁰ SCSL, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction filed on Behalf of Accused Fofana, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-PT, T. Ch., 3 March 2004, par. 40.

⁶²¹ *Ibid.*, par. 38; SCSL, Judgement, *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T, T. Ch. I, 2 August 2007, par. 91 – 92. At the same time, Trial chamber I held that “[w]hether or not in actuality the Accused could be said to bear the greatest responsibility can only be determined by the Chamber after considering all the evidence presented during trial” (*ibid.*, par. 92).

⁶²² SCSL, Judgment, *Prosecutor v. Brima et al. (AFRC)*, Case No. SCSL-2004-16-T, T. Ch. II, 20 June 2007, par. 653. The argumentation by the Trial Chamber is based on a wrong interpretation of the ‘Letter Dated 12 July 2001 from the Secretary-General to the President of the Security Council, U.N. Doc. S/2001/693, 12 July 2001’, which confirms that the members of the Security Council are in agreement with the Secretary-General that “the words beginning with ‘those leaders who [...]’ are intended as guidance to the Prosecutor in determining his or her prosecutorial strategy” (emphasis added). This sentence cannot be interpreted as implying that the ‘those bearing the greatest responsibility’ criterion should be interpreted as guidance to the Prosecutor. It only refers to the latter part of the sentence which clarifies that ‘those bearing the greatest responsibility’ includes ‘those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone’. For a confirming view, consider *e.g.* S. MORRISON, Extraordinary Language in the Courts of Cambodia: Interpreting the Limiting Language and Personal Jurisdiction of the Cambodian Tribunal, in «Capital University Law Review», Vol. 37, 2009, pp. 595 – 597 (“The United Nations establishing documents show an intent that the “greatest responsibility” language was to act as a jurisdictional requirement. However, for practical reasons, the Appeals Chamber [(where it endorsed Trial Chamber II’s interpretation of Article 1 (1) SCSL Statute)] ruled that the phrase is to be understood solely as a guide to the Prosecutor in exercising discretion”). Consider additionally C.C. JALLOH, Prosecuting those Bearing “Greatest Responsibility”: The Lessons of the Special Court for Sierra Leone, in «Marquette Law Review», Vol. 96, 2013, pp. 891 - 892 (“it would seem that the judges of Trial Chamber II did not read in their entirety either the drafting history of Article 1(1) and the subsequent correspondence between Secretary-General Annan and the Council”).

⁶²³ SCSL, Judgment, *Prosecutor v. Brima et al. (AFRC)*, Case No. SCSL-2004-16-T, T. Ch. II, 20 June 2007, par. 643.

⁶²⁴ *Ibid.*, par. 644 – 646.

streamline the focus of prosecutorial strategy.”⁶²⁵ However, it added that it “does not exclusively articulate prosecutorial discretion,” as the Prosecutor submitted.⁶²⁶ Trial Chamber II also emphasised that it follows from Article 15 SCSL Statute that the Prosecutor is solely responsible for the investigation and prosecution of persons bearing the greatest responsibility for serious violations of international humanitarian law.⁶²⁷ The Prosecutor should act independently as a separate organ of the Court. Hence, the Chamber “is [...] not called upon to review the prosecutorial discretion in bringing a case against the Accused, nor would it be in a position to do so.”⁶²⁸

This latter interpretation was later confirmed by the Appeals Chamber.⁶²⁹ Unlike both of the Trial Chambers, the Appeals Chamber did not rely on the *travaux préparatoires* as its starting point for interpreting the ‘greatest responsibility’ term but, rather, considered the Special Court’s structure. It stated that it follows from Article 15 (1) that the Prosecutor is responsible for and has the competence to determine who should be investigated and prosecuted.⁶³⁰ Therefore, the:

“only workable interpretation of Article 1 (1) is that it guides the Prosecutor in the exercise of prosecutorial discretion. That discretion must be exercised by the Prosecution in good faith, based on sound professional judgment [...] that it would also be unreasonable and unworkable to suggest that the discretion is one that should be exercised by the Trial Chamber or the Appeals Chamber at the end of the trial.”⁶³¹

The Appeals Chamber added that “it is inconceivable that after a long and expensive trial the Trial Chamber could conclude that although the commission of serious crimes has been established beyond reasonable doubt against the accused, the indictment ought to be struck

⁶²⁵ *Ibid.*, par. 653.

⁶²⁶ *Ibid.*, par. 653.

⁶²⁷ *Ibid.*, par. 653; SCSL, Judgement, *Prosecutor v. Brima et al.*, A. Ch., Case No. SCSL-2004-16-A, 22 February 2008, par. 280.

⁶²⁸ SCSL, Judgment, *Prosecutor v. Brima et al. (AFRC)*, Case No. SCSL-2004-16-T, T. Ch. II, 20 June 2007, par. 654.

⁶²⁹ SCSL, Judgement, *Prosecutor v. Brima et al.*, A. Ch., Case No. SCSL-2004-16-A, 14 October 2011, par. 280; SCSL, Judgement, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, T. Ch. II, 18 May 2012, par. 78.

⁶³⁰ *Ibid.*, par. 280-281.

⁶³¹ *Ibid.*, par. 280-281.

out on the ground that it has not been proved that the accused was not one of those who bore the greatest responsibility.”⁶³²

This reasoning neglects the fact that at the time the Confirming Judge reviews the indictment, he or she must have already determined whether he or she is satisfied that the crime(s) charged fall(s) within the Court’s jurisdiction (subject matter, personal, territorial or temporal).⁶³³ It does not seem problematic to consider the ‘greatest responsibility’ threshold during the confirmation of the indictment process.⁶³⁴ To some extent, such an assessment can be compared to the Bureau’s review of the indictment at the ICTY to determine whether it, *prima facie*, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the tribunal’s jurisdiction.⁶³⁵ However, the low threshold for the confirmation of the indictment at the Special Court, coupled with the limited material that should be made available by the SCSL Prosecutor, may hamper the Confirming Judge’s assessment.⁶³⁶ This problem led one author to suggest that any determination of whether a particular accused appears to bear the greatest responsibility should be postponed until the evidentiary phase of the trial process has been completed.⁶³⁷ However, such a solution does not resolve the Appeals Chamber’s concern that such a determination at the end of the trial process may waste money on a trial that the Special Court was not competent to handle. In

⁶³² *Ibid.*, par. 283.

⁶³³ Rule 47 (E) (i) SCSL RPE. In fact, through the confirmation of the indictment, the Confirming Judge *reviews* the prosecutorial discretion in bringing a case, where the Judge will assess whether the crimes charged fall within the jurisdiction of the Court and where jurisdictional requirements limit prosecutorial discretion. Therefore, this author disagrees with the statement by Trial chamber II that “[t]he trial chamber is therefore not called upon to review the prosecutorial discretion in bringing a case against the Accused, nor would it be in a position to do so.” At least, such statement should be nuanced. See SCSL, Judgment, *Prosecutor v. Brima et al.* (AFRC), Case No. SCSL-2004-16-T, T. Ch. II, 20 June 2007, par. 654.

⁶³⁴ Confirming, see C.C. JALLOH, *Special Court for Sierra Leone: Achieving Justice?*, in «Michigan Journal of International Law», Vol. 32, 2011, p. 416; C.C. JALLOH, *Prosecuting those Bearing “Greatest Responsibility”*: The Lessons of the Special Court for Sierra Leone, in «Marquette Law Review», Vol. 96, 2013, p. 896.

⁶³⁵ Rule 28 (A) ICTY RPE.

⁶³⁶ Under present Rule 47 (C) SCSL RPE, the Prosecutor should provide the Confirming Judge with: (1) the name and particulars of the suspect; (2) a statement of each specific offence of which the named suspect is charged; (3) a short description of the particulars of the offence and (4) a Prosecutor’s case summary briefly setting out the allegations he proposes to prove in making his case. Rule 47 (D) formulates the threshold for the confirmation of the indictment and requires that the Confirming Judge is satisfied that (i) the indictment charges the suspect with a crime or crimes within the jurisdiction of the Special Court; and (ii) that the allegations in the Prosecution’s case summary would, if proven, amount to the crime or crimes as particularised in the indictment.

⁶³⁷ C.C. JALLOH, *Special Court for Sierra Leone: Achieving Justice?*, in «Michigan Journal of International Law», Vol. 32, 2011, p. 416.

that regard, it is clearly preferable to have a solution that settles the jurisdiction at the initial stages of the proceedings.⁶³⁸

It is this author's conviction that the Appeals Chamber erred in finding Article 1 (1) of the SCSL Statute to merely offer guidance to the Prosecutor in exercising his or her discretion.⁶³⁹ First and foremost, a literal interpretation of Article 1 (1) SCSL indicates that the Prosecutor has the power to prosecute those persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. Where 'power' denotes an 'ability to act', it follows that the Prosecutor would not have the ability to act in relation to those persons that do not fall within the category of the persons bearing the greatest responsibility.⁶⁴⁰ Besides, a contextual interpretation shows that the 'greatest responsibility' criterion is to be found in Article 1, which deals with the 'competence' of the Special Court. Competence refers to 'the quality or position of being legally competent; legal capacity or admissibility'. From there, it is argued that the Special Court lacks competence to prosecute persons that do not satisfy the 'greatest responsibility' criterion. First and foremost, it is clear that the jurisprudence gives too much weight to the drafting history of the Statute of the Special Court. It is recalled that the *travaux préparatoires* constitute a 'supplementary means of interpretation' under the VCLT, which may only be consulted in precisely delineated situations. While it is this author's conviction that the meaning of Article 1 (1) is sufficiently clear, it is noted *arguendo* that the interpretation given to the drafting history of the Statute by the AFRC Trial Chamber is erroneous since the drafting history confirms that the criterion was intended to limit the Court's personal jurisdiction.⁶⁴¹ Overall, if the consideration of whether a person falls within the category of those bearing the greatest responsibility is left entirely to the Prosecutor and such a criterion is not subjected to judicial review, the possibilities for external control over

⁶³⁸ For a similar view (with regard to the ECCC), consider S. MORRISON, Extraordinary Language in the Courts of Cambodia: Interpreting the Limiting Language and Personal Jurisdiction of the Cambodian Tribunal, in «Capital University Law Review», Vol. 37, 2009, p. 600.

⁶³⁹ G.-J.A. KNOOPS, Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective, in «Criminal Law Forum», Vol. 15, 2005, pp. 378, 380.

⁶⁴⁰ Oxford Legal Dictionary, Third edition, December 2006; online version September 2011.

⁶⁴¹ For a criticism of the interpretation by Trial Chamber II in the AFRC case, see *supra*, fn. 622 and accompanying text.

prosecutorial choices are greatly diminished. Other authors equally consider the ‘greatest responsibility’ criterion to delineate personal jurisdiction.⁶⁴²

As in other international criminal tribunals, SCSL Prosecutors did not make their prosecution strategy public.⁶⁴³ Besides, the decision of Trial Chamber I mentioned previously, which determined that the ‘greatest responsibility’ concept entails a jurisdictional threshold, did not clarify how such a threshold was to be interpreted.⁶⁴⁴ However, in one decision, some hints were given. In its judgment on a motion for acquittal, Trial Chamber II stated that the expression ‘greatest responsibility’ includes “at a minimum, political and military leaders and implies an even broader range of individuals.”⁶⁴⁵ “This category may even include children between the ages of 15 and 18.”⁶⁴⁶

Nevertheless, some general trends in the Prosecutor’s selection of cases may be noted. The Court’s first Prosecutor’s decision to not prosecute any children was notable, notwithstanding the Court’s jurisdiction *ratione personae* over children 15 years and older.⁶⁴⁷ Furthermore, the Prosecutor purportedly narrowed the “greatest responsibility” concept out of financial and political considerations, including the stability of the region and the viability of the Special Court.⁶⁴⁸ The Prosecution relied upon some high level participants in the Sierra Leonean

⁶⁴² Consider *e.g.* D. M. CRANE, White Man’s Justice: Applying International Justice After Regional Third World conflicts, in «Cardozo Law Review», Vol. 27, 2005-2006, p. 1684 (the first Prosecutor of the Special Court argues that “[a]t the international level, “greatest responsibility” should be the standard for personal jurisdiction”); M. SHAHABUDEEN, Teething Phase of the ECCC, in «Chinese Journal of International Law», Vol. 10, 2011, p. 473; R. CRYER, A “Special Court” for Sierra Leone?, in «International and Comparative Law Quarterly», Vol. 50, 2001, p. 441; C. CERONE, The Special Court for Sierra Leone: Establishing a New Approach to International Criminal Justice, in «ILSA Journal of International and Comparative Law», Vol. 8, 2001-2002, p. 383; M. MIRALDI, Overcoming Obstacles of Justice: The Special Court of Sierra Leone, in «New York Law School Journal of Human Rights», 2003, p. 855; C.C. JALLOH, Prosecuting those Bearing “Greatest Responsibility”: The Lessons of the Special Court for Sierra Leone, in «Marquette Law Review», Vol. 96, 2013, p. 907.

⁶⁴³ T. PERRIELLO and M. WIERDA, the Special Court for Sierra Leone under Scrutiny, ICTJ, March 2006, p. 27.

⁶⁴⁴ P. KNOWLES, The Power to Prosecute: the Special Court for Sierra Leone from a Defence Perspective, in «International Criminal Law Review», Vol. 6, 2006, p. 406.

⁶⁴⁵ SCSL, Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, *Prosecutor v. Brima et al.*, Case No. SCSL-04-16T, T. Ch. II, 31 March 2006, par. 34.

⁶⁴⁶ *Ibid.*, par. 36.

⁶⁴⁷ Article 7 SCSL Statute.

⁶⁴⁸ U.S. BERKELY WAR CRIMES STUDIES CENTER, Interim Report on the Special Court for Sierra Leone, April 2005, p. 6 (“it appears that the Prosecutor has adopted a fairly narrow interpretation of an already narrow mandate”); S. MORRISON, Extraordinary Language in the Courts of Cambodia: Interpreting the Limiting Language and Personal Jurisdiction of the Cambodian Tribunal, in «Capital University Law Review», Vol. 37, 2009, p. 613. Consider also G.-J.A. KNOOPS, Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective, in «Criminal Law Forum», Vol. 15, 2005, p. 387 (referring to time and financial burdens).

conflict as insider witnesses, rather than prosecuting them.⁶⁴⁹ The Prosecutor only targeted those “at the very top”, “rather than targeting individuals who may bear the greatest responsibility for some of the conflict’s most brutal atrocities below the top-level commanders.”⁶⁵⁰

The Special Court has been lauded for its even-handed approach in the investigation and for prosecuting crimes allegedly committed by all sides of the conflict.⁶⁵¹ However, at least one author criticises the consideration of ‘open-ended terms’ such as peace and justice by the SCSL Prosecutor. This blurs the line between politics and law.⁶⁵²

§ *Limitations to prosecutorial discretion*

In line with what was said regarding the *ad hoc* tribunals, the Prosecutor’s discretion is both guaranteed and limited by his or her independence.⁶⁵³ In the *Taylor* case, in applying the same test set forward by the ICTY Appeals Chamber in *Delalić et al. (Čelebići case)*, Trial Chamber II concluded that the defendant had not been singled out for selective prosecution.⁶⁵⁴ Besides, the Appeals Chamber of the SCSL clarified that “discretion must be exercised by the Prosecution in good faith, based on sound professional judgment.”⁶⁵⁵

II.4. The ICC: tempered legality

II.4.1. General

From the first sentence of Article 53 ICC Statute (‘Initiation of Investigation’), it follows that a principle of legality is incumbent on the ICC Prosecutor (‘shall [...] initiate an investigation’). This formulation seems to rule out any arbitrary decision making by the

⁶⁴⁹ U.S. BERKELY WAR CRIMES STUDIES CENTER, Interim Report on the Special Court for Sierra Leone, April 2005, p. 6.

⁶⁵⁰ *Ibid.*, p. 7.

⁶⁵¹ W.A. SCHABAS, Prosecutorial Discretion v. Judicial Activism at the ICC, in «Journal of International Criminal Justice», Vol. 6, 2008, p. 750.

⁶⁵² N.J. JURDI, The International Criminal Court and National Courts, Farnham, Ashgate Publishing Limited, 2011, p. 95 (calling the decision to prosecute Charles Taylor an example where it is unclear whether the political aspect influenced the Prosecutor’s decision or not).

⁶⁵³ Article 15 (1) SCSL Statute.

⁶⁵⁴ SCSL, Judgement, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, T. Ch. II, 18 May 2012, par. 84. See *supra*, Chapter 3, II.2.

⁶⁵⁵ SCSL, Judgement, *Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-A, A. Ch., 14 October 2011, par. 280-281.

Prosecutor regarding the appropriateness of an investigation.⁶⁵⁶ In a similar vein, Article 15 (3) ICC Statute (on the more limited question of the Prosecutors' *proprio motu* power to initiate an investigation) is drafted in mandatory terms.⁶⁵⁷ Contrary to other international criminal tribunals, any explicit requirement (jurisdictional, admissibility or otherwise) requiring the ICC Prosecutor to focus on a specific category of persons (e.g. 'those most responsible') is absent from the ICC Statute. Such a limitation was explicitly rejected during the negotiations on the ICC Statute.⁶⁵⁸ The Statute's Preamble offers further support for the existence of a principle of obligatory prosecution.⁶⁵⁹

Nevertheless, as will be shown, the ICC's procedural design does not offer a straightforward, conclusive answer to the question of whether the Prosecutor is to be guided by a principle of legality or by a principle of opportunity. Rather, as some of the literature acknowledges, it is clear that the principle that guides the Prosecutor depends on the factors the Prosecutor should consider in deciding whether or not to initiate investigations into a certain situation or in deciding whether or not to prosecute a certain case.⁶⁶⁰ At least some discretion is built in and

⁶⁵⁶ Consider e.g. M. BERGSMO and P. KRUGER, Article 53, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1068.

⁶⁵⁷ Article 15 (3) ICC Statute ("If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she *shall* submit to the Pre-Trial Chamber a request for authorization of an investigation" (emphasis added)). Consider I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 251 (noting that this provision, together with Article 53, suggests "*prima facie* mandatory investigations"). SCHABAS notes that the term 'shall' is confusing as far as the *proprio motu* powers of the Prosecutor are concerned. The Prosecutor 'shall' proceed after having decided to exercise of discretion under Article 15 ICC Statute. W.A. SCHABAS, *An Introduction to the International Criminal Court* (3d ed.), Cambridge, Cambridge University Press, 2007, p. 242.

⁶⁵⁸ I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 442.

⁶⁵⁹ Consider in particular preambular paragraph 4 of the ICC Statute: "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished." Importantly, this duty is coupled with the duty of national states "to exercise criminal jurisdiction" (preambular paragraph 6), which, however, falls short of a 'duty to prosecute'. See D. ROBINSON, *The Mysterious Mysteriousness of Complementarity*, in «Criminal Law Forum», Vol. 21, 2010, p. 94. *Contra*, consider e.g. W.A. SCHABAS, *Complementarity in Practice: Some Uncomplimentary Thoughts*, in «Criminal Law Forum», Vol. 19, 2007, pp. 5, 8, 22-23.

⁶⁶⁰ H. OLÁSOLO, *The Prosecutor of the ICC before the Initiation of Investigations: a Quasi-Judicial or Political Body?*, in «International Criminal Law Review», Vol. 3, 2003, p. 132; G.-J.A. KNOOPS, *Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective*, in «Criminal Law Forum», Vol. 15, 2005, p. 377 (holding that "the discretion to prosecute under the ICC Statute amounts to a departure from [the] principle of legality"). *Contra*, consider Razesberger, who argues that it follows from the joint reading of Article 15 (1) ICC Statute ("The Prosecutor *may* start investigations *proprio motu*" (emphasis added)) and Article 53 (1) ICC Statute ("The Prosecutor *shall*, [...] initiate investigations" (emphasis added)) that the Prosecutor enjoys a margin of discretion with regard to *proprio motu* investigations whereas he or she is under an obligation to investigate with regard to Security Council or state referrals (though still enjoying a margin of appreciation under Article 53 (1) (c) ICC Statute). However, the author does not further clarify the relationship between Article 15 (1) ('may') and 15 (3) ICC Statute ('shall submit to the Pre-Trial Chamber a request for authorization'). See F. RAZESBERGER, *The International Criminal Court: The Principle of Complementarity*,

the Prosecutor is not under an obligation to investigate and prosecute all crimes within the Court's jurisdiction.⁶⁶¹ Hence, it is necessary to identify the instances where the ICC Prosecutor possesses some discretion to investigate and/or prosecute the crimes within the Court's jurisdiction. This requires a closer consideration of the substantive requirements of Article 53 (1) and (2) ICC Statute. Nevertheless, falling short of giving a comprehensive overview of each and every one of these requirements, our focus will be on the question of whether these conditions leave or do not leave discretion to the Prosecutor.

II.4.2. Variables to be considered

§ Receipt of the notitia criminis / start of the preliminary investigation

It is recalled that the wording of Article 15 (2) ICC Statute, on the receipt of the *notitia criminis* by the Prosecutor, points toward an underlying principle of legality. It was concluded that the Prosecutor does not have the discretion to not conduct a preliminary investigation.⁶⁶² If additional information is required to properly assess the *notitia criminis*, the Prosecutor has no discretion and *must* conduct a preliminary investigation.

§ Decision whether or not to proceed with an investigation

As previously discussed, it follows from Article 53 (1) ICC Statute that different variables should be considered in assessing whether there is 'reasonable basis' to proceed with an investigation into a situation.⁶⁶³ It was equally pointed out that the same variables have to be

Frankfurt am Main, Peter Lang, 2006, pp. 100 - 101. Turone holds the view that the ICC will operate under a system of expediency. See G. TURONE, Powers and Duties of the Prosecutor, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1174.

⁶⁶¹ As evidenced, for example, by Article 13 ICC Statute: 'The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if...'. Consider e.g. C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years on*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 249 (the author argues that "[t]he Statute provides only limited guidance in this respect and leaves considerable leeway for interpretation and prosecutorial policy"); *ibid.*, p. 257 ("the selection of situations encompasses elements of prosecutorial discretion [...] further discretion is exercised in the choice of admissible cases that warrant prosecution").

⁶⁶² See *supra*, Chapter 3, I.2. Consider Article 15 (2) ICC Statute ("shall analyse the seriousness of the information received"); Confirming, consider e.g. H. OLÁSULO, *The Prosecutor of the ICC before the Initiation of Investigations: a Quasi-Judicial or Political Body?*, in «International Criminal Law Review», Vol. 3, 2003, pp. 121 - 122.

⁶⁶³ See *supra*, Chapter 3, I.1.

considered in case the Prosecutor decides to make use of his or her *proprio motu* powers.⁶⁶⁴ The first two variables respectively require (1) the Prosecutor to proceed when a ‘reasonable basis to believe’ exists that a crime has been committed and that (2) such a crime falls within the Court’s jurisdiction.⁶⁶⁵ The third variable requires the Prosecutor to consider, prior to the initiation of the investigation, (3) whether the ‘case’ would be *prima facie* admissible.⁶⁶⁶ Below, it will be shown how these variables are based on an objective assessment of the *notitia criminis*.⁶⁶⁷ Contrastly, the last variable to be considered, to know (4) whether taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice, leaves broad discretion with the Prosecutor.⁶⁶⁸ Remarkably, in this scheme, the issue of the gravity of the crime should be considered twice, as part of the admissibility consideration (3) and in the assessment of the interests of justice (4). Such a list of variables is exhaustive in nature (‘shall’).⁶⁶⁹ Most of the variables indicated lack a clear definition in the Statute or the RPE. Nevertheless, the precise definition of these terms is a precondition for any meaningful assessment of the discretionary (or non) nature of any of these elements.

As a caveat, it should be noted that prosecutorial discretion not only depends on the particular variable under consideration but equally on the triggering mechanism. Prosecutorial discretion may be more limited in case of referrals.⁶⁷⁰ Unlike communications, in cases where a situation is referred, there is a *presumption* in favour of opening an investigation. This follows from Article 53 (1), which states that the Prosecutor ‘shall [...] initiate an investigation unless he or she determines that there is no reasonable basis to proceed’.⁶⁷¹ Only the review by the PTC of a determination not to proceed is provided for under the Statute, not of an affirmative decision to proceed (as with *proprio motu* investigations).

⁶⁶⁴ See *supra*, Chapter 3, I.1.

⁶⁶⁵ Article 53 (1) (a) ICC Statute.

⁶⁶⁶ Article 53 (1) (b) ICC Statute.

⁶⁶⁷ G. TURONE, Powers and Duties of the Prosecutor, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1152.

⁶⁶⁸ Article 53 (1) (c) ICC Statute.

⁶⁶⁹ A. MCDONALD and R. HAVEMAN, Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC, Expert Consultation Process on General Issues Relevant to the ICC Office of the Prosecutor, 15 April 2003, p. 3.

⁶⁷⁰ Consider the ‘Annex to the “Paper on Some Policy Issues before the Office of the Prosecutor”’, pp. 1-2; L.F. HORTON, Prosecutorial Discretion Before International Criminal courts and Perceptions of Justice: How Expanded Prosecutorial Independence Can Increase the Accountability of International Actors, in «Eyes on the ICC», Vol. 7, 2010-2011, p. 31.

⁶⁷¹ Article 53 (1) ICC Statute *chapeau* and *in fine*.

§ *Whether 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*

The first two variables led the ICC Prosecutor not to proceed with an investigation in the Venezuela situation and the Palestine situation.⁶⁷² According to PTC II, any definition on the ‘reasonable basis to believe’ threshold should reflect “the specific purpose underlying this procedure.”⁶⁷³ Bearing in mind that this threshold is the lowest to be found in the ICC Statute, the information available to the Prosecutor does not have to be ‘comprehensive’ or ‘conclusive’.⁶⁷⁴ Rather, (like the reasonable basis to proceed threshold in the *chapeau* of Article 53 (1)), it serves to prevent unwarranted, frivolous, or politically motivated investigations.⁶⁷⁵ Hence, information “need not point towards only one conclusion.”⁶⁷⁶ Consequently, PTC II considered the threshold to imply that the Chamber must be satisfied that there is a sensible or reasonable justification for believing that a crime that falls within the Court’s jurisdiction has been or is being committed. However, it remains unclear what the difference between a reasonable basis to proceed in the *chapeau* of Article 53 (1) and a reasonable basis to believe in Article 53 (1) (a) actually is.⁶⁷⁷

⁶⁷² ICC, Annex to Update on Communications Received by the Office of the Prosecutor: Venezuela Response, 9 February 2006, p. 4 (“The available information did not provide a reasonable basis to believe that the requirement of a widespread and systematic attack against any civilian population had been satisfied”); OTP: Situation in Palestine, 3 April 2012 (the Prosecutor concludes that he lacks authority to determine whether Palestine qualifies as a ‘state’, which is a prerequisite for the lodging of an *ad hoc* declaration accepting the Court’s jurisdiction).

⁶⁷³ ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 32, 35.

⁶⁷⁴ *Ibid.*, par. 27. Notably, the Pre-Trial Chamber considered that the ECtHR’s ‘reasonable suspicion’ threshold, upon which the Court’s case law relies for the interpretation of the ‘reasonable grounds to believe’ test under Article 58 ICC Statute, is not suitable for the interpretation of Article 53 (1) (a) ICC Statute, where “[t]he latter was not designed to determine whether a particular person was involved in the commission of a crime within the jurisdiction of the Court, which may justify his arrest” (*ibid.*, par. 32).

⁶⁷⁵ *Ibid.*, par. 32; H. OLÁSULO, The Prosecutor of the ICC before the Initiation of Investigations, in «International Criminal Law Review», Vol. 3, 2003, p. 133 (“The ultimate object and purpose of such standard [...] is to avoid the initiation of unfounded politically motivated investigations”).

⁶⁷⁶ ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 34. It should be noted that the PTC interprets this threshold in light of the underlying purpose of the procedure of Article 15 (4) ICC Statute (authorisation by the PTC of *proprio motu* investigation by the ICC Prosecutor) (*ibid.*, par. 32).

⁶⁷⁷ Nevertheless, the two concepts do not conflict because the “reasonable basis to believe” test under Article 53 (1) (a) is only one of the elements to be considered under the “reasonable basis to proceed” test in the *chapeau* of Article 53 (1). M. BERGSMO and P. KRUGER, Article 53, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 1069.

Several attempts have been undertaken to further define this parameter. The OTP Draft Regulations suggested the following interpretation: “if there is a realistic prospect that the investigation will produce evidence that will lead to a *prima facie* case against the potential accused” or “if there is a clear indication that a person has participated in a crime within the jurisdiction of the Court”.⁶⁷⁸ However, this suggestion did not make it to the final version of the Regulations of the OTP. Also scholarly writings have proposed different formulas. For example, STEGMILLER argues that a reasonable basis implies that “[i]f there is initial evidence that the event in question occurred and the Prosecutor deems the event to be within the jurisdiction of the Court, the Prosecutor should not decline further proceedings.”⁶⁷⁹ In any case, it is clear that the reasonable basis test should objectively be construed and be evidentiary in nature.⁶⁸⁰ It should not include a check on the appropriateness of the request to initiate an investigation.⁶⁸¹

The rest of the parameter’s wording, specifically ‘crimes within the jurisdiction of the court’ does not cause a great deal of difficulty. It is clear that such wording is devoid of any discretionary traits and implies an examination of all necessary jurisdictional requirements (subject-matter, temporal, personal and territorial).⁶⁸²

§ *Whether the case is or would be admissible under Article 17*

The second parameter refers to admissibility. A brief incursion on the content of this criterion is necessary in order to assess whether it leaves room for prosecutorial discretion or not. According to Pre-Trial Chamber II, this admissibility criterion refers mainly to “the scenarios or conditions on the basis of which the court shall refrain from exercising its recognized

⁶⁷⁸ Regulation 12.3 of the Draft Regulations of the OTP, fn. 80.

⁶⁷⁹ I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 272.

⁶⁸⁰ M.R. BRUBACHER, *Prosecutorial Discretion in the International Criminal Court*, in «*Journal of International Criminal Justice*», Vol. 2, 2004, p. 79; G. TURONE, *Powers and Duties of the Prosecutor*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1152 (it should encompass “an assessment based on objective and specific indicia”).

⁶⁸¹ J. WOUTERS, S. VERHOEVEN and B. DEMEYERE, *The International Criminal Court’s Office of the Prosecutor: Navigating between Independence and Accountability?*, in «*International Criminal Law Review*», Vol. 8, 2008, pp. 280, 296 (equating the reasonable basis threshold with that of a “probability of a *prima facie* case”).

⁶⁸² ICC, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 37 – 39.

jurisdiction over a given situation or case.”⁶⁸³ It encompasses both complementarity and gravity,⁶⁸⁴ which led TURONE to label it as “fluctuating”. He argues that this criterion may be discretionary or non-discretionary, depending on the case. Where gravity is concerned, the criterion would be “fully discretionary” in nature.⁶⁸⁵ Other authors argue that gravity under Article 53 (1) (b) ICC Statute should be objectively construed. Yet other authors hold that not only the gravity criterion, but also the complementarity criterion, leaves considerable room for discretion.⁶⁸⁶

Admissibility attaches to different stages, starting with a ‘situation’ up to a concrete ‘case’.⁶⁸⁷ The text of Article 53 (1) (b) suggests that the admissibility at this stage relates to ‘cases’. Nevertheless, a contextual reading of Article 53 (1) ICC Statute affirms that, notwithstanding its wording, the admissibility test at this stage, in principle, relates to a ‘situation’ rather than a specific case.⁶⁸⁸ Indeed, the wording of Article 53 (1) (b) ICC Statute points to an assessment at a more general level than that of a particular ‘case’ (‘or *would be* admissible’).⁶⁸⁹ An interpretation whereby admissibility would be assessed on the basis of a concrete case at the stage when individuals may not yet have been identified would be illogical.⁶⁹⁰ Pre-Trial Chamber II offered different explanations for the peculiar wording of Article 53 (1) (b) ICC Statute. Firstly, based on the *travaux préparatoires* of the ICC Statute, it appears that ‘case’

⁶⁸³ *Ibid.*, par. 40.

⁶⁸⁴ Consider *e.g. ibid.*, par. 52; ICC, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Situation in the Republic of Côte d’Ivoire”, *Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-14-Corr, PTC III, 15 November 2011, par. 192 – 206.

⁶⁸⁵ G. TURONE, Powers and Duties of the Prosecutor, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1152.

⁶⁸⁶ A. MCDONALD and R. HAVEMAN, Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC, Expert Consultation Process on General Issues Relevant to the ICC Office of the Prosecutor, 15 April 2003, p. 4.

⁶⁸⁷ ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 41. Consider also ICC, Decisions on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, *Situation in the DRC*, Case No. ICC 01/04-01-101-tEN-Corr, PTC I, 17 January 2006, par. 65 (situations are generally defined in terms of temporal, territorial and in some cases personal parameters whereas cases comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects. They entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear).

⁶⁸⁸ ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 44-46. Such reading is supported by a plain reading of Article 13 (a), 14 (1), 15 (5) and (6) and 18 (1) ICC Statute.

⁶⁸⁹ See also J. KLEFFNER, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford, Oxford University Press, 2008, p. 197 (“This wording suggests that the provision extends to situations in which the facts can only be determined with such a degree of generality that the question of whether a case *is* admissible cannot be answered” (emphasis in original)).

⁶⁹⁰ *Ibid.*, p. 197.

was used in all drafts of Article 17 at the Prepcom. It has been argued that, at the Rome conference, there was a ‘prevailing trend’ to not reopen the ‘substance’ of the admissibility provisions drafted by the PrepCom. Therefore, changing the terminology in Article 53 would have required revisiting the terminology of Article 17; hence, it was left unaltered.⁶⁹¹ However, Pre-Trial Chamber II preferred a different explanation and held that the reference to ‘case’ was advertently left in all provisions on admissibility, leaving it up to the Court “to harmonize the meaning according to the different stages of the proceedings.”⁶⁹² Thus, the Chamber is called upon to construe the meaning of a ‘case’ within the context where it is applied. It continued by explaining that since “it is not possible to have a concrete case involving an identified suspect for the purpose of prosecution, prior to the commencement of the investigation, the admissibility assessment at this stage actually refers to the admissibility of one or more potential cases within the context of a situation.”⁶⁹³ As such “admissibility at the situation phase should be assessed against certain criteria defining a “potential case” such as (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).”⁶⁹⁴

Logically, such a “selection [...] is preliminary in nature and is not binding for future admissibility assessments.”⁶⁹⁵ “[T]he Prosecutor’s selection on the basis of these elements for the purposes of defining a potential “case” for this particular phase may change at a later

⁶⁹¹ ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 46.

⁶⁹² *Ibid.*, par. 47.

⁶⁹³ *Ibid.*, par. 48; ICC, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Situation in the Republic of Côte d’Ivoire”, *Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-14-Corr, PTC III, 15 November 2011, par. 190. See also R. RASTAN, What is a ‘Case’ for the Purpose of the Rome Statute?, in «Criminal Law Forum», Vol. 19, 2008, p. 441.

⁶⁹⁴ ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, par. 50 and 182; ICC, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Situation in the Republic of Côte d’Ivoire”, *Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-14-Corr, PTC III, 15 November 2011, par. 191. Such selection is not binding for future admissibility assessments.

⁶⁹⁵ ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 50.

stage, depending on the development of the investigation.”⁶⁹⁶ In this sense, one may argue that the complementarity is assessed at this stage “in a general manner.”⁶⁹⁷ Such an admissibility assessment is of a *prima facie* nature.⁶⁹⁸ Nevertheless, at least one scholar argues that a *prima facie* determination of admissibility may sometimes be impossible because of insufficient factual and legal bases on which to decide.⁶⁹⁹

The admissibility assessment encompasses the three grounds of inadmissibility under Article 17 (1) (complementarity, gravity and *ne bis in idem*), which are exhaustive in nature.⁷⁰⁰ As held by Pre-Trial Chamber II, the admissibility assessment at this stage first encompasses “an examination as to whether the relevant State(s) is/are conducting or has/have conducted national proceedings in relation to the groups of persons and the crimes allegedly committed during those incidents, which together would likely form the object of the Court’s investigation.”⁷⁰¹ Secondly, it includes an assessment of whether the gravity threshold is met or not.

The first admissibility test is that of complementarity, a concept at the core of the ICC’s procedural framework.⁷⁰² However, the notion has not been defined in the Statute or the RPE anywhere. Rather, Article 17 ICC Statute outlines the requirements pursuant to which the Court exercises its complimentary jurisdiction. These requirements entail that a case will be inadmissible and that the Prosecutor has to defer to the national authorities in the event that a case is or has been the subject of genuine national proceedings. This assessment is on-going

⁶⁹⁶ ICC, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Situation in the Republic of Côte d’Ivoire”, *Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-14-Corr, PTC III, 15 November 2011, par. 191.

⁶⁹⁷ P. KIRSCH and D. ROBINSON, Referral by States Parties, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 639; I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, pp. 285-286.

⁶⁹⁸ G. TURONE, Powers and Duties of the Prosecutor, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1151. It may be noted that it follows from Article 15 (4) that in case the Pre-Trial Chamber grants authorisation to the Prosecutor to start an investigation, this assessment is without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

⁶⁹⁹ M.M. EL ZEIDY, Some Remarks on the Question of Admissibility of a Case During Arrest Warrant Proceedings before the International Criminal Court, in «Leiden Journal of International Law», Vol. 19, 2006, p. 748.

⁷⁰⁰ I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 259.

⁷⁰¹ ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 52.

⁷⁰² ICC Statute, preambular paragraph 10.

and made on the basis of the underlying facts as they exist at the time⁷⁰³ but, nevertheless, subject to revision based on any change in those facts.⁷⁰⁴ At first, it seems that the principle of complementarity is devoid of any discretionary traits.

However, it is to be recalled that the ICC's practice shows that an 'inaction' requirement is to be read into Article 17 (1) ICC Statute.⁷⁰⁵ This requirement follows from an *a contrario* reading of Article 17 (1) (a) – (c) ICC Statute.⁷⁰⁶ It results in a 'two-step'⁷⁰⁷ complementarity test, entailing that a situation (i) will be *prima facie* admissible only insofar as states having jurisdiction over it have remained inactive in relation to individuals and crimes that are likely to constitute the Court's future case(s) or (ii) where states are unwilling or unable in the sense

⁷⁰³ ICC, Decision on the Admissibility of the Case under Article 19 (1), *Prosecutor v. Kony et al., Situation in Uganda*, Case No. ICC-02/04-01/05-377, PTC II, 10 March 2009, par. 28 (“Considered as a whole, the corpus of these provisions delineates a system whereby the determination of admissibility is meant to be an ongoing process throughout the pre-trial phase, the outcome of which is subject to review depending on the evolution of the relevant factual scenario. Otherwise stated, the Statute as a whole enshrines the idea that a change in circumstances allows (or even, in some scenarios compels) the Court to determine admissibility anew”); ICC, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-1497, PTC II, 25 September 2009, par. 56.

⁷⁰⁴ *Ibid.*, par. 56.

⁷⁰⁵ ICC, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Situation in the Republic of Côte d’Ivoire”, *Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-14-Corr, PTC III, 3 November 2011, par. 193-200; ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 53-54; ICC, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-1497, A. Ch., 25 September 2009, par. 56; ICC, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Situation in the Republic of Kenya*, Case No. ICC-01/09-01/11-307, A. Ch., 30 August 2011, par. 41 (“It should be underlined, however, that determining the existence of an investigation must be distinguished from assessing whether the State is “unwilling or unable genuinely to carry out the investigation or prosecution”, which is the second question to consider when determining the admissibility of a case. For assessing whether the State is indeed investigating, the genuineness of the investigation is not at issue; what is at issue is whether there are investigative steps” (footnote omitted)). Similarly: ICC, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-274, A. Ch., 30 August 2011, par. 40; ICC, Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Situation in Libya*, Case No. ICC-01/11-01/11-344-Red, PTC I, 31 May 2013, par. 58.

⁷⁰⁶ ICC, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 29, fn. 19 (annexed to ICC, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-8, PTC I, 24 February 2006).

⁷⁰⁷ D. ROBINSON, The Mysterious Mysteriousness of Complementarity, in «Criminal Law Forum», Vol. 21, 2010, pp. 68-87.

of Article 17 (1) (a) – (c), (2) and (3) ICC Statute.⁷⁰⁸ This issue of inactivity should be addressed prior to the unwillingness or inability test.⁷⁰⁹

In the *Katanga and Ngudjolo Chui* case, the Appeals Chamber held that the inaction requirement clearly follows from the wording of Article 17 (1) (a) and (b) and 17 (2) (a), where these provisions refer to a situation in which an investigation or prosecution is being or has been conducted in a state that has jurisdiction.⁷¹⁰ The Appeals Chamber overturned the holding of Trial Chamber II, which seemingly treated inaction as a form of unwillingness.⁷¹¹ The Appeals Chamber held that an interpretation whereby unwillingness and inability are also considered in case of inaction conflicts with a purposive interpretation of the Statute, which aim is “to put an end to impunity” and to ensure that “the most serious crimes of concern to the international community as a whole do not go unpunished.”⁷¹² Such an interpretation can be reconciled with the notion of complementarity, a notion which “strikes a balance between safeguarding the primacy of domestic proceedings *vis-à-vis* the International Criminal Court on the one hand, and the goal of the Rome Statute to “put an end to impunity” on the other

⁷⁰⁸ ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, *Situation in the DRC, Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 29 (annexed to ICC, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-8, PTC I, 24 February 2006).

⁷⁰⁹ *Ibid.*, par. 29; ICC, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Prosecutor v. Katanga and Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-1497, A. Ch., 25 September 2009, par. 78. Consider also ICC, Policy Paper on Preliminary Examinations, 2013, par. 47 (“As confirmed by the Appeals Chamber, the first question in assessing complementarity is an empirical question: whether there are or have been any relevant national investigations or prosecutions”).

⁷¹⁰ ICC, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-1497, A. Ch., 25 September 2009, par. 74 – 79 (for example, the Appeals Chamber refers to the wording of Article 17 (1) (a) “*is being investigated or prosecuted*”; Article 17 (1) (b) “*has been investigated [...] has decided not to prosecute*” (emphasis added). According to the Appeals Chamber “the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the questions of unwillingness and inability. To do otherwise would be to put the cart before the horse.” (*ibid.*, par. 78).

⁷¹¹ ICC, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-1213, T. Ch. II, 16 June 2009, par. 74-75, 77.

⁷¹² *Ibid.*, par. 79 (such interpretation would entail that “[t]he Court would be unable to exercise its jurisdiction over a case as long as the State is theoretically willing and able to investigate and to prosecute the case, even though that State has no intention of doing so. Thus a potentially large number of cases would not be prosecuted by domestic jurisdictions or by the International Criminal court”).

hand.” “If States do not or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in.”⁷¹³

The Appeals Chamber’s stance is convincing. It is in line with the Prosecutor’s understanding of complementarity.⁷¹⁴ ROBINSON, who was responsible for drafting the text that later became Article 17, also shares this understanding. In this regard, he distinguishes a “proceedings requirement”, and argues that in the absence of such proceedings, inadmissibility under the complementarity regime is impossible.⁷¹⁵ However, it should be noted that other commentators reject reading an inaction requirement into Article 17 ICC Statute.⁷¹⁶

It should be underlined that the admissibility determination at the start of the investigation (‘situation stage’) differs from the admissibility assessment at the ‘case stage’. The latter stage starts with an application by the Prosecutor under Article 58 of the Statute for the issuance of a warrant of arrest or summons to appear, where one or more suspects has or have been identified.⁷¹⁷ At the case stage, the Court’s jurisprudence has held that national proceedings must encompass both the *same person* and the *same conduct* (specificity test).⁷¹⁸ Contrastly,

⁷¹³ *Ibid.*, par. 85 (the Appeals Chamber added that “there may be merit in the argument that the sovereign decisions of a State to relinquish its jurisdiction in favour of the court may well be seen as complying with the “duty to exercise [its] criminal jurisdiction”, as envisaged in the sixth paragraph of the Preamble.”); ICC, Decision on Application by the government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2) (b) of the Statute, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Situation in the Republic of Kenya*, Case No. ICC-01/09-01-11-101, PTC II, 30 May 2011, par. 44.

⁷¹⁴ See ICC, Paper on Some Policy Issues before the Office of the Prosecutor (‘Policy Paper’), September 2003, p. 5 (“There is no impediment to the admissibility of a case before the Court where no State has initiated any investigation”). The idea was first developed in the informal expert paper on complementarity. See OTP, Informal Expert Paper: the Principle of Complementarity in Practice, 2003, par. 17- 18.

⁷¹⁵ D. ROBINSON, The Mysterious Mysteriousness of Complementarity, in «Criminal Law Forum», Vol. 21, 2010, p. 68 (“the requirement of national proceedings is not a gloss or innovation; it is expressly stated in 55 words of unambiguous, black and white text in Article 17”). Consider also the detailed textual and teleological interpretation of Article 17: *ibid.*, pp. 82 – 91.

⁷¹⁶ Consider e.g. H. ARSANJANI and W. M. REISMAN, The Law-in-Action of the International Criminal Court, in «American Journal of International Law», Vol. 99, 2005, p. 391; W. SCHABAS and S. WILLIAMS, Article 17, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, München, Verlag C.H. Beck, 2008, pp. 615 - 616. Compare D. ROBINSON, The Mysterious Mysteriousness of Complementarity, in «Criminal Law Forum», Vol. 21, 2010, p. 77 (calling this one-step approach to complementarity the “slogan version”).

⁷¹⁷ ICC, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2) (b) of the Statute, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Situation in the Republic of Kenya*, Case No. ICC-01/09-01/11-101, PTC II, 30 May 2011, par. 54.

⁷¹⁸ “[I]t is a *condition sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is subject of the case before the Court.” See ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, *Prosecutor v. Lubanga*,

at the situation stage, “the contours of the likely case will often be relatively vague because the investigations of the Prosecutor are at their initial stages.”⁷¹⁹ “Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear.”⁷²⁰ It follows that the admissibility check is more general in nature insofar that it relates to the overall conduct.⁷²¹

While a definition of complementarity is lacking, the factors to be considered are outlined in Article 17 ICC Statute. For example, it is clear from Article 17 (2) (a) – (c) ICC Statute which factors should be considered in assessing unwillingness and that these factors are exhaustive in nature (‘shall consider [...] whether one or more of the following exist’).⁷²² Also the

Situation in the DRC, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 37; ICC, Decision on the Prosecution Application under Article 58 (7) of the Statute, *Prosecutor v. Harun and Kushayb, Situation in Darfur, Sudan*, Case No. ICC-02-05-01/07, PTC I, 27 April 2007, par. 24 – 25. As endorsed by the Appeals Chamber, consider e.g. ICC, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Situation in the Republic of Kenya*, Case No. ICC-01/09-01/11-307, A. Ch., 30 August 2011, par. 40.

⁷¹⁹ ICC, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-274, A. Ch., 30 August 2011, par. 38; ICC, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Situation in the Republic of Kenya*, Case No. ICC-01/09-01/11-307, A. Ch., 30 August 2011, par. 39.

⁷²⁰ *Ibid.*, par. 39; ICC, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-274, A. Ch., 30 August 2011, par. 38.

⁷²¹ T.O. HANSEN, A Critical Review of the ICC’s Recent Practice Concerning Admissibility Challenges and Complementarity, in «Melbourne Journal of International Law», Vol. 13, 2012, p. 224. In its decision authorising a *proprio motu* investigation in Kenya, Pre-Trial Chamber II concluded that there were no national investigations regarding senior business and political leaders on the serious criminal incidents which are likely to be the focus of the Prosecutor’s investigation. See ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 187. In a similar vein, in authorising a *proprio motu* investigation in the Republic of Côte d’Ivoire, Pre-Trial Chamber III found that Côte d’Ivoire nor any other state having jurisdiction is conducting or has conducted national proceedings against individuals or crimes that are going to be the likely to constitute the Court’s future case(s). See ICC, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Situation in the Republic of Côte d’Ivoire”, *Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-14-Corr, PTC III, 3 November 2011, par. 206. Hence “there are potential cases that would be admissible in the situation in the Republic of Côte d’Ivoire, if the investigation is authorised.”

⁷²² Confirming, see M.M. EL ZEIDY, The Principle of Complementarity in International Criminal Law: Origin, Development and Practice, Martinus Nijhoff Publishers, Leiden – Boston, 2008, p. 168 (since unwillingness is the exception to the rule (admissibility), the term should be given a narrow interpretation). *Contra*, consider e.g. D. ROBINSON, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal*

inability assessment is deemed to be exhaustive and linked to the ‘national judicial system’.⁷²³ From this, one is tempted to conclude that the complementarity component of Article 53 (1) (b) ICC Statute reflects a principle of legality.⁷²⁴

However, some commentators disagree and have argued that, notwithstanding the fact that the parameters on complementarity are indicated in Article 17 ICC Statute (except for the implicit inaction requirement), the vagueness of many of these parameters, such as ‘an unjustified delay’ or ‘to bring the person concerned to justice’, leave ample discretion with the Prosecutor.⁷²⁵ It has been argued that such ‘subjective potential’ is particularly present in the unwillingness criterion, unlike the more objective inability criterion.⁷²⁶ While one can agree with this argument, it is important in light of our assessment, that these parameters lend themselves to objective qualification, either through the Court’s jurisprudence, or through the definition in prosecutorial guidelines. Here, one could refer to the distinction between ‘inherent’ and ‘political’ discretion. Underlying this distinction is the understanding that there are some inherent forms of discretion (or a ‘margin of appreciation’) in all systems that adhere to the principle of legality.⁷²⁷ In turn, political discretion allows for the consideration of purely political factors.⁷²⁸ The limited nature of prosecutorial discretion does not deny the political sensitivity surrounding admissibility considerations, insofar that it may involve a critical assessment of the domestic system of criminal justice.⁷²⁹

Court, in «European Journal of International Law», Vol. 14, 2003, p. 500 (noting that “the list of criteria should not be interpreted as a closed list: the open-ended wording ‘shall *consider* whether’ was deliberately chosen, as opposed to language imposing a fixed requirement”).

⁷²³ I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 309.

⁷²⁴ *Ibid.*, p. 294 (noting that “the legal avenue of admissibility does not leave room for the exercise of prosecutorial discretion based on policy grounds”); J. KLEFFNER, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford, Oxford University Press, 2008, p. 288.

⁷²⁵ See e.g. A. MCDONALD and R. HAVEMAN, *Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC*, Expert Consultation Process on General Issues Relevant to the ICC Office of the Prosecutor, 15 April 2003, p. 4; I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 295. DELMAS-MARTY even argues that the concept of unwillingness cannot be tested with regard to a situation as a whole. A more specific assessment is necessary: unwillingness to investigate and prosecute persons really responsible. See M. DELMAS-MARTY, *Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC*, in «Journal of International Criminal Justice», Vol. 4, 2006, p. 5.

⁷²⁶ I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 303. On the inability criterion, Stegmiller argues that it is a more fact-driven, objective notion than unwillingness (*ibid.*, p. 309).

⁷²⁷ H. OLÁSULO, *The Prosecutor of the ICC before the Initiation of Investigations*, in «International Criminal Law Review», Vol. 3, 2003, p. 110.

⁷²⁸ *Ibid.*, p. 90, 109.

⁷²⁹ A.M. DANNER, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, in «American Journal of International Law», Vol. 97, 2003, p. 517 (quoting Justice Arbour).

The gravity-criterion is another criterion that lacks clarity. Notably, the Prosecutor relied on this gravity concept so as to not proceed with an investigation into the situation in Iraq.⁷³⁰ It was also the criterion on the basis of which the LRA, and not the UPDF, was selected for investigation in the situation in Uganda.⁷³¹ According to Pre-Trial Chamber II, the gravity criterion (Article 17 (1) (d) ICC Statute) “prevents the court from investigating, prosecuting and trying peripheral cases.”⁷³² At the Article 53 (1) stage, gravity, like admissibility, will be assessed in a general sense, on the basis of ‘potential cases’.⁷³³ Such assessment should be general in nature and compatible with the pre-investigative stage.⁷³⁴ It entails a generic assessment of whether the individuals or groups of persons that are likely to be the object of an investigation capture those who may bear the greatest responsibility for the alleged crimes committed.⁷³⁵ With regard to the crimes committed during the incidents that are likely to be the focus of an investigation for the purpose of future cases, Pre-Trial Chambers II and III referred to the interplay between crimes and their context, entailing that the gravity of the crimes will be assessed in the context of the incidents that are likely to be the object of the investigation.⁷³⁶ It may include quantitative and qualitative parameters, including factors such as (i) the scale of the alleged crimes (including geographic and temporal intensity), (ii) the nature of the unlawful behaviour or of the crimes allegedly committed, (iii) the means employed for executing the crimes (manner of their commission) and (iv) the impact of the crimes and the harm caused to victims and their families.⁷³⁷ Also, any aggravating

⁷³⁰ ICC, Annex to Update on Communications Received by the Office of the Prosecutor: Iraq Response, 9 February 2006, p. 9 (“The number of potential victims of crimes within the jurisdiction of the Court in this situation [...] was of a different order than the number of victims found in other situations under investigation or analysis by the Office”).

⁷³¹ OTP, Statement by Luis Moreno-Ocampo, 14 October 2005, p. 3 (“The criteria for selection of the first case was gravity. We analyzed the gravity of all crimes in Northern Uganda committed by the LRA and Ugandan forces. Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF. We therefore started with an investigation of the LRA”).

⁷³² ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 56.

⁷³³ *Ibid.*, par. 58; ICC, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Situation in the Republic of Côte d’Ivoire”, *Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-14-Corr, PTC III, 15 November 2011, par. 202.

⁷³⁴ *Ibid.*, par. 203. ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 60.

⁷³⁵ *Ibid.*, par. 60; ICC, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Situation in the Republic of Côte d’Ivoire”, *Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-14-Corr, PTC III, 15 November 2011, par. 204.

⁷³⁶ ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 61.

⁷³⁷ *Ibid.*, par. 62.

circumstances should be considered.⁷³⁸ However, it is evident that this definition of gravity is vague. Hence, it may open the door for discretionary traits.

The ordinary meaning of the word gravity refers to “extreme importance”, or “seriousness.”⁷³⁹ No indications are to be found in the ICC Statute on the application of this gravity threshold. Furthermore, the drafting history does little to enlighten us. It seems that the concept is vague ‘by design’.⁷⁴⁰ Its function remains unclear.⁷⁴¹ It may be read in light of the preambular reference that “the serious crimes of concern to the international community as a whole must not go unpunished.” Besides, Article 1 ICC Statute clarifies that the Court will have “the power to exercise its jurisdiction over persons for the most serious crimes of international concern” and Article 5 (1) limits jurisdiction to “the most serious crimes of concern to the international community as a whole.” Both provisions convey the clear message that not all crimes committed within a situation will be investigated and/or prosecuted.⁷⁴²

Originally, the Prosecution paid little attention to the gravity concept. It arose for the first time in the OTP Policy Paper and in the annex thereof.⁷⁴³ The OTP Policy Paper clarified that “[t]he concept of gravity should not be exclusively attached to the act that constituted the crime but also to the degree of participation in its commission.”⁷⁴⁴ In turn, the Regulations of the OTP refer to ‘various factors’, including (i) the scale of the crimes, (ii) the nature of the crimes, (iii) the manner of commission of the crimes as well as (iv) the impact of the crimes.⁷⁴⁵ These factors are further detailed in the ‘Policy Paper on Preliminary

⁷³⁸ ICC, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Situation in the Republic of Côte d’Ivoire”, *Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-14-Corr, PTC III, 15 November 2011, par. 204.

⁷³⁹ Concise Oxford English Dictionary (11th edition), Oxford, Oxford University Press, 2004, p. 622.

⁷⁴⁰ M.M. DEGUZMAN, Choosing to Prosecute: Expressive Selection at the International Criminal Court, in «Michigan Journal of International Law», Vol. 33, 2012, p. 284 (arguing that “[t]he gravity threshold for admissibility was also aimed at eliding differences of opinion about when jurisdiction is appropriate”).

⁷⁴¹ I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 319 (“Is it a procedural, legal filter or a policy decision by the Prosecutor?”).

⁷⁴² Consider e.g. H. TAKEMURA, *Prosecutorial Discretion in International Criminal Justice: Between Fragmentation and Unification*, in L. VAN DEN HERIK and C. STAHN (eds.), *The Diversification and Fragmentation of International Criminal Law*, Leiden, Martinus Nijhoff Publishers, 2012, p. 639.

⁷⁴³ ICC, Paper on Some Policy Issues before the Office of the Prosecutor (‘Policy Paper’), September 2003, p. 7 and ‘Annex to the “Paper on Some Policy Issues before the Office of the Prosecutor”: Referrals and Communications’, p. 3. Consider W.A. SCHABAS, *Prosecutorial Discretion and Gravity*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, pp. 230-231 (noting that the limited attention to gravity in these two documents “indicate[s] that gravity was not viewed as an issue of significance in the selection of cases and an assessment of their admissibility”).

⁷⁴⁴ ICC, Paper on Some Policy Issues before the Office of the Prosecutor (‘Policy Paper’), September 2003, p.7.

⁷⁴⁵ Regulation 29 (2) of the Regulations of the OTP.

Investigations’.⁷⁴⁶ The Prosecution assesses gravity in light of ‘the gravity of each potential case that would likely arise from an investigation of the situation’.⁷⁴⁷ The Prosecution rejects an “overly restrictive” interpretation of the criterion. Firstly, the ‘scale of the crimes’ may be interpreted in light of factors including the number of direct and indirect victims, the damage (bodily or psychological damage in particular) caused to the victims and their families or the geographical or temporal spread.⁷⁴⁸ Far from being rigid, the weight to be attributed to each of these factors depends on the facts and circumstances of each case.⁷⁴⁹ The last of these criteria (‘impact of the crimes’) seems especially subjective in nature. One author questions the inclusion of this criterion, given that within the context of Article 53 (1) (b) and 17 (1) (d) “primarily quantitative factors” should be applied.⁷⁵⁰ Since the latter impact criterion is discretionary in nature, it does not fit in well.⁷⁵¹

As is well documented, the first substantive discussion of the gravity criterion in the Court’s case law is to be found in the *Lubanga* case.⁷⁵² The gravity of the ‘case’ was assessed by the Pre-Trial Chamber at the Article 58 stage. On the basis of a literal, contextual and teleological interpretation, taking into consideration the existing principles and rules of international law, Pre-Trial Chamber I advanced a number of parameters – that should be considered in assessing gravity. According to Pre-Trial Chamber I, the parameters included in this test were not discretionary in nature.⁷⁵³ This test was later quashed by the Appeals Chamber, insofar that they found the Pre-Trial Chamber’s interpretation of gravity to be flawed.⁷⁵⁴ For example, the Appeals Chamber found the ‘social alarm’ criterion that was introduced by Pre-Trial Chamber

⁷⁴⁶ ICC, Policy Paper on Preliminary Examinations, 2013, par. 59 – 66.

⁷⁴⁷ *Ibid.*, par. 59.

⁷⁴⁸ *Ibid.*, par. 62.

⁷⁴⁹ F. GUARIGLIA, *The Selection of Cases by the Office of the Prosecutor of the International Criminal Court*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 214.

⁷⁵⁰ I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 351 (noting that any attempt to include qualitative factors in the assessment will be controversial).

⁷⁵¹ *Ibid.*, pp. 340, 350.

⁷⁵² ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 42-63 (annexed to ICC, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-8, PTC I, 24 February 2006).

⁷⁵³ *Ibid.*, par. 62.

⁷⁵⁴ ICC, Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I Entitled: “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, *Situation in the DRC*, Case No. ICC-01/04-169, A. Ch., 13 July 2006, par. 68-84.

I (and which is, as mentioned by the Appeals Chamber, nowhere to be found in the Statute)⁷⁵⁵ to be *subjective* in nature and not suitable for an objective assessment of the gravity of a crime.⁷⁵⁶ Hence, the Appeals Chamber holds the view that gravity, as part of the admissibility requirement of Article 17 (1) (d) (and Article 53 (1) (b)), is to be construed objectively.

While the Appeals Chamber's reasons for turning down the gravity test proposed by Pre-Trial Chamber I are convincing, the Appeals Chamber failed to subsequently shed light on the exact meaning of the term. An attempt to define the concept was undertaken by Judge Pikis, but his thoughts are enigmatic and fall short of a useful test that can be readily applied.⁷⁵⁷ Judge Pikis argues that the term should be interpreted and applied in the context of Article 17.⁷⁵⁸ He argues that gravity denotes "weightiness" and that the qualifier "sufficient" in this context implies "a case of sufficient weightiness to merit consideration by the Court."⁷⁵⁹ It refers to cases "unworthy of consideration by the Court."⁷⁶⁰ Judge Pikis understands such cases to include "cases insignificant in themselves; where the criminality on the part of the culprit is wholly marginal; borderline cases."⁷⁶¹ It refers to crimes that "notwithstanding the fact that [they] satisf[y] the formalities of the law, *i.e.* the insignia of the crime, bound up with the *mens rea* and the *actus reus*, the acts constituting the crime are wholly peripheral to the objects of the law in criminalising the conduct." As discussed, Pre-Trial Chambers II and III

⁷⁵⁵ *Ibid.*, par. 72.

⁷⁵⁶ The Appeals Chamber found the requirement that the conduct must be systematic or large-scale to be at tension with the express intent of the drafters of the ICC Statute, who chose not to include such jurisdictional requirement in Article 8 (1) ICC Statute on war crimes ('in particular'). Besides, only with regard to crimes against humanity, a requirement of the 'systematic' commission of such crimes is provided for under the ICC Statute. As to the second and third prong of the test, the Appeals Chamber found it difficult to understand why the deterrent effect is highest if all other categories but the "most senior leaders suspected of being the most responsible" cannot be brought before the Court. The Appeals Chamber considered that it would seem more logical to assume that the deterrent effect is highest if no category of perpetrators is per se excluded from potentially being brought before the Court. Rather would an exclusion of many perpetrators severely hamper the preventive or deterrent role of the Court. More generally, the Appeals Chamber concluded that the criterion was based on a flawed interpretation.

⁷⁵⁷ ICC, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, *Situation in the DRC, Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, Separate and Partly Dissenting Opinion of Judge Georgios M. Pikis, par. 42-63 (annexed to ICC, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dylilo, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-8, PTC I, 24 February 2006).

⁷⁵⁸ *Ibid.*, par. 26.

⁷⁵⁹ *Ibid.*, par. 39.

⁷⁶⁰ *Ibid.*, par. 39.

⁷⁶¹ *Ibid.*, par. 40.

further clarified the notion of gravity at the situation stage, but failed to remove all of its uncertainties.⁷⁶²

A great deal of the confusion surrounding the gravity concept is due to the fact that the concept appears in several places within the ICC Statute. At the ‘situation stage’, the gravity threshold appears two times: (1) the reference in Article 53 (1) (b) to Article 17 and (2) in Article 53 (1) (c), as part of the interests of justice criterion. It seems logical to assume that these two gravity thresholds at the situation stage should have different meanings.⁷⁶³ The wording ‘gravity of the case’ vs. ‘gravity of the crime’ supports the idea of two different interpretations. So far, however, the jurisprudence has not addressed the distinction between these two notions.⁷⁶⁴

Several scholars favour a ‘two-notions’ approach to the gravity of situations. They argue that because Article 53 (1) (b) refers to the notion of gravity as embedded in Article 17, the notion should be strictly legally construed (‘legal dimension of the gravity concept’).⁷⁶⁵ This concept of gravity is linked to admissibility.⁷⁶⁶ It encompasses a minimum threshold, below which the Prosecutor cannot initiate an investigation into a situation.⁷⁶⁷ In contrast, ‘relative gravity’ or the ‘policy dimension of gravity’ provides the Prosecutor with the discretion to select situations and cases.

⁷⁶² See *supra*, fn. 736, 737 and accompanying text.

⁷⁶³ See e.g. I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 332.

⁷⁶⁴ In case the Prosecutor requests authorisation from the Pre-Trial Chamber to *proprio motu* start with an investigation, he or she does not have to present information or supporting materials why proceeding with an investigation would be in the interests of justice.

⁷⁶⁵ M.M. DEGUZMAN, Gravity and the Legitimacy of the International Criminal Court, in «*Fordham International Law Journal*», Vol. 32, 2009, p. 1403 (“gravity plays two essential and distinct roles for the ICC.” The author correctly notes that this legal dimension of gravity is also linked to the jurisdiction of the Court, as evident from e.g. Article 1 or Article 5 ICC Statute); I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 332; WCRO, *The Gravity Threshold of the International Criminal Court*, March 2008, pp. 51 - 52, 53. *Contra*, consider e.g. J. WOUTERS, S. VERHOEVEN and B. DEMEYERE, *The International Criminal Court’s Office of the Prosecutor: Navigating between Independence and Accountability?*, in «*International Criminal Law Review*», Vol. 8, 2008, p. 296 (the authors argue that the gravity concept provides the Prosecutor with some discretion (without distinguishing between two notions of gravity)).

⁷⁶⁶ M.M. DEGUZMAN, Gravity and the Legitimacy of the International Criminal Court, in «*Fordham International Law Journal*», Vol. 32, 2009, pp. 1405 – 1406 (this notion of gravity is also to be found in provisions of the ICC Statute on jurisdiction, including Article 1 and 5 ICC Statute).

⁷⁶⁷ *Ibid.*, p. 1412.

In regards to this second notion of gravity, scholars disagree. STEGMILLER links relative gravity to Article 53 (1) (c) ICC Statute.⁷⁶⁸ DEGUZMAN takes another approach. According to her, Article 53 (1) (c) ICC Statute does not allow for a reconsideration of gravity at the situation stage, since it is only mentioned as one of the factors against which the interests of justice are to be balanced (‘Taking into account the gravity of the crime’).⁷⁶⁹ In turn, at the ‘case stage’, Article 53 (2) (c) allows for the consideration of relative gravity, since gravity is mentioned as one of the circumstances to be taken into the equation by the Prosecutor.⁷⁷⁰ Rather, DEGUZMAN argues that relative gravity at the situation stage only attaches to the Prosecutor’s use of his or her own *proprio motu* powers. In other words, unlike for *proprio motu* investigations, relative gravity plays no role in the determination of a reasonable basis to investigate in case of a referral.⁷⁷¹ However, this distinction, based on the triggering mechanism, is to be rejected, if one agrees that Article 53 (1) ICC Statute applies to all triggering mechanisms.

Scholars are in agreement that only the latter notion allows for discretionary evaluation. In general, it appears that the framework of Article 53 favours discretion as only part of Article 53 (1) (c) (and Article 53 (2) (c)) since the review mechanism of Article 53 (3) would otherwise be undermined.⁷⁷² Hence, STEGMILLER suggests using ‘legal gravity’ with regard to Article 53 (1) (b) and 17 (1) (d) ICC Statute and ‘relative gravity’ with regard to Article 53 (1) (c) ICC Statute.⁷⁷³

⁷⁶⁸ I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, pp. 319, 332 – 334.

⁷⁶⁹ M.M. DEGUZMAN, *Gravity and the Legitimacy of the International Criminal Court*, in «Fordham International Law Journal», Vol. 32, 2009, pp. 1412 – 1413.

⁷⁷⁰ *Ibid.*, p. 1415 (“here the language of the “interests of justice” provision, unlike the similar provision discussed above, does seem to envision a relative gravity analysis. Rather than pitting gravity *against* the interests of justice, here gravity is one of the circumstances the Prosecutor should consider in determining the interests of justice”).

⁷⁷¹ *Ibid.*, p. 1410 (“As such, the Prosecutor does not appear to have discretion to reject a referred situation at this preliminary stage based on a *relative* gravity determination”). The author holds the view that Article 53 (1) does not apply to *proprio motu* investigations by the Prosecutor. Otherwise, the Prosecutor would have to start an investigation in all cases where information provided demonstrates a reasonable basis for an investigation (an “absurd result” according to the author). Rather, the author proposes an interpretation of Article 15 ICC Statute whereby an intermediate step is read into it, between the receipt of information and the determination of a reasonable basis. During this step, the Prosecutor will, pursuant to Rule 48 ICC RPE, consider the *factors* of Article 53 (1), not yet the existence of a reasonable basis. According to the author, such interpretation is not precluded by the wording of Article 15 ICC Statute. Article 15 (1) reads “*may* initiate investigations *proprio motu*”, whereas Article 15 (3) (“if the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit...”) refers to the stage where an assessment of the reasonable basis to proceed has been made (after the intermediate step).

⁷⁷² I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 334.

⁷⁷³ *Ibid.*, p. 335.

Conversely, TURONE argues that if the Prosecutor decides to not initiate investigations because the case is inadmissible due to insufficient gravity, his or her decisions have to be considered as falling under Article 53 (1) (c), including all of the relevant consequences. This includes the duty to notify the Pre-Trial Chamber in case the Prosecutor's determination is solely based on the 'interests of justice' criterion.⁷⁷⁴ This view takes the risk of side-lining the Pre-Trial Chamber into consideration. TURONE holds that the reference to gravity in Article 53 (1) (c) should be *lex specialis* to the reference in Article 53 (1) (b) since the latter reference is stated in a generic manner and the former in a very specific manner.⁷⁷⁵ Under Article 53 (1) (c), gravity should be considered together with, *inter alia*, the interests of victims.⁷⁷⁶ However, as argued above, provided that the two notions of gravity under Article 53 (1) do have different meanings, the better view seems to clearly distinguish between a strictly legal and a relative conception of gravity. In order to preserve the Pre-Trial Chamber's function, it is necessary to clearly define and distinguish both notions.

As to the nature of the gravity test under Article 53 (1) (b), STEGMILLER argues that such a threshold should be low, in contrast to relative gravity, which should encompass a high threshold considering the number of potential cases.⁷⁷⁷ Judge PIKIS also favours a low threshold, throwing out cases "unworthy of consideration by the International Criminal Court." Setting a high threshold would detract from the deterrent effect of the ICC and other objectives, including the preambular order to ensure that the most serious crimes do not go unpunished.⁷⁷⁸ STEGMILLER further argues that the assessment pursuant to Article 53 (1) (b) (situations) and Article 53 (2) (b) (cases) should basically be the same. Such an interpretation deviates from the view expressed by Pre-Trial Chambers II and III that at the

⁷⁷⁴ G. TURONE, Powers and Duties of the Prosecutor, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, pp. 1154-1156. According to Turone, such duty to notify the Pre-Trial Chamber thus also applies to cases of 'insufficient gravity of the case', since Article 53 (1) (c) is *lex specialis*.

⁷⁷⁵ *Ibid.*, pp. 1154, 1174.

⁷⁷⁶ *Ibid.*, p. 1154. For a similar view, consider J. WOUTERS, S. VERHOEVEN and B. DEMEYERE, *The International Criminal Court's Office of the Prosecutor: Navigating between Independence and Accountability?*, in «International Criminal Law Review», Vol. 8, 2008, pp. 297, 301.

⁷⁷⁷ I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 353.

⁷⁷⁸ On the deterrent effect of investigations and prosecutions, consider ICC, Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I Entitled: "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", *Situation in the Democratic Republic of the Congo*, Case No. ICC-01/04-169, A. Ch., 13 July 2006, par. 77; M.M. DEGUZMAN, Gravity and the Legitimacy of the International Criminal Court, in «Fordham International Law Journal», Vol. 32, 2009, pp. 1428 – 1429; WCRO, *The Gravity Threshold of the International Criminal Court*, March 2008, pp. 46 – 48.

‘situation stage’, gravity should be assessed in a more general manner.⁷⁷⁹ One commentator holds the view that the gravity of the crime should be measured quantitatively, in order to remove any prosecutorial discretion.⁷⁸⁰ It was discussed how the Pre-Trial Chambers have, so far, interpreted the gravity of the crimes at the situation stage to encompass both qualitative and quantitative parameters.⁷⁸¹

When looking at the application of situational gravity in practice, it seems that the ICC Prosecutor also applies two notions of gravity.⁷⁸² Nevertheless, the Prosecutor fails to clearly distinguish between these different dimensions of gravity.⁷⁸³ For example, the Prosecution interpreted the gravity consideration in Article 53 (1) (b) as allowing it to compare different situations and *in casu*, not to *proprio motu* initiate an investigation into the situation of British war crimes in Iraq. However, gravity considerations under Article 53 (1) (b) ICC Statute should be limited to the question of whether the gravity threshold is met, according to clear and pre-set criteria, rather than allowing the Prosecutor to select between different situations.⁷⁸⁴ Similarly, in deciding to pursue crimes committed by the LRA and not those allegedly committed by government forces in the situation in Uganda, the ICC Prosecutor compared the gravity of the crimes committed.⁷⁸⁵

In sum, gravity under Article 53 (1) (b) should be distinguished from relative gravity under Article 53 (1) (c) ICC Statute. Although the ICC Judges have started to interpret the notion of gravity in Articles 17 and 53 (1) (b) ICC Statute, its precise meaning remains rather unclear. The Court’s case law should further elucidate its meaning. In turn, as far as relative gravity is

⁷⁷⁹ ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 58; ICC, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Situation in the Republic of Côte d’Ivoire”, *Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-14-Corr, PTC III, 15 November 2011, par. 202.

⁷⁸⁰ N.J. JURDI, *The International Criminal Court and National Courts*, Farnham, Ashgate Publishing Limited, 2011, pp. 69 – 97.

⁷⁸¹ See *supra*, fn. 737 and accompanying text.

⁷⁸² WCRO, *The Gravity Threshold of the International Criminal Court*, March 2008, p. 51.

⁷⁸³ M.M. DEGUZMAN, *Gravity and the Legitimacy of the International Criminal Court*, in «*Fordham International Law Journal*», Vol. 32, 2009, p. 1429; WCRO, *The Gravity Threshold of the International Criminal Court*, March 2008, p. 52.

⁷⁸⁴ ICC, Annex to Update on Communications Received by the Office of the Prosecutor: Venezuela Response, 9 February 2006, pp. 8-9 as referred to by M.M. DEGUZMAN, *Gravity and the Legitimacy of the International Criminal Court*, in «*Fordham International Law Journal*», Vol. 32, 2009, p. 1432.

⁷⁸⁵ OTP, Statement by Luis Moreno-Ocampo, 14 October 2005, p. 3 (“The criteria for selection of the first case was gravity. We analyzed the gravity of all crimes in Northern Uganda committed by the LRA and Ugandan forces. Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF. We therefore started with an investigation of the LRA”).

concerned, jurisprudence has yet to start interpreting this term.⁷⁸⁶ In the absence of a further elaboration of this proposed interpretation, the gravity criterion is not devoid of subjective traits (e.g. how should the Prosecutor or the Court determine which ‘potential cases’ are ‘peripheral’). Thus, in practice, gravity under Article 53 (1) (b) still leaves some room for the Prosecutor to manoeuvre.

§ *The ‘interests of justice’*

As with the other language used in Article 53, the term ‘interests of justice’ has been left undefined, leaving it open to various interpretations.⁷⁸⁷ For example, it is unclear as to whether the drafters envisaged a narrower conception of justice (as referring only to ‘criminal justice’) or a broader one (including ‘restorative justice’ interests).⁷⁸⁸ As one author puts it, the ‘interests of justice’ parameter offers full discretion to the Prosecutor and “moves along a principle of largely discretionary criminal action”, characteristic of common law jurisdictions.⁷⁸⁹ Another author points out that the factor is “quite elastic”.⁷⁹⁰ Hence, it is clear that the undefined nature of the concept leaves considerable discretion to the Prosecutor.⁷⁹¹

⁷⁸⁶ M.M. DEGUZMAN, Gravity and the Legitimacy of the International Criminal Court, in «Fordham International Law Journal», Vol. 32, 2009, p. 1425.

⁷⁸⁷ No definition can be found in the Statute or the RPE. See F. RAZESBERGER, The International Criminal Court: The Principle of Complementarity, Frankfurt am Main, Peter Lang, 2006, p. 103; R. J. GOLDSTONE and N. FRITZ, ‘In the Interests of Justice’ and Independent Referral: The ICC Prosecutor’s Unprecedented Powers, in «Leiden Journal of International Law», Vol. 13, 2000, p. 662 (noting that the word ‘justice’ means different things to different persons).

⁷⁸⁸ Consider e.g. J. WOUTERS, S. VERHOEVEN and B. DEMEYERE, The International Criminal Court’s Office of the Prosecutor: Navigating between Independence and Accountability?, in «International Criminal Law Review», Vol. 8, 2008, p. 292 (the authors argue that the lack of such definition may prove to be one of the fundamental flaws in the Statute, “fatally leading the Prosecutor to be forced to take position in a politically sensitive areas without clear legal guidelines”); I. STEGMILLER, The Pre-Investigation Stage of the ICC, Berlin, Duncker & Humblot GmbH, 2011, pp. 357-358 (who focuses on two opposing views on the interests of justice, namely justice in the narrow sense (criminal or retributive justice) and justice in the broader sense (transitional or restorative justice)); H. OLÁSOLO, The Prosecutor of the ICC before the Initiation of Investigations, in «International Criminal Law Review», Vol. 3, 2003, p. 140 (arguing that, on the basis of the Preamble of the ICC Statute, there can be no doubt that criminal prosecutions were preferred over amnesties).

⁷⁸⁹ G. TURONE, Powers and Duties of the Prosecutor, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court, Oxford, Oxford University Press, 2002, p. 1153.

⁷⁹⁰ A.M. DANNER, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, in «American Journal of International Law», Vol. 97, 2003, p. 542; R. GOLDSTONE, More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court, in «Journal of International Criminal Justice», Vol. 8, 2010, p. 392 (“the phrase [...] is elastic. It provides the Prosecutor a great deal of latitude, except for certain clear-cut abuses”).

⁷⁹¹ *Contra*, consider F. RAZESBERGER, The International Criminal Court: The Principle of Complementarity, Frankfurt am Main, Peter Lang, 2006, p. 103 (because the ‘interests of justice’ criterion should be understood in light of the goals set forth in the Preamble of the ICC Statute, “the margin of discretion for the Prosecutor is very narrow”); J. WOUTERS, S. VERHOEVEN and B. DEMEYERE, The International Criminal Court’s Office of the Prosecutor: Navigating between Independence and Accountability?, in «International Criminal Law

Some scholars even hold that this discretion is ‘unlimited’.⁷⁹² However, this is not entirely accurate given that the discretion inherent in the ‘interests of justice’ criterion is checked by the prosecutorial duty to inform the Pre-Trial Chamber if a decision to not initiate investigations or prosecutions was solely gauged on the ‘interests of justice’.⁷⁹³

It has been argued that the concept was included at the Rome conference to accommodate concerns that criminal prosecution may not always be the most appropriate course of action.⁷⁹⁴ Admittedly, the interpretation of this concept is “one of the most complex aspects of the Treaty.”⁷⁹⁵ It raises difficult issues, such as whether the reliance on alternative justice mechanisms qualifies as ‘unwillingness’ in the sense of Article 17 ICC Statute.

The Prosecution’s understanding of the ‘interests of justice’ concept is to be found in its ‘Policy Paper on the Interests of Justice’.⁷⁹⁶ The Prosecution considers the interests of justice to be a “course of last resort”.⁷⁹⁷ The paper stresses the exceptional nature of the ‘interests of justice’ criterion but does not engage in a detailed discussion of the factors that underlie it. Nevertheless, it sets out the four main considerations underlying the OTP’s interpretation. Firstly, (i) the paper stresses the exceptional nature of the ‘interests of justice’ criterion and sets out a general presumption in favour of investigations and prosecutions. This implies that there is no precondition that an investigation is in the interests of justice. Besides, (ii) criteria are to be guided by the object and purposes of the ICC Statute (prevention of serious crimes of concern to the international community through ending impunity) and (iii) a distinction should be drawn between ‘interests of justice’ and ‘interests of peace’. Lastly, (iv) the OTP is under a duty to notify the Pre-Trial Chamber of any decision not to investigate or prosecute in

Review», Vol. 8, 2008, p. 281 (the authors seem to argue that all criteria, including ‘the interests of justice’ are objective in nature).

⁷⁹² H. OLÁSULO, The Prosecutor of the ICC before the Initiation of Investigations, in «International Criminal Law Review», Vol. 3, 2003, p. 135; P. WEBB, The ICC Prosecutor’s Discretion not to Proceed in the “Interests of Justice”, in «Criminal Law Quarterly», Vol. 50, 2005, p. 318 (“enormous discretion”).

⁷⁹³ If the decision not to proceed is based solely on article 53, paragraph 1 (c) or 2 (c), the Prosecutor shall promptly inform the Pre-Trial Chamber in accordance with Rules 105 (4) and (5), and 106 respectively. See more in detail, *infra*, Chapter 3, II.4.3.

⁷⁹⁴ M.M. DEGUZMAN, Choosing to Prosecute: Expressive Selection at the International Criminal Court, in «Michigan Journal of International Law», Vol. 33, 2012, p. 283.

⁷⁹⁵ OTP Policy Paper on the Interests of Justice, September 2007, p. 2.

⁷⁹⁶ *Ibid.* Note that the policy paper expressly states on page 1 that it does not give right to any rights in litigation.

⁷⁹⁷ *Ibid.*, p. 9.

the interests of justice.⁷⁹⁸ The OTP paper deliberately does not detail all of the factors to be considered when a situation arises, provided that “each situation is different”.⁷⁹⁹

The Policy paper goes some way in clarifying the meaning of the factors explicitly named in Article 53 (1) (c) ICC Statute. With regard to the ‘gravity of the crime’ factor, the paper refers (with regard to the situations stage) to the same considerations as with regard to Article 53 (1) (b) and 17 (1) (d) ICC Statute (to know the scale of the crimes, the nature of the crimes, the manner of their commission and their impact).⁸⁰⁰ Such overlap is understandable, insofar that the reference was seemingly only inserted to satisfy the concern of delegations “that the interests underlying the complementarity principle sufficiently permeate the Statute.”⁸⁰¹ Nevertheless, it was previously concluded that the inclusion of gravity considerations into Article 53 (1) (c) would not make any sense if the criterion would be identical to the gravity requirement found in Article 53 (1) (b) ICC Statute. Hence, a two-notions approach was favoured.

As far as the ‘interests of victims’ consideration is concerned (Article 53 (1) (c) and Article 53 (2) (c) ICC Statute), the paper notes that victims have the interest ‘to see justice done’ but acknowledges also that other considerations, such as the safety of witnesses, should be measured in.⁸⁰² Hence, while this factor will normally weigh in favour of investigation or prosecution, this will not always be the case.⁸⁰³ With regard to the ‘particular interests of the accused’ (Article 53 (2) (c) ICC Statute), the OTP’s strategy is to focus on those bearing the greatest degree of responsibility, and to consider factors including the alleged status or hierarchical level of the accused or his or her alleged implication in particularly serious or notorious crimes (‘significance of the role of the accused in the overall commission of the crimes and the degree of the accused’s involvement’). In some instances however, these

⁷⁹⁸ *Ibid.*, p. 1; F. GUARIGLIA, The Selection of Cases by the Office of the Prosecutor of the International Criminal Court, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 216.

⁷⁹⁹ OTP Policy Paper on the Interests of Justice, September 2007, pp. 1, 9.

⁸⁰⁰ *Ibid.*, p. 5.

⁸⁰¹ M. BERGSMO and P. KRUGER, Article 53, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes*, München, Verlag C.H. Beck, 2008, p. 1071; P. WEBB, The ICC Prosecutor’s Discretion not to Proceed in the “Interests of Justice”, in «*Criminal Law Quarterly*», Vol. 50, 2005, p. 327.

⁸⁰² OTP Policy paper on the interests of justice, September 2007, p. 5.

⁸⁰³ *Ibid.*, p. 5. Compare P. WEBB, who notes that it follows from national practice, that the interests of victims can also be a factor not to prosecute a case. See P. WEBB, The ICC Prosecutor’s Discretion not to Proceed in the “Interests of Justice”, in «*Criminal Law Quarterly*», Vol. 50, 2005, p. 330.

‘particular interests of the accused’ will prevent the accused from being prosecuted; for example, if the accused were to be terminally ill or is the victim of serious human rights abuses.⁸⁰⁴ This factor is not mentioned in Article 53 (1) (c), given that, at that stage, the accused will often not be known yet. Furthermore, depending on the facts of the case or the situation under consideration, the Prosecutor may consider (i) other justice mechanisms and (ii) peace processes.⁸⁰⁵

In the literature, disagreement persists as to how to interpret the ‘interests of justice’; interpretations of the term point in different directions.⁸⁰⁶ Again, disagreement boils down to the question of whether the notion should be strictly or broadly construed. While a narrow conception is victim-oriented and ignores reconciliation and alternative justice mechanisms, in a broad conception, the Prosecutor considers the implications that an investigation or prosecution will have on peace and security, including reconciliatory processes.⁸⁰⁷ For the purposes of this section, it suffices to emphasise that most scholars subscribe to a broader approach to the ‘interests of justice’.⁸⁰⁸ So construed, the ‘interests of justice’ concept allows

⁸⁰⁴ OTP Policy paper on the interests of justice, September 2007, p. 7.

⁸⁰⁵ *Ibid.*, pp. 7-9. However, the paper equally stresses that the ‘interests of justice’ concept should not be construed too broadly as to encompass all peace and security related issues where the broader matter of international peace and security clearly falls within the mandate of institutions other than the Prosecutor (*ibid.*, p. 9).

⁸⁰⁶ I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, pp. 367-368.

⁸⁰⁷ M.R. BRUBACHER, *Prosecutorial Discretion in the International Criminal Court*, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 83 (noting that “[s]triking the balance between concerns of international peace and security and material factors, including the gravity of the offence and the interests of victims, will be a persistent dilemma for the ICC”).

⁸⁰⁸ Consider e.g. R.J. GOLDSTONE and N. FRITZ, ‘In the Interests of Justice’ and Independent Referral: The ICC Prosecutor’s Unprecedented Powers, in «Leiden Journal of International Law», Vol. 13, 2000, pp. 655-667; D. ROBINSON, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, in «European Journal of International Law», Vol. 14, 2003, p. 488 (arguing that this “appears to be the only supportable solution”); I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 367 and following (arguing that the concept should encompass alternative forms of justice); F. RAZESBERGER, *The International Criminal Court: The Principle of Complementarity*, Frankfurt am Main, Peter Lang, 2006, p. 105 (holding that “the notion is not only confined to interests of retributive criminal justice but a broader concept that includes alternative means has to be taken into account”); P. WEBB, *The ICC Prosecutor’s Discretion not to Proceed in the “Interests of Justice”*, in «Criminal Law Quarterly», Vol. 50, 2005, pp. 338 – 340; B.D. LEPARD, *How Should the ICC Prosecutor Exercise his or her discretion? The Role of Fundamental Ethical Principles*, in «John Marshall Law Review», Vol. 43, 2010, p. 565 (the author argues that fundamental ethical principles show a close connection between peace and human rights, which justifies a broader interpretation of the ‘interests of justice’ concept than the ICC Prosecutor has adopted); A. MCDONALD and R. HAVEMAN, *Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC*, Expert Consultation Process on General Issues Relevant to the ICC Office of the Prosecutor, 15 April 2003, p. 5 (“It could well be decided in a particular case that justice is served not by prosecuting before the ICC or even by stimulating prosecution in a particular case but by the encouragement of alternative disputes mechanisms”); A.K.A. GREENAWALT, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, in «NYU Journal of International Law &

public policy considerations and the broader interests of the international community to be taken into account.⁸⁰⁹ It obliges the Prosecutor to consider the political ramifications of investigations and/or prosecutions.⁸¹⁰

When starting an investigation, the Prosecutor does not need to show that the investigation *is* in the interests of justice.⁸¹¹ Only in case of a decision that continuing with an investigation is not in the interests of justice, the Prosecution should inform the Chamber of the reasons thereof.⁸¹² Even though this criterion leaves the Prosecutor considerable discretion, it avoids arbitrariness by requiring ‘substantial reasons’. This implies that the Prosecutor produce convincing reasons *not* to open an investigation. Besides, further supervision is guaranteed since the Pre-Trial chamber may *ex officio* review a determination not to proceed with an investigation, solely based on the interests of justice.⁸¹³

It is important to realise that the ‘interests of justice’ criterion allows the Prosecutor to refuse to investigate a situation where a State remains inactive.⁸¹⁴ Indeed, based on the ‘two step’ approach to admissibility, it was concluded that Article 17 ICC Statute implies that a case is admissible where a State has remained inactive. The interests of justice criterion offers the Prosecutor the necessary leeway not to investigate or prosecute. This equips him or her with an indispensable instrument for preventing States from ‘dumping’ cases onto the Prosecutor’s desk.⁸¹⁵ Hence, the ‘interests of justice’ leaves the discretion of whether or not to investigate (or prosecute) a case to the Prosecutor and offers leeway for different approaches, including

Politics», Vol. 39, 2007, pp. 618-620 (the author notes that the language and the context of the Rome Statute suggest that the Prosecutor may sometimes forego prosecution in deference of amnesty arrangements).

⁸⁰⁹ M.R. BRUBACHER, Prosecutorial Discretion in the International Criminal Court, in «Journal of International Criminal Justice», Vol. 2, 2004, pp. 81 – 82.

⁸¹⁰ *Ibid.*, p. 81.

⁸¹¹ ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation not the Situation in the Republic of Kenya. *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 63 (“the Prosecutor does not have to present reasons or supporting material in this respect”); OTP Policy paper on the interests of justice, September 2007, pp. 2-3 (“While the other two tests (jurisdiction and admissibility) are positive requirements that must be satisfied, the “interests of justice” is not. The *interests of justice* test is a potential *countervailing* consideration that might produce a reason *not* to proceed even where the first two are satisfied. This difference is important: the Prosecutor is not required to establish that an investigation or prosecution is in the interests of justice” (emphasis in original)).

⁸¹² Article 53 (1) *in fine* ICC Statute; Rule 105 (4) – (5) ICC RPE.

⁸¹³ Article 53 (3) (b) ICC Statute. See *infra*, Chapter 3, II.4.3.

⁸¹⁴ D. ROBINSON, The Mysterious Mysteriousness of Complementarity, in «Criminal Law Forum», Vol. 21, 2010, p. 93.

⁸¹⁵ *Ibid.*, pp. 92-93.

burden-sharing between the international and national levels.⁸¹⁶ Absent strict rules on when, in case of inaction, national action is preferred (a certain preference for national prosecutions emerges from the ICC Statute's Preamble), it is for the Prosecutor to adopt guidelines in that regard.⁸¹⁷

In conclusion, it appears that the 'interests of justice' criterion leaves considerable discretion to the Prosecutor. However, it also appears that further clarification is necessary regarding the precise elements that are included in the 'interests of justice' and how they should be balanced against each other.⁸¹⁸

§ *Criteria for the selection of cases under Article 53 (2) ICC Statute*

In general, the criteria which are to be found in Article 53 (2) ICC Statute (which has 'cases' as its subject) refer to similar considerations as Article 53 (1) ICC Statute.⁸¹⁹ Nevertheless, the parameters are stricter than those for the commencement of an investigation. At this stage, the contours of the likely cases will have been shaped further. For example, rather than a 'reasonable basis', Article 53 (2) ICC Statute refers to a stricter 'sufficient basis to seek a warrant of summons under Article 58' as the threshold for proceeding with a prosecution.⁸²⁰ In a similar vein, the consideration of admissibility under Article 53 (2) is more specific in nature. Indeed, Pre-Trial Chamber II confirmed that while the admissibility check at the situation stage encompasses 'potential cases', "the test is more specific when it comes to an admissibility determination at the 'case' stage, which starts with an application by the Prosecutor under article 58 of the Statute for the issuance of a warrant of arrest or summons to appear, where one or more suspects has or have been identified."⁸²¹ At this stage, the Appeals

⁸¹⁶ Consider *e.g.* the proposal by C. STAHN on a positive form of complementarity, allowing flexibility and a managerial division of labour between the Court and domestic jurisdictions. See C. STAHN, *Complementarity: A Tale of Two Notions*, in «Criminal Law Forum», Vol. 19, 2008, p. 88.

⁸¹⁷ D. ROBINSON, *The Mysterious Mysteriousness of Complementarity*, in «Criminal Law Forum», Vol. 21, 2010, p. 98 (admitting that several answers are possible to this question).

⁸¹⁸ I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 416.

⁸¹⁹ *Ibid.*, p. 418. It follows from Regulation 29 (5) and 33 of the Regulations of the OTP that in selecting potential cases within a situation, the Prosecution will *mutatis mutandis* apply the same steps as for the selection of situations and will analyse issues of jurisdiction, admissibility (including gravity) and the interests of justice.

⁸²⁰ J. WOUTERS, S. VERHOEVEN and B. DEMEYERE, *The International Criminal Court's Office of the Prosecutor: Navigating between Independence and Accountability?*, in «International Criminal Law Review», Vol. 8, 2008, p. 312; M.R. BRUBACHER, *Prosecutorial Discretion in the International Criminal Court*, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 80.

⁸²¹ ICC, *Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2) (b) of the Statute*, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and*

Chamber determined that a case ‘being investigated’ must cover *the same individual and substantially the same conduct* as alleged in the proceedings before the Court.⁸²² With regard to gravity under Article 53 (2) (b) ICC Statute (legal gravity), the same considerations apply but where the test here refers to specific cases, the test is narrower.⁸²³ Hence, gravity in the sense of Article 17 (1) (d) is relevant to two parts of the proceedings: (i) the initiation of the investigation of a situation and (ii) cases arising out of that situation.⁸²⁴

In line with Article 53 (1), discretion regarding what cases to prosecute mainly enters through the consideration of the ‘interests of justice’. The criterion, which is to be found in Article 53 (2) (c), is broader than Article 53 (1) (c). The formulation ‘taking into consideration all circumstances’ clearly evidences the non-exhaustive nature of the enumeration of factors to be considered.⁸²⁵ Besides, insofar that Article 53 (2) deals with cases and not situations, the assessment occurs at a more advanced stage of individualisation.⁸²⁶ Criteria expressly listed are: (1) the gravity of the crime, (2) the interests of victims, (3) the age of the alleged perpetrator or the infirmity of the alleged perpetrator and (4) his or her role in the alleged crime. Similar to the interests of justice criterion under Article 53 (1) (c) ICC Statute, this

Joshua Arap Sang, Situation in the Republic of Kenya, Case No. ICC-01/09-01/11-101, PTC II, 30 May 2011, par. 54; ICC, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-96, PTC II, 30 May 2011, par. 50.

⁸²² ICC, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-274, A. Ch., 30 August 2011, par. 39; ICC, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Situation in the Republic of Kenya*, Case No. ICC-01/09-01/11-307, A. Ch., 30 August 2011, par. 40. As previously noted, the test was first adopted by Pre-Trial Chamber I in the *Lubanga* case. See ICC, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 37; see also ICC, Decision on the Prosecution Application under Article 58 (7) of the Statute, *Prosecutor v. Harun and Kushayb, Situation in Darfur, Sudan*, Case No. ICC-02-05-01/07-, PTC I, 27 April 2007, par. 24 – 25. In the *Katanga and Ngudjolo Chui* case, the Appeals Chamber declined to rule on the correctness of the test where this was not determinative for the appeal. See ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Case No. ICC-01/04-01/07-1497, A. Ch., 25 September 2009, par. 81.

⁸²³ I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 424.

⁸²⁴ ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 44 (annexed to ICC, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the case against Mr. Thomas Lubanga Dyilo, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-8, PTC I, 24 February 2006).

⁸²⁵ I. STEGMILLER, *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, p. 425.

⁸²⁶ *Ibid.*, p. 425.

criterion is fully discretionary in nature.⁸²⁷ For example, with regard to the role of the accused person in the crime, “[i]t is possible that the role of a suspect, while satisfying all elements of the crime, was so insignificant as to make it counter to the interests of justice to proceed with a prosecution.”⁸²⁸

II.4.3. Review of and control over prosecutorial discretion

From the foregoing, it can be concluded that some of the factors that the Prosecutor must consider when proceeding with an investigation or a prosecution are discretionary in nature. In this regard, at the Rome conference, review of prosecutorial discretion was considered essential. The need for accountability structures was mainly driven by the fear of an overactive Prosecutor.⁸²⁹ Besides, some forms of accountability have been built in to prevent political interference and to counter criticisms of political influences.⁸³⁰ Below, a distinction will be drawn between institutional and judicial forms of accountability.

As far as *judicial forms of accountability* are concerned, an important check on prosecutorial discretion is provided through the vehicle of Article 53 (3) ICC Statute. In case of a referral, it allows the Pre-Trial Chamber to review the Prosecutor’s decision to not proceed with an investigation or prosecution, upon request by the referring state or the Security Council within 90 days following notification of the decision.⁸³¹ If a decision is solely based on the interests of justice, the Pre-Trial Chamber may itself review a decision to not proceed within 180 days following notification.⁸³² It is clear that this review mechanism requires that the Pre-Trial Chamber, referring state or Security Council be informed of any prosecutorial decision taken

⁸²⁷ See e.g. G. TURONE, Powers and Duties of the Prosecutor, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1173.

⁸²⁸ M. BERGSMO and P. KRUGER, Article 53, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1073 (for example a case against the abettor while the main perpetrator is still at large where this could put witnesses important to the case at risk).

⁸²⁹ C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years on*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 265 (“It was essentially the idea of Pre-Trial Chamber control which managed to overcome objections by those delegations which were hesitant to accept”).

⁸³⁰ *Ibid.*, p. 253.

⁸³¹ Rule 107 ICC RPE.

⁸³² Article 53 (3) (b) and Rule 109 ICC RPE.

to not investigate or to not prosecute.⁸³³ It is in the discretionary nature of this review obligation ('may review') that potentially lays its most important limitation. No obligation is incumbent on the Pre-Trial Chamber to act upon a request. On such an occasion, the Pre-Trial Chamber may request the Prosecutor to transmit the necessary information or documents in his possession or the summaries thereof and should take measures to protect the documents and the safety of the victims, witnesses and family members.⁸³⁴ The Pre-Trial Chamber may also seek further observations from States or the Security Council.⁸³⁵

In case of a request by a State or by the Security Council, the Pre-Trial Chamber may either confirm the decision by the Prosecutor or request the reconsideration of that determination, an obligation which the Prosecutor should fulfil as soon as possible. Nothing prevents the Prosecutor from reaching the same conclusion upon reconsideration. While Article 53 (3) (a) only speaks of referrals, nothing seems to prevent the information provider (other than a State Party or the Security Council) from filing a motion to the Chamber prospecting the reasons for which a judicial review on its own initiative could be desirable and practicable.⁸³⁶

If a negative decision is solely based on Article 53 (1) (c), the Prosecution's decision *may* only become effective if the Pre-Trial Chamber confirms it.⁸³⁷ Consequently, the Pre-Trial Chamber's revision may lead to a judicial order to investigate ('shall').⁸³⁸ Such a possibility is known to some civil law jurisdictions. Admittedly, the term 'investigation on judicial command' only makes sense in case of a *notitia criminis* referred by another source. Besides, the possibility of an investigation on judicial command may be problematic insofar that nothing prevents the Prosecutor from conducting a "perfunctory and superficial" investigation.⁸³⁹

⁸³³ As provided for under Article 105 and 106 ICC RPE respectively. Consider also C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years on*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, pp. 271 – 272 (noting that the review mechanism is at risk of "remain[ing] largely academic in the absence of prosecutorial notification").

⁸³⁴ With regard to Article 53 (3) (a), consider Rule 107 (2) and (3) ICC RPE; with regard to Article 53 (3) (b), consider Regulation 48 (1) of the Court Regulations.

⁸³⁵ Rule 107 (4) ICC RPE.

⁸³⁶ G. TURONE, *Powers and Duties of the Prosecutor*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1158.

⁸³⁷ Article 53 (3) (b) ICC Statute. Again, in such case, the Pre-Trial Chamber has to be informed of a decision not to investigate, based solely on Article 53 (1) (c) ICC Statute. See Rule 105 (4) ICC RPE and Article 53 (1) *in fine* ICC Statute.

⁸³⁸ Rule 110 (2) ICC RPE.

⁸³⁹ W.A. SCHABAS, *An Introduction to the International Criminal Court* (3d ed.), Cambridge, Cambridge University Press, 2007, p. 245.

Some commentators have argued that there is a duty to review the Prosecutor's decision ("In order to be valid such decisions must be confirmed by the PTC").⁸⁴⁰ Others have interpreted this provision as implying that the decision not to proceed with an investigation or prosecution only becomes effective if the Pre-Trial Chamber reviews the Prosecutor's decision.⁸⁴¹ However, a textual interpretation suggests that judicial review is not a prerequisite for the Prosecutor's decision to be effective (in case a decision not to proceed is solely based on the 'interests of justice'). Logically, the second sentence of paragraph (b) of Article 53 (3) ICC Statute ('[i]n such a case') refers to the situation outlined in the previous sentence, and leaves discretion to the Pre-Trial Chamber whether or not to review such a decision. Overall, however, the structure of Article 53 (3) suggests that closer scrutiny is provided for in case of a decision not to investigate or prosecute, solely based on the interests of justice.⁸⁴²

Furthermore, it has been argued that the reference to Article 53 (1) (c) and Article 53 (2) (c) in Article 53 (3) (b) ICC Statute should be interpreted in a broad manner, so as to also include 'gravity' as included in Article 53 (1) (b) and 53 (2) (b) ICC Statute.⁸⁴³ It was previously stated that such an interpretation may be preferable to prevent side-lining the Article 53 (3) review mechanism. However, strictly distinguishing between legal and relative gravity may achieve a similar result.⁸⁴⁴

It has been argued that the different treatment of situations when the Prosecutor's decision not to proceed is based solely on the interests of justice is necessary given that such a decision may involve political or other reasons. Thus, this decision requires a check by the Pre-Trial Chamber. It is necessary to control the Prosecutor's actions, otherwise, the Prosecutor's role

⁸⁴⁰ M. BERGSMO and P. KRUGER, Article 53, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1075.

⁸⁴¹ Consider *e.g.* F. RAZESBERGER, *The International Criminal Court: The Principle of Complementarity*, Frankfurt am Main, Peter Lang, 2006, p. 108; J. WOUTERS, S. VERHOEVEN and B. DEMEYERE, *The International Criminal Court's Office of the Prosecutor: Navigating between Independence and Accountability?*, in «*International Criminal Law Review*», Vol. 8, 2008, pp. 297, 302.

⁸⁴² P. WEBB, *The ICC Prosecutor's Discretion not to Proceed in the "Interests of Justice"*, in «*Criminal Law Quarterly*», Vol. 50, 2005, p. 321 (speaking of "intensified oversight").

⁸⁴³ Consider *e.g.* J. WOUTERS, S. VERHOEVEN and B. DEMEYERE, *The International Criminal Court's Office of the Prosecutor: Navigating between Independence and Accountability?*, in «*International Criminal Law Review*», Vol. 8, 2008, p. 301 (referring to the substantial overlap between gravity under Article 17 (1) (d) and considerations regarding the 'interests of justice').

⁸⁴⁴ See *supra*, Chapter 3, II.4.2.

may become unduly politicised.⁸⁴⁵ As one scholar rightly points out, the difficulty of the Pre-Trial Chamber's and/or the Appeals Chamber's review task consists of the inherently political nature of the decision not to investigate or prosecute.⁸⁴⁶ This is particularly true when a decision not to investigate or prosecute was solely gauged on the 'interests of justice' criterion---which was found to be fully discretionary in nature---, making it difficult for the Pre-Trial Chamber to meaningfully exercise its review task. Moreover, the lack of clear definitions for many other criteria in Article 53 will also hamper the Pre-Trial Chamber. Since the Pre-Trial Chamber lacks an independent investigative function, it has to rely on the Prosecutor's information in order to review the Prosecutor's decision.⁸⁴⁷ Considering that the Article 53 (3) review mechanism has not yet been applied in practice, it will be important for the Pre-Trial Chamber to put forward its own understanding of the criteria considered, including the 'interests of justice'.

To meaningfully exercise its task, Regulation 48 of the Regulations of the Court encompasses the Pre-Trial Chamber's power to 'request the Prosecutor to provide specific or additional information or documents in his or her possession [...] that the Pre-Trial Chamber considers necessary in order to exercise the functions and responsibilities set forth in Article 53 (3) (b)'. However, the existence of such a power, in the absence of any express decision not to proceed, has occasionally been contested by the Prosecutor.⁸⁴⁸ For example, in the *Uganda situation*, Pre-Trial Chamber II convened a status conference in order to seek further information from the Prosecutor confirming that the Prosecution did not intend to further

⁸⁴⁵ F. RAZESBERGER, *The International Criminal Court: The Principle of Complementarity*, Frankfurt am Main, Peter Lang, 2006, p. 108.

⁸⁴⁶ H. OLÁSULO, *The Prosecutor of the ICC before the Initiation of Investigations*, in «International Criminal Law Review», Vol. 3, 2003, pp. 142 – 143 (Olásulo points out that this judicial review mechanism has turned both the Pre-Trial Chamber and the Appeals Chamber into policy makers. Hence, while providing a guarantee against prosecutorial abuse, it generates additional problems by turning the judges into legislators).

⁸⁴⁷ C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years on*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, pp. 271 – 273 (adding that the practice of judicial review so far remained limited, where Judges failed to obtain relevant information).

⁸⁴⁸ Consider e.g. ICC, OTP Submission Providing Information on the Status of the Investigation in Anticipation of the Status Conference to be Held on 13 January 2006, *Situation in Uganda*, PTC II, Case No. ICC-02/04-01/05-76, 11 January 2006, par. 8.

investigate past crimes and that the investigation was nearing completion.⁸⁴⁹ The Prosecution subsequently denied that a decision not to prosecute further crimes had been taken.⁸⁵⁰

Apart from Article 53 (3), Article 15 (4) ICC Statute provides for an independent review of the Prosecutor's decision to investigate with regard to *proprio motu* investigations. Such a review is evidentiary in nature.⁸⁵¹ It provides for some checks and balances by ensuring judicial supervision when the Prosecutor wants to initiate an investigation in the absence of a referral. Its underlying purpose is to prevent "unwarranted, frivolous, or politically motivated investigations".⁸⁵² In order to allow the Pre-Trial Chamber to exercise its supervisory functions, the Prosecutor is required to submit a request for authorisation in writing.⁸⁵³ Consequently, the Pre-Trial Chamber should authorise the investigation with respect to all or parts of the request. This supervisory function of the Pre-Trial Chamber does not affect the investigative or prosecutorial functions of the Prosecutor.⁸⁵⁴ It entails a two-fold assessment of whether there is a reasonable basis to proceed and whether the case appears to fall within the jurisdiction of the Court.⁸⁵⁵ Again, at this stage, 'the case' refers to potential cases within

⁸⁴⁹ ICC, Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, *Situation in Uganda*, Case No. ICC-02/04-01/05-68, PTC II, 2 December 2005, par. 8-9.

⁸⁵⁰ ICC, OTP Submission Providing Information on the Status of the Investigation in Anticipation of the Status Conference to be Held on 13 January 2006, *Situation in Uganda*, PTC II, Case No. ICC-02/04-01/05-76, 11 January 2006, par. 8.

⁸⁵¹ J. WOUTERS, S. VERHOEVEN and B. DEMEYERE, The International Criminal Court's Office of the Prosecutor: Navigating between Independence and Accountability?, in «International Criminal Law Review», Vol. 8, 2008, p. 281.

⁸⁵² ICC, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d'Ivoire", *Situation in the Republic of Cote d'Ivoire*, Case No. ICC-02/11-14-Corr, PTC III, 15 November 2011, par. 21; ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 32.

⁸⁵³ Rule 50 (2) ICC RPE and Regulation 49 of the Court Regulations. A request shall contain: (a) A reference to the crimes which the Prosecutor believes have been or are being committed and a statement of the facts being alleged to provide the reasonable basis to believe that those crimes have been or are being committed; (b) A declaration of the Prosecutor with reasons that the listed crimes fall within the jurisdiction of the Court. The statement of the facts shall indicate, as a minimum: (a) The places of the alleged commission of the crimes, e.g. country, town, as precisely as possible; (b) The time or time period of the alleged commission of the crimes; and (c) The persons involved, if identified, or a description of the persons or groups of persons involved. An appendix should be included which includes 'if possible': (a) The chronology of relevant events; (b) Maps showing relevant information, including the location of the alleged crimes; and (c) An explanatory glossary of relevant names of persons, locations and institutions.

⁸⁵⁴ ICC, Corrigendum to "Judge Fernández de Gurmendi's Separate and Partially Dissenting Opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d'Ivoire", *Situation in the Republic of Cote d'Ivoire*, Case No. ICC-02/11-15-Corr, PTC III, 5 October 2011, par. 10.

⁸⁵⁵ Article 15 (4) ICC Statute.

the situation under consideration.⁸⁵⁶ Such a form of judicial review is not traditionally provided for in national criminal justice systems. In those inquisitorial criminal justice systems where the investigation is headed by an investigating judge or examining judge, the power to initiate investigations remains the prerogative of the Prosecutor (or the victim).⁸⁵⁷

In regards to the first prong of the assessment (existence of a ‘reasonable basis to proceed’), Judge de Gurmendi considered that insofar that such an assessment encompasses the consideration of the same factors previously considered by the Prosecutor in submitting a request for authorisation, it “should not become a duplication of the preliminary examination conducted by the Prosecutor.”⁸⁵⁸ Rather, the examination should be limited by “the underlying purpose of providing a judicial safeguard against frivolous or politically-motivated charges.”⁸⁵⁹ As such, Judge de Gurmendi disagreed with the majority’s assessment. On the basis of supporting materials provided by the Prosecutor and the victims’ representatives, the majority made a number of conclusions regarding crimes that were not presented by the Prosecutor.⁸⁶⁰ According to Judge de Gurmendi, “the Chamber should not attempt to duplicate the preliminary analysis conducted by the Prosecutor for the purpose of initiating an investigation, in particular by seeking to identify additional alleged crimes and suspects on its own.”⁸⁶¹ The Chamber has not been endowed with investigative or fact-finding powers. Hence, it “has no independent way to assess the reliability, credibility or completeness of the

⁸⁵⁶ ICC, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d’Ivoire”, *Situation in the Republic of Cote d’Ivoire*, Case No. ICC-02/11-14-Corr, PTC III, 15 November 2011, par. 18; ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19-Corr, PTC II, 31 March 2010, par. 64.

⁸⁵⁷ P. HAUCK, *Judicial Decisions in the Pre-Trial Phase of Criminal Proceedings in France, Germany and England: a Comparative Analysis Responding to the Law of the International Criminal Court*, Baden-Baden, Nomos Verlagsgesellschaft, 2008, p. 33 (the author notes several exceptions, including the referral of a case to an investigating judge by another investigating judge, who declared him or herself incompetent, but these exceptions do not confer the power to the investigating judge to initiate the investigation).

⁸⁵⁸ ICC, Corrigendum to “Judge Fernández de Gurmendi’s Separate and Partially Dissenting Opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d’Ivoire”, *Situation in the Republic of Cote d’Ivoire*, Case No. ICC-02/11-15-Corr, PTC III, 5 October 2011, par. 15.

⁸⁵⁹ *Ibid.*, par. 16.

⁸⁶⁰ ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19-Corr, PTC II, 31 March 2010, par. 83 – 86; 144 – 148; par. 162 – 165 and 166 – 169 (under the heading “Other underlying acts not presented by the Prosecutor”).

⁸⁶¹ ICC, Corrigendum to “Judge Fernández de Gurmendi’s Separate and Partially Dissenting Opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d’Ivoire”, *Situation in the Republic of Cote d’Ivoire*, Case No. ICC-02/11-15-Corr, PTC III, 5 October 2011, par. 19.

information available to it.”⁸⁶² Moreover, information that is gathered by the Prosecutor during the pre-investigation stage is non-exhaustive. Any facts or incidents that are mentioned in the Prosecutor’s request only serve to provide concrete examples of the gravest types of criminality that were allegedly committed in the situation. They are, by no means, any indication of the cases that will later be selected for prosecution.⁸⁶³ One commentator describes the undertaking by the Pre-Trial Chamber as superfluous.⁸⁶⁴ It is evident that the broad interpretation given by Pre-Trial Chamber II to its functions regarding the authorisation of *proprio motu* investigations by the Prosecutor neglects the supervisory nature of this procedural step.

A second category of restraints on prosecutorial discretion consists of *institutional forms of accountability*. These checks on prosecutorial discretion are of an indirect nature. Political accountability is ensured since the Prosecutor operates under the scrutiny of the Assembly of States Parties (‘ASP’). The ASP exercises supervision over the ICC Prosecutor through election⁸⁶⁵, professional responsibility⁸⁶⁶ or through its control over the ICC’s budget.⁸⁶⁷ The professional accountability mechanism is weak given the high threshold (“serious misconduct and serious breach of duty”) and the requirement of an absolute majority vote in the ASP.⁸⁶⁸ DANNER (who speaks in this respect of ‘formal accountability’), argues that this form of institutional accountability may be useful in cases of manifest abuses “but likely will have

⁸⁶² *Ibid.*, par. 35 - 39.

⁸⁶³ *Ibid.*, par. 31 - 34.

⁸⁶⁴ R. RASTAN, The Jurisdictional Scope of Situations before the International Criminal Court, in «Criminal Law Forum», Vol. 23, 2012, pp. 26 – 27 (“The specification by the Chamber of further examples is merely illustrative of a threshold that has already been met. The task of the Chamber is to identify the outer parameters of the situation, not to fill in the individual pieces thereof”).

⁸⁶⁵ Article 42 (4) ICC Statute.

⁸⁶⁶ Article 46 (1) (a) ICC Statute and Rule 24 ICC RPE.

⁸⁶⁷ Article 112 (2) (d) ICC Statute. Some authors have noted that the use by the ASP of budgetary allocations to exercise pressure on the Prosecutor would be in violation of Article 42 ICC Statute which establishes the Prosecutor’s full authority over the administration and management of the office (Article 42 (2) ICC Statute). See e.g. H. OLÁSULO, The Prosecutor of the ICC before the Initiation of Investigations, in «International Criminal Law Review», Vol. 3, 2003, p. 108.

⁸⁶⁸ Rule 24 ICC RPE and Article 46 (2) (b) ICC Statute respectively. Note that the requirement of an absolute majority is lower than the two-third majority needed for the removal of Judges (Article 46 (2) (a) ICC Statute). A.M. DANNER, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, in «American Journal of International Law», Vol. 97, 2003, p. 523 (noting, more generally, that “in many significant cases, member states have proven ineffective at constraining or overriding decisions made by international institutions.” On the ICC Prosecutor, DANNER notes that “[i]t is doubtful [...] whether the ASP will in fact act as a strong check on the Prosecutor” (*ibid.*, p. 524)). OLÁSULO takes another view, calling the requirement of an absolute majority “a source of major concern”, when compared to the position of judges, who can be removed by only a two-third majority of the members of the ASP. See H. OLÁSULO, The Prosecutor of the ICC before the Initiation of Investigations, in «International Criminal Law Review», Vol. 3, 2003, p. 107.

little impact on a Prosecutor who is simply ineffective or demonstrates poor judgment.”⁸⁶⁹ STAHN also refers to process-based checks and balances that follow from prosecutorial obligations towards several actors. These actors include states and victims. They may restrain the Prosecutor, even if he or she is not directly accountable to these actors. Consider, for example, the existence of notification duties (e.g. the right of information providers to be informed of the result of the prosecutorial information analysis), the possibility for states to challenge the admissibility of a case, the possibility to challenge a decision not to proceed with an investigation and prosecution, etc.⁸⁷⁰ In addition, DANNER (who speaks in this regard of ‘pragmatic accountability’) refers to the choice that actors have as to how to react to prosecutorial decisions, namely, to cooperate or not.⁸⁷¹ He refers to “enforcement weaknesses” in the state cooperation regime.⁸⁷² The need of cooperation by states forces the Prosecutor to apply rules uniformly.⁸⁷³ A more powerful tool allowing for external political pressure is Article 16 ICC Statute which allows the Security Council to prevent or stop an investigation or prosecution for a renewable period of 12 months under Chapter VII.⁸⁷⁴

Lastly, forms of institutional accountability may be found in forms of (self) regulation. In line with many national jurisdictions, prosecutorial guidelines may be adopted defining the exercise of prosecutorial discretion.⁸⁷⁵ ‘Incentives’ for the ICC Prosecutor to adopt guidelines can be found in the statutory framework.⁸⁷⁶ In practice, various policy documents have

⁸⁶⁹ A.M. DANNER, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, in «American Journal of International Law», Vol. 97, 2003, p. 525.

⁸⁷⁰ C. STAHN, Judicial Review of Prosecutorial Discretion: Five Years on, in C. STAHN and G. SLUITER (eds.), The Emerging Practice of the International Criminal Court, Leiden, Koninklijke Brill, 2009, pp. 260 – 261.

⁸⁷¹ A.M. DANNER, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, in «American Journal of International Law», Vol. 97, 2003, p. 525 (these forms of accountability are informal (implied rather than explicit), dynamic (as they may change over time) and hence dialectic in nature. Aside from the decision of a state to cooperate or not with the ICC, DANNER notes that pragmatic forms of accountability towards states are to be found in the various control mechanisms built-in into the ICC Statute as well as in forms of financial accountability).

⁸⁷² *Ibid.*, p. 530.

⁸⁷³ M.R. BRUBACHER, Prosecutorial Discretion in the International Criminal Court, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 93.

⁸⁷⁴ R. CRYER, Prosecuting International Crimes: Selectivity and the International Criminal Law Regime, Cambridge, Cambridge University Press, 2005, p. 226.

⁸⁷⁵ C. STAHN, Judicial Review of Prosecutorial Discretion: Five Years on, in C. STAHN and G. SLUITER (eds.), The Emerging Practice of the International Criminal Court, Leiden, Koninklijke Brill, 2009, p. 262 and accompanying footnotes.

⁸⁷⁶ First, Article 42 (2) ICC Statute seems to authorise the Prosecutor to adopt certain office policies. Secondly, Rule 105 (5) and 106 (2) require the Prosecutor to provide reasons for a decision, pursuant to Article 53 ICC Statute, not to investigate a situation or not to prosecute a case.

already been adopted by the Prosecution, including a policy paper on the ‘interests of justice’.⁸⁷⁷

II.4.4. Organisational safeguards and constraints of prosecutorial discretion

Firstly, it is clear that an independent Prosecutor is important for safeguarding prosecutorial discretion. In this regard, it is important to underline that the OTP is set up as a separate organ of the ICC. It operates independently and is responsible for receiving referrals and any *substantiated* information on crimes within the Court’s jurisdiction, for examining referrals and information and for conducting investigations and prosecutions before the Court.⁸⁷⁸ The Prosecution cannot seek or act on instructions from any external source.⁸⁷⁹ As one author notes, this provision also implies that “the selection process is not influenced by the presumed wishes of any external source, the importance of the cooperation of any particular party, or the quality of cooperation provided” and that the selection process “is conducted exclusively on the available information and evidence and in accordance with the Statute criteria and the policies of the Office.”⁸⁸⁰ In that regard, the ICC Prosecutor is in a worse position than his counterparts at the *ad hoc* tribunals insofar that he or she finds himself in a weaker position *vis-à-vis* states. Besides, while the Prosecutor exercises “full authority over the management and administration of the Office” he or she does not enjoy similar institutional protections as his or her national counterparts.⁸⁸¹ The Prosecutor has labelled independence to be one of the guiding principles in the course of preliminary investigations. Additionally, the Prosecutor also interpreted the principle to imply that decisions ‘shall not be influenced or altered by the

⁸⁷⁷ OTP Policy Paper on the Interests of Justice, September 2007. Consider also e.g. ICC, Paper on Some Policy Issues before the Office of the Prosecutor (‘Policy Paper’), September 2003. It is noted that many of these prosecutorial guidelines include a disclaimer, stating that these guidelines “[do] not give rise to rights in litigation and [are] subject to revision based on experience and in the light of legal determinations by the Chambers of the Court.” See OTP Policy paper on the interests of justice, September 2007, p. 1; OTP Policy Paper on Victims’ Participation, April 2010, p. 2.

⁸⁷⁸ Article 34 (c) ICC statute; Article 42 (1) ICC Statute (emphasis added) and Regulation 13 of the Regulations of the OTP.

⁸⁷⁹ Article 42 (1) ICC Statute; Regulation 13 of the Regulations of the OTP.

⁸⁸⁰ F. GUARIGLIA, The Selection of Cases by the Office of the Prosecutor of the International Criminal Court, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 212 (referring to the OTP Draft paper on the Criteria for the selection of situations and cases (2006)).

⁸⁸¹ M.R. BRUBACHER, Prosecutorial Discretion in the International Criminal Court, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 85.

presumed or known wishes of any party, or in connection with efforts to secure cooperation’,⁸⁸²

Secondly, linked to this, is the principle of impartiality.⁸⁸³ It has been interpreted by the Prosecutor to imply that (i) the OTP will not draw any adverse distinction based on a ground prohibited under the Statute and (ii) will consistently apply methods and criteria irrespective of the states or parties involved or the person(s) or group(s) concerned.⁸⁸⁴ Besides, geopolitical implications as well as geographical spread between situations are not considered to be relevant criteria.⁸⁸⁵ As such, this understanding of impartiality seeks to guarantee the two linked principles of non-discrimination and equality before the law; both of which derive from human rights law and can be traced in the ICC Statute.⁸⁸⁶

Thirdly, a principle guiding the preliminary examination and the selection of cases (situations) is that of objectivity.⁸⁸⁷ It implies that information received is analysed in an objective manner. According to DEGUZMAN, where situations and cases are selected on the basis of vague criteria such as ‘gravity’ or the ‘interests’ of justice’, it may well be impossible to uphold a principle of objectivity in practice.⁸⁸⁸

II.4.5. Prosecutorial practice

While an in-depth analysis of the Prosecutor’s selection of cases surpasses the aims of the present undertaking, the most important features of it will shortly be outlined.⁸⁸⁹ Notably, the Prosecutor has faced criticism on the selection of cases.⁸⁹⁰ The Office of the Prosecutor consistently stated that it would focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the state or organisation

⁸⁸² ICC, Policy Paper on Preliminary Examinations, 2013, par. 26.

⁸⁸³ Article 42 (7) and 21 (3) ICC Statute.

⁸⁸⁴ ICC, Policy Paper on Preliminary Examinations, 2013, par. 28.

⁸⁸⁵ ICC, Policy Paper on Preliminary Examinations, 2013, par. 29.

⁸⁸⁶ Article 67 (1) ICC Statute and Article 21 (3) ICC Statute. See *supra*, Chapter 3, II.2, fn. 560.

⁸⁸⁷ ICC, Policy Paper on Preliminary Examinations, 2013, par. 30 - 33. This principle of objectivity is to be distinguished from the principle of objectivity that can be found in Article 54 (1) (a) ICC Statute.

⁸⁸⁸ M.M. DEGUZMAN, Choosing to Prosecute: Expressive Selection at the International Criminal Court, in «Michigan Journal of International Law», Vol. 33, 2012, pp. 296 – 297.

⁸⁸⁹ The selection of cases is to be distinguished from the selection of *situations*, a feature which is only found at the ICC.

⁸⁹⁰ Generally on this issue: *ibid.*, pp. 265 – 320.

allegedly responsible for those crimes ('focused investigations' approach).⁸⁹¹ Such a focus derives from the Prosecutor's own convictions, rather than from the ICC Statute itself.⁸⁹² Unlike other international(ised) criminal tribunals, no clear focus on those bearing the greatest responsibility can be discerned in the ICC Statute. Nevertheless, even though the ICC Appeals Chamber rejected the idea of such a criterion as a legal requirement (as part of the gravity requirement), it is a legitimate criterion in the exercise of prosecutorial discretion.⁸⁹³ Such an approach is coupled with encouraging national prosecutions. Notwithstanding the Prosecutor's proclaimed focus on those bearing the greatest responsibility, it may be feared that the Prosecutor occasionally made use of the inactivity of the state to pick up minor cases.⁸⁹⁴

Besides, the Prosecutor clarified that, within a situation, a number of incidents are selected, allowing short investigations in order to limit the number of persons put at risk because of their interactions with the OTP.⁸⁹⁵ In deciding what incidents to select for trial, the OTP undertakes "to provide a sample that reflects the gravest incidents and the main types of victimization."⁸⁹⁶ Besides, a 'sequenced approach' was adopted by the OTP in 2006, implying that cases within a situation are selected according to their gravity.⁸⁹⁷

⁸⁹¹ ICC, Paper on Some Policy Issues before the Office of the Prosecutor ('Policy Paper'), September 2003, p. 7; OTP, Prosecutorial Policy 2009 – 2012, 1 February 2010, par. 15, 19.

⁸⁹² Confirming, consider e.g. L.F. HORTON, Prosecutorial Discretion Before International Criminal Courts and Perceptions of Justice: How Expanded Prosecutorial Independence Can Increase the Accountability of International Actors, in «Eyes on the ICC», Vol. 7, 2010-2011, p. 56.

⁸⁹³ P. SEILS, The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court, in M. BERGSMO (ed.), Criteria for Prioritizing and Selecting Core International Crimes Cases, Oslo, Torkel Opsahl Academic EPublisher, 2010, p. 72.

⁸⁹⁴ Consider e.g. N.J. JURDI, The International Criminal Court and National Courts, Farnham, Ashgate Publishing Limited, 2011, p. 89; I. STEGMILLER, The Pre-Investigation Stage of the ICC, Berlin, Duncker & Humblot GmbH, 2011, p. 301.

⁸⁹⁵ OTP, Prosecutorial Policy 2009 – 2012, 1 February 2010, par. 20.

⁸⁹⁶ *Ibid.*, par. 20.

⁸⁹⁷ OTP, Report on Prosecutorial Strategy, 14 September 2006, p. 5; W.A. SCHABAS, Prosecutorial Discretion v. Judicial Activism at the ICC, in «Journal of International Criminal Justice», Vol. 6, 2008, p. 735. However, SEILS notes that since this 2006 report, this idea has not been repeated in later statements and briefings. See P. SEILS, The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court, in M. BERGSMO (ed.), Criteria for Prioritizing and Selecting Core International Crimes Cases, Oslo, Torkel Opsahl Academic EPublisher, 2010, p. 77; Consider also F. GUARIGLIA, The Selection of Cases by the Office of the Prosecutor of the International Criminal Court, in C. STAHN and G. SLUITER (eds.), The Emerging Practice of the International Criminal Court, Leiden, Koninklijke Brill, 2009, p. 215. Human Rights Watch is critical of 'sequencing', because it is at tension with the perception of impartiality. In the *Situation in the DRC*, this strategy lead to an imbalance in charging members of different groups, which proved damaging for the perceptions of impartiality and independence. See HRW, Unfinished Business, Closing Gaps in the Selection of ICC Cases, 2011, pp. 19 – 22 (available at: <http://www.hrw.org/sites/default/files/reports/icc0911webcover.pdf>, 10 February 2014).

Finally, it is recalled that at the beginning, the OTP adopted a policy of inviting and encouraging voluntary referrals.⁸⁹⁸ While commentators agree that such a policy made sense in the early stages of the Court's lifetime, they argue that such a policy should be re-evaluated.⁸⁹⁹ Besides, it is important for the Prosecution to underline the fact that it will investigate all sides of the conflict in case of a self-referral, in order to prevent the mechanisms from being hijacked for domestic political (or military) reasons.⁹⁰⁰

II.5. The Extraordinary Chambers in the Courts of Cambodia (ECCC): moderate legality

Articles 1 and 2 of the ECCC Agreement and Article 1 and 2 new ECCC Law expressly limit the jurisdiction of the Extraordinary Chambers *ratione personae* to 'senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979'.⁹⁰¹ The formulation indicates that 'senior leaders' and 'those who were most responsible' are two distinct categories. This seems to imply that senior

⁸⁹⁸ See OTP, Report on the Activities Performed During the first three Years (June 2003 – June 2006), 12 September 2006, p. 7 ("the Prosecutor adopted the policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court. This policy resulted in referrals for what would become the Court's first two situations: Northern Uganda and the DRC. The method of initiating investigations by voluntary referral has increased the likelihood of important cooperation and on-the-ground support"). A. CASSESE, Is the ICC Still Having Teething Problems?, in «Journal of International Criminal Justice», Vol. 4, 2006, p. 436 (the author highlights that the biggest advantage lies in the "likelihood of cooperation from the national authorities"); P. GAETA, Is the Practice of 'Self-Referrals' a Sound Start for the ICC?, in «Journal of International Criminal Justice», Vol. 2, 2004, pp. 950 - 951 (noting that the same level of cooperation cannot always be expected from where the Prosecutor relies on his or her *proprio motu* powers or even compared to the other two remaining triggering mechanisms, especially where the Court determined, contrary to the will of that state, that it is not willing or able to conduct genuine national proceedings. Such makes on-site investigation an arduous undertaking and may lead the Prosecutor to principally investigate sources outside the territorial state).

⁸⁹⁹ In this regard, GAETA notes that this practice may have assisted in reassuring opponents of the Court which fear the design of the Prosecutor's role and function. See P. GAETA, Is the Practice of 'Self-Referrals' a Sound Start for the ICC?, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 950. For a similar view, see J. WOUTERS, S. VERHOEVEN and B. DEMEYERE, The International Criminal Court's Office of the Prosecutor: Navigating between Independence and Accountability?, in «International Criminal Law Review», Vol. 8, 2008, p. 289 (arguing that "[i]n the long term [...] the Prosecutor should not rely primarily on state referrals but use his *proprio motu* power, even if this entails entering into conflict with the States concerned: it is in the use of the *proprio motu* powers that his real force resides." At the same time, the authors acknowledge that "this is a long-term process, requiring the Prosecutor to increase his Office's legitimacy before actually resorting to using these powers"). Consider also: I. STEGMILLER, The Pre-Investigation Stage of the ICC, Berlin, Duncker & Humblot GmbH, 2011, p. 143.

⁹⁰⁰ P. GAETA, Is the Practice of 'Self-Referrals' a Sound Start for the ICC?, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 952.

⁹⁰¹ Emphasis added.

leaders may be prosecuted solely on the basis of their status.⁹⁰² In this regard, the formulation differs from the “most senior leaders suspected of being most responsible” criterion that was proposed by ICC Pre-Trial Chamber I.⁹⁰³

From the legislative history of the ECCC, it follows that the Group of Experts, whose advice had been sought by the UN General Assembly, had suggested a focus on “those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea.” Such a formulation would be broad enough not only to include the senior leaders who had responsibility over the abuses but also “those at lower levels who are directly implicated in the most serious atrocities.”⁹⁰⁴ This was also the understanding during the discussion of the ECCC Agreement and changes to the ECCC Law in the Cambodian parliament.⁹⁰⁵ As one former negotiator explained, “at no point did negotiators state to each other that any suspect must be *both* a senior leader of Democratic Kampuchea *and* an individual most responsible for the serious violations.”⁹⁰⁶ Hence, both the clear wording of the ECCC texts as well as the drafting history confirm that there are two categories of suspects that the ECCC has jurisdiction over.⁹⁰⁷ In *Duch*, the Supreme Court Chamber confirmed, on the basis of the drafting history, that the term “senior leaders of Democratic Kampuchea and those who were most responsible” refer to two categories but added that these categories overlap.⁹⁰⁸ It further specified these two categories as, on one hand, the “senior leaders of the

⁹⁰² Critical, see X.A. ARANBURU, *Gravity of Crimes and Responsibility of the Suspect*, in M. BERGSMO (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Oslo, Torkel Opsahl Academic EPublisher, 2010, p. 222 (“It is excessive to cast suspicion on leaders just because of their formal status without qualifying clearly what circumstances justify a presumption of individual responsibility”).

⁹⁰³ See ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 42-63 (annexed to ICC, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the case against Mr. Thomas Lubanga Dyilo, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-8, PTC I, 24 February 2006).

⁹⁰⁴ Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, 18 February 1999, par. 110.

⁹⁰⁵ ECCC, Appeal Judgement, *KAING Guek Eav (Duch)*, Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 53.

⁹⁰⁶ D. SCHEFFER, *The Negotiating history of the ECCC’s Personal Jurisdiction*, 26 May 2011 (to be found at <http://ki-media.blogspot.be/2011/05/negotiating-history-of-ecccs-personal.html>, last visited 10 February 2014).

⁹⁰⁷ Confirming, see S. HEDER, *A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia*, London – Paris, 2011, pp. 40 – 41 (to be found at <http://www.cambodiatribunal.org/sites/default/files/A%20Review%20of%20the%20Negotiations%20Leading%20to%20the%20Establishment%20of%20the%20Personal%20Jurisdiction%20of%20the%20ECCC.pdf>, last visited, 10 February 2014).

⁹⁰⁸ ECCC, Appeal Judgement, *KAING Guek Eav (Duch)*, Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 57 (referring to “two categories of Khmer Rouge officials that are not dichotomous”); ECCC, Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, Case No. 003/07-09-2009-ECCC-OCIJ, OCIJ, 2 May 2012, par. 13.

Khmer Rouge who are among the most responsible” and “non-senior leaders of the Khmer Rouge who are also among the most responsible” on the other.⁹⁰⁹ However, contrary to the Supreme Court Chamber’s argumentation, it is unclear how this latter distinction is supported by the *travaux préparatoires*.⁹¹⁰

The Expert Group preferred any such limitation to offer *guidance* to the Co-Prosecutors, and opposed an express limitation of the ECCC’s personal jurisdiction in that regard.⁹¹¹ From the same report, it follows that the Group of Experts advised to focus on Khmer Rouge officials.⁹¹² However, from a combined literal and contextual interpretation, it clearly follows that these limitations encompass jurisdictional hurdles for the Co-Prosecutors in bringing cases. Most clearly, Article 2 of the ECCC Agreement stipulates that the Extraordinary Chambers “have *personal jurisdiction* over senior leaders of Democratic Kampuchea and those who were most responsible.”⁹¹³ Besides, these limitations can be found in the Chapter of the ECCC Law that concerns the ‘competence’ of the Extraordinary Chambers.⁹¹⁴ In line with the argument made regarding the personal jurisdiction of the Special Court, it is argued here that this is a clear indication of the jurisdictional nature of the limitations.⁹¹⁵

Such an interpretation was initially confirmed by the ECCC’s case law.⁹¹⁶ However, in *Duch*, the Supreme Court Chamber somewhat confusingly arrived at another conclusion. It

⁹⁰⁹ *Ibid.*, par. 57.

⁹¹⁰ While the Supreme Court Chamber derives such distinction from the *travaux préparatoires*, the sources cited do not seem to clearly draw such distinction. Rather, it seems to derive from the writings of one scholar. Notably, MORRISON argued that “[s]ince all senior leaders must also be most responsible, the use of two phrases is technically redundant. However, the addition of “senior leaders” to the jurisdiction of the court helps focus the prosecution. Even if “senior leaders” is held to not be a jurisdictional requirement, “most responsible” should remain” (emphasis added). See S. MORRISON, Extraordinary Language in the Courts of Cambodia: Interpreting the Limiting Language and Personal Jurisdiction of the Cambodian Tribunal, in «Capital University Law Review», Vol. 37, 2009, p. 627. It is respectfully argued here that while one can understand the reasoning of the Supreme Court Chamber (“because a senior leader is not a suspect on the sole basis of his/her leadership position”), such further delineation of the two categories does not clearly follow from the *travaux préparatoires*.

⁹¹¹ Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, 18 February 1999, par. 110 – 111, 154.

⁹¹² *Ibid.*, par. 219 (1).

⁹¹³ Emphasis added.

⁹¹⁴ Article 2 new ECCC Law.

⁹¹⁵ Compare, *supra*, Chapter 3, II.3; for a confirming view, consider: S. MORRISON, Extraordinary Language in the Courts of Cambodia: Interpreting the Limiting Language and Personal Jurisdiction of the Cambodian Tribunal, in «Capital University Law Review», Vol. 37, 2009, p. 599.

⁹¹⁶ ECCC, Judgement, *KAING Guek Eav (Duch)*, Case No. 001/18-07-2007/ECCC/TC, T. Ch., 26 July 2010, par. 17; ECCC, Closing Order, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 15 September 2010, par. 1327 – 1328 (the Co-Investigating Judges conclude that the charged persons fall within the personal jurisdiction of the Court where they were senior leaders of the Democratic Kampuchea during the period of the ECCC’s temporal jurisdiction and holding in addition, or alternatively, that the charged persons also fall within

distinguished between three elements of the phrase “senior leaders of Democratic Kampuchea and those who were most responsible” in dealing with the question as to whether this phrase is jurisdictional in nature. Firstly, (i) there is the requirement of being a Khmer Rouge official; a requirement for the two categories of persons discussed above. Secondly (ii), there is the requirement of being ‘most responsible’, which, according to the Supreme Court Chamber, applies to the two categories of persons. Lastly, (iii) there is the requirement of being a ‘senior leader’, which only applies to one of the two categories. As to the first term, the Appeals Chamber concluded that it is precise and leaves little room for discretion. Hence, it is justiciable before the Trial Chamber and establishes a jurisdictional threshold.⁹¹⁷ As far as the second term ‘most responsible’ is concerned, the Supreme Court Chamber concluded that it cannot be jurisdictional in nature.⁹¹⁸ However, the reasons provided by the Chamber are not convincing. The Chamber pointed out that the term is not defined anywhere, leaving a great deal of room for discretion. Consequently, it is not justiciable.⁹¹⁹ Of course, there is some truth in such a statement. However, one can ask whether it is not for the jurisprudence to further clarify and detail this notion. For example, with mixed success, the ICC jurisprudence undertook steps to carve out its understanding of ‘gravity’ as found within the ICC Statute.⁹²⁰ Moreover, it is unclear how the vague nature of the term alone would suffice to cast aside the express and unambiguous wording of the provision (labelling it a *jurisdictional* threshold).⁹²¹

the category of those ‘most responsible’ through their participation in the implementation of the CPK’s common purpose). Also the national Co-Prosecutor has understood these limitations to be jurisdictional in nature. See the argumentation in ECCC, Annex I: Public Redacted Version - Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, Disagreement No. 001/18-11-2008-ECCC/PTC, 18 August 2009, par. 32.

⁹¹⁷ ECCC, Appeal Judgement, *KAING Guek Eav (Duch)*, Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 61.

⁹¹⁸ *Ibid.*, par. 62 – 74; ECCC, Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, Case No. 003/07-09-2009-ECCC-OCIJ, OCIJ, 2 May 2012, par. 12.

⁹¹⁹ ECCC, Appeal Judgement, *KAING Guek Eav (Duch)*, Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 62. Even less convincing, the Supreme Court Chamber argues that such jurisdictional requirement would be in violation of the prohibition of a defence of superior orders under the ECCC Law, an argumentation which confuses jurisdictional thresholds with criminal defences.

⁹²⁰ See *supra*, Chapter 3, II.4.2.

⁹²¹ The Supreme Court Chamber lists some counter-indications to argue that the term is only a policy consideration. First, the Chamber refers to the independence of the Co-Prosecutors and the Co-Investigating Judges. However, while it is uncontested that the Co-Prosecutors and Co-Investigating Judges should exercise their functions independently, it is unclear how such principle of independence can tell us anything on the jurisdictional nature or not of the ‘most responsible’ term. Where these actors should act independently, they should do so within certain predetermined jurisdictional boundaries. Secondly, the Supreme Court Chamber refers to the drafting history, more particular the recommendation by the Group of Experts that the term should not be understood to be a jurisdictional threshold (as highlighted in the main text). Here, it is to be recalled that the *travaux préparatoires* are a supplementary means of interpretation. Hence, where the wording is clear and unambiguous, there is no need to refer to it. The argument the Experts’ Report “is consistent with the terms of [the UN-RGC Agreement and the ECCC Law]” is plainly wrong: it clearly contradicts the texts of the two documents (“that the Extraordinary Chambers *have personal jurisdiction*...”). Lastly, the Supreme Court

Lastly, as far as the term ‘senior leaders’ is concerned, the Supreme Court Chamber similarly concluded that the term exclusively operates as “investigatorial and prosecutorial policy”.⁹²² The Supreme Court Chamber relied on the vague nature of the term and on the drafting history.⁹²³ Again, the Supreme Court failed to explain how the drafting history, a supplementary means of interpretation, can brush aside the clear wording of the provision concerned, labelling it a jurisdictional threshold. Overall, rather than clarify, the Supreme Court Chambers’ findings seem to further obfuscate the matter.⁹²⁴

As to the exact meaning of ‘senior leaders of Democratic Kampuchea’, the legislative history indicates that the term was intended to target a “small number” of people from the leadership of the Democratic Kampuchea, the selection of individuals being left to the Co-Prosecutors.⁹²⁵ Such a limitation is in keeping with the recommendations from the Group of Experts for Cambodia.⁹²⁶ The second category of persons ‘most responsible’ was intended to encompass those who were not ‘senior leaders’ but who committed crimes as serious as the crimes that were committed by the senior leaders.⁹²⁷

Chamber refers to the use of the term ‘most responsible’ at the *ad hoc* tribunals and the Special Court. Again, it is unclear how the treatment of this term by other international criminal tribunals may put aside the express wording of the ECCC Law and the ECCC Agreement. See ECCC, Appeal Judgement, *KAING Guek Eav (Duch)*, Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 64 – 74.

⁹²² *Ibid.*, par. 77.

⁹²³ *Ibid.*, par. 75 – 78.

⁹²⁴ For a similar view, consider e.g. OSJI, Recent Developments in the Extraordinary Chambers in the Courts of Cambodia, February 2012, p. 9 (to be found at <http://www.opensocietyfoundations.org/sites/default/files/cambodia-eccc-20120223.pdf>, last visited 10 February 2014) (“The SCC’s determination of this matter is alarming, not least because it potentially narrows the scope for review of the decision(s) of the co-investigating judges in relation to a highly controversial issue: the selection of individuals for investigation and prosecution.”); Amnesty International, Cambodia: Khmer Rouge Judgment Welcome, but Raises Human rights Concerns, 3 February 2012 (to be found at <http://www.amnesty.org/en/news/cambodia-khmer-rouge-judgment-welcome-raises-human-rights-concerns-2012-02-03>, last visited 4 July 2012) (warning that “confusing findings relating to the Tribunal’s personal jurisdiction over former Khmer Rouge may have implications for other cases”).

⁹²⁵ A. AHMED and M. DAY, Prosecution Criteria at the Khmer Rouge Tribunal, in M. BERGSMO (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Oslo, Torkel Opsahl Academic EPublisher, 2010, pp. 109 - 110.

⁹²⁶ See the Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, 18 February 1999, par. 110 (“Therefore, fourth, the Group recommends that any tribunal focus upon those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea. This would include senior leaders with responsibility over the abuses as well as those at lower levels who are directly implicated in the most serious atrocities. We do not wish to offer a numerical limit on the number of such persons who could be targets of investigation. It is, nonetheless, the sense of the Group from its consultations and research that the number of persons to be tried might well be in the range of some 20 to 30. While the decisions on whom and when to indict would be solely within the discretion of a prosecutor, the Group believes that the strategy undertaken by the Prosecutor of any tribunal should fully take into account the twin goals of individual accountability and national reconciliation”).

⁹²⁷ *Ibid.*, par. 109.

In interpreting the ‘senior leaders’ and ‘most responsible’ requirements, a parallel can be drawn with the ‘most senior leaders suspected of being most responsible’ requirement that can be found at the ICTY and which was previously discussed.⁹²⁸ However, while Rule 28 (A) ICTY RPE combines the two terms, the ECCC documents clearly intended those two concepts to refer to separate categories.⁹²⁹ Besides, while Article 28 (A) refers to the ‘most senior leaders’, the ECCC documents refer to ‘senior leaders’. However, some further guidance as to the interpretation can be found in the consideration of the level of responsibility by the ICTY Referral Bench in Rule 11*bis* proceedings.⁹³⁰ In general, in this assessment, factors considered include the position or function of the accused in the civil, political or military hierarchy *de jure* and *de facto*, the role and level of their participation in the crimes committed as well as the permanence of their position.⁹³¹ The seniority of the leaders will depend on the organisational structure, including not only the *de jure* but also the *de facto* position of the person.⁹³² They should have exercised such a degree of authority that it would be appropriate to describe them as being among the ‘most senior’, rather than ‘intermediate’ leaders.⁹³³

Furthermore, based on a literal interpretation of the term ‘most responsible’, commentators have concluded that this term could be understood as including “those individuals who bear

⁹²⁸ Consider in particular Rule 28 (A) ICTY RPE. Consider also UN, Security Council Resolution 1503, U.N. Doc S/RES/1503, 28 August 2003, preambular paragraph 7 and other documents referred to, see *supra*, Chapter 3, II.2. Consider e.g. the references to Rule 28 (A) ICTY RPE in ECCC, Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, Case No. 003/07-09-2009-ECCC-OCIJ, OCIJ, 2 May 2012, par. 16 – 25.

⁹²⁹ Consider the interpretation by the Trial Chamber in ECCC, Judgement, *KAING Guek Eav (Duch)*, Case No. 001/18-07-2007/ECCC/TC, T. Ch., 26 July 2010, par. 17 *et seq.*; S. MORRISON, Extraordinary Language in the Courts of Cambodia: Interpreting the Limiting Language and Personal Jurisdiction of the Cambodian Tribunal, in «Capital University Law Review», Vol. 37, 2009, p. 617 (referring to the fact that the two categories were inserted to ensure that KAING “Duch” Guek Eav and other high-ranking commanders of S-21 could be prosecuted).

⁹³⁰ Pursuant to Rule 11*bis* (C) ICTY RPE.

⁹³¹ ECCC, Judgement, *KAING Guek Eav (Duch)*, Case No. 001/18-07-2007/ECCC/TC, T. Ch., 26 July 2010, par. 22; ICTY, Decision on Referral of Case Pursuant to Rule 11*bis*, *Prosecutor v. Milošević*, Case No. IT-98-29/1-PT, Referral Bench, 8 July 2005, par. 22-23; ICTY, Decision on Referral of Case Pursuant to Rule 11*bis* with Confidential Annex A and Annex B, *Prosecutor v. Lukić et al.*, Case No. I-98-32/1-PT, Referral bench, 5 April 2007, par. 28; ICTY, Decision on Referral of Case Pursuant to Rule 11*bis*, *Prosecutor v. Kovačević*, Case No. IT-1-42/2-1, Referral Bench, 17 November 2006, par. 20; ICTY, Decision on Rule 11*bis* Referral, *Prosecutor v. Janković*, Case No. IT-96-23/2-AR11*bis*.2, A. Ch., 15 November 2005, par. 20; ICTY, Decision on Milan Lukić’s Appeal Regarding Referral, *Prosecutor v. Lukić*, Case No. IT-98-32/1-AR11*bis*.1, A. Ch., 11 July 2007, par. 22.

⁹³² S. MORRISON, Extraordinary Language in the Courts of Cambodia: Interpreting the Limiting Language and Personal Jurisdiction of the Cambodian Tribunal, in «Capital University Law Review», Vol. 37, 2009, pp. 619 – 620.

⁹³³ ICTY, Decision on Savo Todović’s Appeal against Decisions on Referral under Article 11*bis*, *Prosecutor v. Rašević and Todović*, Case No. IT-97-25/1-AR11*bis*.1, A. Ch., 4 September 2006, par. 20.

the greatest responsibility for causing the crimes that occurred during the temporal jurisdiction of the court.⁹³⁴ The term ‘most responsible’ seems broader than the equivalent formulation in the Special court’s procedural framework, namely, the “greatest responsibility” requirement.⁹³⁵ The ECCC Supreme Court Chamber clarified that “it denotes a degree of criminal responsibility in comparison to all Khmer Rouge officials responsible for crimes within the ECCC’s jurisdiction.”⁹³⁶ Notably, the Co-Investigating Judges alleged that *Duch* fell within this category of persons.⁹³⁷ It was the scope of these two categories of persons (‘senior leaders’ and ‘most responsible’) that led to a split between international and national Judges and Prosecutors of the ECCC and to the endless controversy as to whether the Extraordinary Chamber had jurisdiction over Cases 003 and 004.⁹³⁸

⁹³⁴ A. AHMED and M. DAY, *Prosecution Criteria at the Khmer Rouge Tribunal*, in M. BERGSMO (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Oslo, Torkel Opsahl Academic EPublisher, 2010, p. 111.

⁹³⁵ S. MORRISON, *Extraordinary Language in the Courts of Cambodia: Interpreting the Limiting Language and Personal Jurisdiction of the Cambodian Tribunal*, in «Capital University Law Review», Vol. 37, 2009, p. 623.

⁹³⁶ ECCC, Appeal Judgement, *KAING Guek Eav (Duch)*, Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 62.

⁹³⁷ ECCC, Judgement, *KAING Guek Eav (Duch)*, Case No. 001/18-07-2007/ECCC/TC, T. Ch., 26 July 2010, par. 18. In fact, as revealed by one negotiator, it appears that Duch “was a constant reference point for the negotiators as a likely defendant”, as he had been detained for six months when negotiations on the ECCC took place. D. SCHEFFER, *The Negotiating history of the ECCC’s Personal Jurisdiction*, 26 May 2011 (to be found at <http://ki-media.blogspot.be/2011/05/negotiating-history-of-eccc-personal.html>, last visited, 10 February 2014).

⁹³⁸ Consider e.g. the press release by the national Co-Prosecutor, holding that on the basis of the preliminary investigation he concluded that Case 003 did not fall within either of these two categories. See ECCC, Press Release, Statement by the National Co-Prosecutor Regarding Case File 003, 11 May 2011, to be found at <http://www.eccc.gov.kh/en/articles/statement-national-co-prosecutor-regarding-case-file-003>, last visited 10 February 2014; ECCC, Annex I: Public Redacted Version - Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, Disagreement No. 001/18-11-2008-ECCC/PTC, 18 August 2009, par. 32-33 (The national Co-Prosecutor holds that the suspects indicated in the Introductory Submissions are not senior leaders or those most responsible but lower-ranking officials). It is recalled that this controversy, which started in 2008, still continues today. When former international Co-Prosecutor Petit failed to reach agreement with his national colleague on the forwarding of the initial submissions with regard to Cases 003 and 004 to the Co-Investigating Judges, he filed a notice of disagreement and forwarded the matter to the Pre-Trial Chamber. The Pre-Trial Chamber could not reach agreement with regard to the disagreement (a supermajority is needed). Hence, in accordance with the Internal Rules, the request for a judicial investigation was allowed to proceed by default. However, this did not end the disputes. The matter became much worse once the matter reached the Co-Investigating Judges. It led to a division amongst national/international lines within the Office of the Co-Prosecutors, the Office of the Co-Investigating Judges as well as in the Pre-Trial Chamber. On this controversy, consider Open Society Justice Initiative, *The Future of Cases 003/004 at the Extraordinary Chambers in the Courts of Cambodia*, October 2012 (available at: http://www.opensocietyfoundations.org/sites/default/files/eccc-report-cases3and4-100112_0.pdf, last visited 10 February 2014); Open Society Justice Initiative, *Briefing Paper: Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, March 2013, p. 11 (to be found at: <http://www.refworld.org/pdfid/5242b9f84.pdf>, last visited 10 February 2014); J.D. CIORCIARI and A. HEINDEL, *Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal*, June 2013, pp. 29 - 33 (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2269925, last visited 10 February 2014). In February 2013, a statement was issued by the Co-Investigating Judges containing contradictory statements as to the status of Case No. 003. See ECCC, Statement by the Co-Investigating Judges Regarding Case 003, 28 February 2013.

Having these jurisdictional (or not) limitations in mind, the question remains as to whether the Extraordinary Chambers are characterised by a principle of legality or a principle of opportunity. The formulation of Articles 5 (3) and 6 (3) of the ECCC Agreement point towards a principle of opportunity.⁹³⁹ Besides, it follows from the ECCC IR that the Co-Prosecutors enjoy full discretion to initiate proceedings. More precisely, only the Co-Prosecutors can initiate a prosecution and they can do so either at their own discretion or on the basis of a complaint.⁹⁴⁰ A further indication follows from the fact that complaints do not automatically initiate the prosecution.⁹⁴¹ On the other hand, Rule 53 (1) ECCC IR states that “[i]f the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they *shall* open a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges.”⁹⁴² Consequently, while the Co-Prosecutors enjoy full discretion to decide whether or not to initiate preliminary investigations, they have no discretion at the end of the preliminary investigation and shall sanction the opening of a judicial investigation. Hence, it appears that the procedural system of the ECCC is closer to a principle of legality than the other tribunals under review.⁹⁴³ Similarly, the Co-Investigating Judges have the authority to dismiss a case only where (i) the acts in question do not amount to crimes within the jurisdiction of the ECCC, (ii) the perpetrators of the act have not been identified or (iii) there is not sufficient evidence against the charged person(s) of the charges.⁹⁴⁴

However, since it is for the Co-Prosecutors to decide whether there are ‘reasons to believe’ that crimes within the jurisdiction of the ECCC have been committed---which requires the

⁹³⁹ Article 5 (3) ECCC Agreement reads: ‘The co-investigating judges shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source. It is understood, however, that the scope of the investigation is limited to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979’. Article 6 (3) ECCC Agreement states: ‘The co-prosecutors shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source. It is understood, however, that the scope of the prosecution is limited to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979’.

⁹⁴⁰ Rule 49 (1) ECCC RPE.

⁹⁴¹ Rule 49 (4) ECCC RPE.

⁹⁴² (emphasis added).

⁹⁴³ See N. JAIN, *Between the Scylla and Charybdis of Prosecution and Reconciliation: the Khmer Rouge Trials and the Promise of International Criminal Justice*, in «Duke Journal of Comparative & International Law», Vol. 20, 2010, p. 258.

⁹⁴⁴ Rule 67 (3) ECCC IR.

Co-Prosecutor to sanction the opening of a judicial investigation (Rule 53 (1) ECCC IR)---, and since such a notion is not further defined, some discretion is built into the system.⁹⁴⁵ Moreover, the absence of a definition of the two previously discussed jurisdictional categories may provide the Co-Prosecutors (and the Co-Investigating Judges) with a certain amount of discretion.

In turn, discretion is limited by certain principles. The first one is the principle of impartiality. However, while an obligation of impartiality is explicitly provided for and incumbent on the Co-Investigating Judges,⁹⁴⁶ no such obligation has been provided with regard to the Co-Prosecutors. Besides, the independence of the Co-Prosecutors prevents them from seeking or receiving instructions with regard to the exercise of their discretion. At the ECCC, the independence of the Co-Prosecutors is laid down in Article 6 (3) ECCC Agreement as well as Article 19 ECCC Law. Besides, the Office of the Co-Prosecutors is established as an independent office within the ECCC.⁹⁴⁷

Furthermore, like the SCSL, the Supreme Court Chamber held that “the Trial Chamber has the power to review the discretion of the Co-Investigating Judges and the Co-Prosecutors on the ground that they allegedly exercised their discretion under Articles 5(3) and 6(3) of the UN-RGC Agreement in bad faith or according to unsound professional judgement.”⁹⁴⁸ However, the Supreme Court Chamber added that such a review is “extremely narrow” so that it does not infringe on the independence of the Co-Prosecutors or the Co-Investigating Judges.⁹⁴⁹ It does not suffice for the accused person to point out that a particular “senior leader” or “person most responsible” is not prosecuted.⁹⁵⁰ In this regard, this power of review by the Trial Chamber is related to claims of selective prosecution before the *ad hoc* tribunals and the SCSL.⁹⁵¹

⁹⁴⁵ N. JAIN, *Between the Scylla and Charybdis of Prosecution and Reconciliation: the Khmer Rouge Trials and the Promise of International Criminal Justice*, in «Duke Journal of Comparative & International Law», Vol. 20, 2010, p. 258.

⁹⁴⁶ Article 5 (2) ECCC Agreement, Article 10 new and 25 ECCC Law ; Rule 55 (5) ECCC IR.

⁹⁴⁷ Rule 13 (1) ECCC IR.

⁹⁴⁸ ECCC, Appeal Judgement, *KAING Guek Eav (Duch)*, Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 80.

⁹⁴⁹ *Ibid.*, par. 80.

⁹⁵⁰ *Ibid.*, par. 80.

⁹⁵¹ See *supra*, Chapter 3, II.2.

II.6. The Special Panels for Serious Crimes (SPSC)

The SPSC had exclusive jurisdiction over ‘serious criminal offences’, including genocide, war crimes, crimes against humanity, murder, sexual offences and torture.⁹⁵² Where ‘serious criminal offences’ were found to have occurred in the respective jurisdictions of District Prosecutors, they had to inform the Deputy General Prosecutor for Serious Crimes and were not allowed to initiate investigations themselves.⁹⁵³

The Public Prosecutor was expected to conduct the investigation impartially and independently, ‘without improper influence, direct and indirect, from any source, whether within or outside the civil administration of East Timor’.⁹⁵⁴ Additionally, all persons had to be considered ‘equal before the courts of law’.⁹⁵⁵ The TRCP equipped the Public Prosecutor with *wide discretion* for initiating the investigation of cases following the reporting of a crime.⁹⁵⁶ In contrast, where investigations had been initiated, there seemed to be no discretion regarding the decision as to whether or not the suspect should be indicted, given the TRCP’s stipulation that “[u]pon completion of the investigation, if the result so warrants, the Public Prosecutor *shall* present a written indictment of the suspect to the competent District Court.”⁹⁵⁷

As far as the exercise of discretion by the Public Prosecutor is concerned, it should be noted that the SPSC faced criticism for focusing on lower-level perpetrators.⁹⁵⁸ Notably, the first prosecutions focused on lower-level suspects that were already in custody.⁹⁵⁹ The Special Panels failed to bring high-level indictees residing outside of the court’s jurisdiction to

⁹⁵² Section 9 UNTAET Regulation 2000/11 (as amended); Section 1.3 UNTAET Regulation 2000/15. Regarding the latter three categories of crimes, a temporal limitation applied and the exclusive jurisdiction was limited to crimes that occurred in the period between 1 January 1999 and 25 October 1999 (Section 9.2 UNTAET Regulation 2000/11 (as amended)).

⁹⁵³ Section 17.1 of UNTAET Regulation 2000/16.

⁹⁵⁴ Section 4 of UNTAET Regulation 2000/16.

⁹⁵⁵ Section 2.1 TRCP.

⁹⁵⁶ Section 13.3 TRCP (stating that ‘[f]ollowing the report, the Public Prosecutor may, as appropriate, initiate an investigation and may for that purpose order the police to carry out the necessary measures’).

⁹⁵⁷ Section 24.1 TRCP (emphasis added).

⁹⁵⁸ H. TAKEMURA, *Big Fish and Small Fish Debate – An Examination of the Prosecutorial Discretion*, in «International Criminal Law Review», Vol. 7, 2007, p. 683. These were often illiterate farmers who stated to have followed superior orders or to have acted under duress.

⁹⁵⁹ C. REIGER and M. WIERDA, *The Serious Crimes Process in Timor-Leste: In Retrospect*, International Center for Transnational Justice, 2006, p. 19.

justice.⁹⁶⁰ A commission of experts found in 2005 that the Serious Crimes Unit (SCU) lacked a “consistent prosecution strategy or focus.”⁹⁶¹ Events, rather than Prosecutors, were setting the Serious Crimes Unit (‘SCU’)’s priorities.⁹⁶² The Commission of Experts noted that investigations were initiated in relation with too many complaints which were received, often targeted at alleged low-level perpetrators.⁹⁶³ It was not until 2002 that the Deputy General Prosecutor for serious crimes made a decision to focus on “those military and political leaders who were allegedly the architects of the serious crimes committed in 1999 and/or those who failed to take responsible measures to prevent the crimes or punish the perpetrators.”⁹⁶⁴ The Commission noted that the *ad hoc* tribunals, the Special Court and the ECCC have focused on and prioritised mid-level and high-level perpetrators or ‘those bearing the greatest responsibility’.⁹⁶⁵ Furthermore, the Commission of Experts noted that the SPSC had not yet achieved full accountability for those who bore the greatest responsibility for the serious human rights violations in East Timor in 1999.⁹⁶⁶

The lack of a clear prosecutorial strategy should be understood in light of the apparent silence of UNTAET Regulation 2000/15, establishing the SPSC, on this particular issue. Neither in this document nor in its preamble is it clarified whether the Special Panels should prosecute all perpetrators, including low-level ones, or if they should only focus on prosecuting high-level perpetrators.⁹⁶⁷

The SPSC have been further criticised for focusing on crimes following the outburst of violence after the 1999 referendum, while their jurisdiction seemed to extend to crimes

⁹⁶⁰ As noted in the Summary of the Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999 (Annex I), attached to the Letter Dated 24 June 2005 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/2005/458, 15 July 2005, par. 9.

⁹⁶¹ *Ibid.*, par. 60.

⁹⁶² *Ibid.*, par. 60.

⁹⁶³ *Ibid.*, par. 60. Notwithstanding the order from the UN to focus on ten priority cases, the report noted that “there was little rationale underlying the selection of some of these ten priority cases, which also appeared to change from year to year” (*ibid.*, par. 62).

⁹⁶⁴ *Ibid.*, par. 63; C. REIGER and M. WIERDA, *The Serious Crimes Process in Timor-Leste: In Retrospect*, International Center for Transnational Justice, 2006, p. 20.

⁹⁶⁵ Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999 (Annex II), attached to the Letter Dated 24 June 2005 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/2005/458, 15 July 2005, par. 61.

⁹⁶⁶ *Ibid.*, par. 64.

⁹⁶⁷ Confirming, see S. LINTON, *Cambodia, East Timor and Sierra Leone: Experiments in International Criminal Justice*, in «Criminal Law Forum», Vol. 12, 2001 pp. 218 – 219 (adding that were the SPSC to deal with all perpetrators, including lower-level ones, such would swamp the system).

committed prior to that date.⁹⁶⁸ Early on, a decision was taken inside the SCU to focus on the 1999 events. However, some investigations were conducted into prior incidents.⁹⁶⁹ Lastly, criticism has been directed toward the SPSC's apparent failure to address the systemic nature of the violence and the military's role in it.⁹⁷⁰

Peculiarities also follow from the limited number of estimated killings in East-Timor. While, as previously discussed, the Public Prosecutor enjoyed wide discretion in initiating investigations, there was an expectation that all of the crimes would be prosecuted, considering the low number of estimated killings, particularly when compared with other international(ised) criminal tribunals.⁹⁷¹

II.7. The Special Tribunal for Lebanon (STL)

The STL is difficult to compare to the other international(ised) tribunals discussed since the tribunal's jurisdiction is very limited. In principle, the tribunal's jurisdiction is limited to bringing to justice the persons responsible for the 14 February 2005 attack which resulted in the death of former Lebanese Prime Minister Rafiq Hariri.⁹⁷² However, the tribunal's jurisdiction may also cover two distinct categories of attacks. Firstly (1), it may cover attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005 which are connected to the 14 February 2005 attack and are of a similar nature and gravity.⁹⁷³ Besides, (2) the tribunal has jurisdiction over similar attacks that occurred at a later date decided by the United Nations and Lebanon, with the consent of the UNSC and Lebanon.⁹⁷⁴ Such jurisdiction requires a connected case submission. For the first category of attacks (1), a motion may be

⁹⁶⁸ Section 2.4 UNTAET Regulation 2000/15 states that jurisdiction *rationae temporis* extends to crimes committed in East Timor prior to 25 October 1999 only insofar as the law on which the serious criminal offence is based is compatible with international standards. See S. LINTON, Cambodia, East Timor and Sierra Leone: Experiments in International Criminal Justice, in «Criminal Law Forum», Vol. 12, 2001, pp. 219 – 220; C. REIGER and M. WIERDA, The Serious Crimes Process in Timor-Leste: In Retrospect, International Center for Transnational Justice, 2006, p. 21; S. LINTON, Rising from the Ashes: The Creation of a viable Criminal Justice System in East Timor, in «Melbourne University Law Review», Vol. 25, 2001, pp. 172 – 173.

⁹⁶⁹ Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999 (Annex II), attached to the Letter Dated 24 June 2005 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/2005/458, 15 July 2005, par. 41.

⁹⁷⁰ C. REIGER and M. WIERDA, The Serious Crimes Process in Timor-Leste: In Retrospect, International Center for Transnational Justice, 2006, p. 18.

⁹⁷¹ *Ibid.*, p. 20 (referring to pressure from families).

⁹⁷² Article 1 (1) STL Agreement; Article 1 STL Statute.

⁹⁷³ Article 1 STL Statute.

⁹⁷⁴ Article 1 STL Statute.

submitted by the Prosecutor for a ruling by the Pre-Trial Judge, either before or together with an application for the confirmation of the indictment.⁹⁷⁵ The Pre-Trial Judge should subsequently determine whether there is *prima facie* evidence that the case is within the tribunal's jurisdiction.⁹⁷⁶ Such a ruling may be appealed by the Prosecutor within seven days.⁹⁷⁷ In cases where the Prosecutor decides to *not* bring a connected case submission, no judicial overview mechanism is provided for, leaving broad discretion to the Prosecutor.⁹⁷⁸ In this regard, the procedure differs from that of the ICC, which provides for some judicial scrutiny over a decision not to proceed. For the second category of attacks (2), a submission including reasoned conclusions to the STL President is required, who will request the Registrar to forward these to the UNSC and to Lebanon.⁹⁷⁹ It is for the UNSC and the Lebanese authorities to decide whether or not to grant the tribunal jurisdiction over these attacks.⁹⁸⁰ The Prosecutor should be convinced that it is appropriate for the tribunal to exercise jurisdiction over the persons allegedly responsible for that attack.⁹⁸¹

Active and passive prosecutorial independence are safeguarded by the STL Statute, which obliges the Prosecutor not to seek or receive instructions from any government or other source.⁹⁸² An obligation to be impartial is only expressly mentioned for Judges.⁹⁸³ In addition, prosecutorial discretion is limited by a principle of equality of accused persons before the Court.⁹⁸⁴ No prosecutorial practice has been clearly established yet regarding the exercise of

⁹⁷⁵ Rule 11 and Rule 68 (C) STL RPE.

⁹⁷⁶ Rule 11 (B) and 68 (H) STL RPE. On 5 July 2011, a confidential decision was issued by the Pre-Trial Judge establishing that the STL has jurisdiction over the attack perpetrated on 12 July 2005 against Mr Elias El-Murr (the 'El-Murr Case'). See the reference in STL, Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated against Mr. Elias El-Murr on 12 July 2005 to Defer to the Special Tribunal for Lebanon, Prosecutor, Case No. STL-11-02/D/PTJ, PTJ, 19 August 2011, p. 2.

⁹⁷⁷ Rule 11 (D) STL RPE. The Appeals Chamber may request the Head of Defence Office to nominate independent counsel for appointment as *amicus curiae* to act in opposition to the Prosecutor's appeal. Where the investigation leads to an indictment, the Defence has the right to challenge the decision by the Pre-Trial Judge as a preliminary motion on jurisdiction.

⁹⁷⁸ STL, Rules of Procedure and Evidence: Explanatory Memorandum by the Tribunal's President, 25 November 2010, par. 9.

⁹⁷⁹ Rule 12 (B) STL RPE. The role of the STL President seems limited to transmitting the request. See STL, Rules of Procedure and Evidence: Explanatory Memorandum by the Tribunal's President, 20 March 2009, par. 10; M. GILLET and M. SCHUSTER, The Special Tribunal for Lebanon Swiftly Adopts Its Rules of Procedure and Evidence, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 893.

⁹⁸⁰ Rule 12 (B) STL RPE.

⁹⁸¹ Rule 12 (A) STL RPE.

⁹⁸² Article 11 (2) STL Statute; Article 3 (4) STL Agreement.

⁹⁸³ Article 9 (1) STL Statute; Article 2 (4) STL Agreement.

⁹⁸⁴ Article 16 (1) and (4) STL Statute.

prosecutorial discretion. It seems that, to whatever extent is possible, investigations are conducted in parallel, rather than that a sequential approach is followed.⁹⁸⁵

II.8. Conclusions

A number of conclusions may be drawn from the comparative overview above. First and foremost, all Prosecutors of international criminal courts and tribunals enjoy considerable discretion in the selection of cases for investigation.⁹⁸⁶ Hence, it can safely be concluded that international criminal courts and tribunals are characterised by prosecutorial discretion in deciding to open an investigation. None of the international criminal tribunals scrutinised above adheres to a principle of legality. With regard to the decision to prosecute a case, the picture seems more varied. Some jurisdictions (e.g. the SPSC) do not seem to leave discretion to the Prosecutor as to whether or not to prosecute a case.

The statutory documents of several tribunals under review (SCSL, ECCC, ICTY) were found to contain ‘limiting language’, which may impact the exercise of prosecutorial discretion. With regard to the SCSL and the ECCC, such language (persons bearing “the greatest responsibility” (SCSL) and “senior leaders” as well as “those most responsible for the crimes” (ECCC)) was found to be jurisdictional in nature. However, this does not seem to find support in the jurisprudence of the SCSL and the ECCC, in that both consider this limiting language to offer mere guidance to the Prosecutor. It was also seen that the ICC Statute does not include such limiting language. In this regard, discretion at the ICC seems wider than at the other international criminal tribunals. Arguably, a limitation was introduced at some point through the interpretation of the gravity criterion. However, since the Appeals Chamber rejected this interpretation, there is, at present, no clearly discernible limitation. With regard to the ICC, it was shown that discussions on what parameters the Prosecutor should consider in determining whether or not to proceed with an investigation boil down to the question of whether they reflect a principle of legality or opportunity.

⁹⁸⁵ STL, Second Annual Report (2010 – 2011), p. 28.

⁹⁸⁶ Consider e.g. C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years on*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 252.

Discretion is limited by the principles of equality and non-discrimination. For example, such principles could be found in the Statutes and jurisprudence of the *ad hoc* tribunals and the SCSL. Likewise, they derive, among others, from Article 21 (3) ICC and Article 67 (1) Statute. These principles, ultimately, derive from human rights law. The principle of impartiality in investigating and prosecuting crimes is closely related. It entails that prosecutorial discretion be applied even-handedly to different groups or persons. Such a principle is found in the statutory frameworks of all courts and tribunals under review. Only the ECCC and the STL do not expressly provide for such a principle in relation to the Co-Prosecutors and the Prosecutor respectively. Rather this duty of impartiality is only provided for in relation to Judges. Furthermore, the principle of prosecutorial independence is important insofar that it entails that the Prosecutor does not seek or receive instructions from external sources.

Furthermore, the overview illustrates how the affiliation of a suspect to a certain faction or group is sometimes taken into account for the tribunal to have a balanced approach, prosecuting all parties that committed crimes within the tribunals' jurisdiction. Such an approach would seem objectionable at the national level. However, with regard to international criminal tribunals, it may be argued that such an approach is legitimate, considering at least some of the goals these tribunals were intended to serve. Clearly, the goals of restoring peace and security or reconciliation will better be served by such a 'balanced approach'.⁹⁸⁷

In the following paragraphs, firstly, (1) some of the reasons as to why the international Prosecutor is guided by a principle of opportunity will be briefly explained.⁹⁸⁸ It was previously indicated how the rationales for prosecutorial discretion at the national level do not

⁹⁸⁷ L. CÔTÉ, Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law, in «Journal of International Criminal Justice», Vol. 3, 2005, p. 176. Consider in this regard TAKEMURA, who refers to the representativity criterion ("Interest of Representativity between the Seriousness of Victimization caused by the Crime and the Scope of Prosecution") for the selection of cases, which was adopted by the Prosecutor's Office of Bosnia and Herzegovina to ensure that the case portfolio reflect "the overall victimization caused by the crimes in the conflict or situation at hand". See H. TAKEMURA, Prosecutorial Discretion in International Criminal Justice: Between Fragmentation and Unification, in L. VAN DEN HERIK and C. STAHN (eds.), The Diversification and Fragmentation of International Criminal Law, Leiden, Martinus Nijhoff Publishers, 2012, p. 21.

⁹⁸⁸ Note that the rationales for awarding discretion to the international Prosecutor do not always emerge from the *travaux préparatoires* of the international(ised) criminal tribunal concerned. See G.-J.A. KNOOPS, Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective, in «Criminal Law Forum», Vol. 15, 2005, p. 371 (with regard to the *ad hoc* tribunals).

always easily translate to the international level and may sometimes diverge.⁹⁸⁹ Secondly, (2) most international Prosecutors have not made public the criteria that are used for determining which cases should be selected for investigation and prosecution. This practice will be critically assessed (2). Thirdly, (3) the comparative overview reveals that the forms of accountability, including judicial oversight, over prosecutorial decision-making are increasing.

(1) Reasons for the choice for prosecutorial discretion (opportunity)

A plethora of either practical or legal reasons may be provided for equipping the Prosecutors of the international(ised) criminal tribunals with discretion. First and foremost, the number of potential cases as well as the number of alleged perpetrators is overwhelming, turning the investigation and prosecution of all cases into a practical impossibility.⁹⁹⁰ This consideration is of special importance to the ICC, given its broad mandate and permanent jurisdiction.⁹⁹¹ Secondly, the limited resources at the disposal of the tribunal further necessitate selectivity.⁹⁹²

⁹⁸⁹ For example, STAHN points out that one of the rationales for prosecutorial discretion at the national level is the separation of powers, a notion which, at a minimum, has to be construed differently at the international echelon. Additionally, he refers to (1) the need for prosecutorial secrecy and (2) deference to prosecutorial expertise and pragmatism. See C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years on*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, pp. 252 – 253.

⁹⁹⁰ One notable exception is the STL. L. CÔTÉ, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, in «*Journal of International Criminal Justice*», Vol. 3, 2005, p. 165; M.R. BRUBACHER, *Prosecutorial Discretion in the International Criminal Court*, in «*Journal of International Criminal Justice*», Vol. 2, 2004, p. 75; R. MURPHY, *Gravity Issues and the International Criminal Court*, in «*Criminal Law Forum*», Vol. 17, 2006, p. 310 (noting that Prosecutors must “as a matter of necessity, be extremely selective in deciding which cases to investigate in order not to overload the system”); R. RASTAN, *Comment on Victor’s Justice & the Viability of Ex ante Standards*, in «*John Marshall Law Review*», Vol. 43, 2010, p. 570 (“The reality of selection is inherent in any accountability response to situations of mass atrocity where there will typically be a large universe of crimes committed by numerous perpetrators against countless victims”); A.K.A. GREENAWALT, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, in «*NYU Journal of International Law & Politics*», Vol. 39, 2007, p. 610; F. DE VLAMING, *De Aanklager: Het Joegoslavië-tribunaal en de selectie van verdachten*, Den Haag, Boom Juridische Uitgevers, 2010, p. 69; *Contra*, consider C.K. HALL, *The Danger of Selective Justice: All Cases Involving Crimes under International Law Should be Investigated and the Suspects, when there is Sufficient Admissible Evidence, Prosecuted*, in M. BERGSMO (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Oslo, Torkel Opsahl Academic EPublisher, 2010, pp. 171 – 181.

⁹⁹¹ In 2011, the OTP received 431 communications. Since July 2002, 9332 communications were received. See OTP, *Report on Preliminary Examination Activities*, 31 December 2011, p. 5.

⁹⁹² Such factor was acknowledged by the ICTY Appeals Chamber in ICTY, *Judgement, Prosecutor v. Delalić*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 602 (“In the present context, indeed in many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted”). Consider A.M. DANNER, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, in «*American Journal of International Law*», Vol. 97, 2003, p. 519 (arguing that while the

Again, ‘selectivity’ takes on different proportions at the international echelon. The level of selectivity required may necessitate another understanding of the principle of non-discrimination. The goals of international criminal tribunals may necessitate selection of defendants based on their membership to rival groups.⁹⁹³

Next, as previously discussed, the independence of the Prosecutor is important. All of the tribunals that have been scrutinised explicitly provide for a principle of prosecutorial independence. Such arguments consider prosecutorial discretion to be a cornerstone of prosecutorial independence.⁹⁹⁴ Nevertheless, this argumentation may easily be countered by arguing that the absence of discretion (as would judicial oversight over the exercise of prosecutorial discretion⁹⁹⁵) may better protect prosecutorial independence, insofar that it insulates the Prosecutor from the risk of political pressure and/or interference. This is a risk that cannot be ignored in international criminal proceedings. Moreover, prosecutorial

conception of the Prosecutor’s role as a truth-seeker does not directly affect the Prosecutor’s discretion, it suggests that investigations will be broad and may presumably be more resource intensive than an investigation which is solely gauged at identifying incriminating evidence). STAHN argues that these financial considerations favour judicial review, for example with regard to the selection of cases. Judicial review may serve the goal of preventing the waste of resources and avoid procedural challenges at a later stage of the proceedings. See C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years on*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, pp. 257 – 258; Consider also L. CÔTÉ, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, in «*Journal of International Criminal Justice*», Vol. 3, 2005, p. 165; G.-J.A. KNOOPS, *Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective*, in «*Criminal Law Forum*», Vol. 15, 2005, p. 369; H. TAKEMURA, *Prosecutorial Discretion in International Criminal Justice: Between Fragmentation and Unification*, in L. VAN DEN HERIK and C. STAHN (eds.), *The Diversification and Fragmentation of International Criminal Law*, Leiden, Martinus Nijhoff Publishers, 2012, p. 636.

⁹⁹³ M.M. DEGUZMAN, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, in «*Michigan Journal of International Law*», Vol. 33, 2012, pp. 293 – 294 (referring to the ICTY policy to sometimes select defendants based on affiliation. However, the author admits that the current jurisprudence suggests that the principle of non-discrimination is not violated if only persons belonging to one group are selected (*ibid.*, p. 295)).

⁹⁹⁴ M.R. BRUBACHER, *Prosecutorial Discretion in the International Criminal Court*, in «*Journal of International Criminal Justice*», Vol. 2, 2004, p. 76; C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years on*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 253 (arguing that “[s]uch powers help the Prosecutor to withstand pressure and temper political interference by various extraneous actors in the investigation and prosecution of crimes”); H. TAKEMURA, *Prosecutorial Discretion in International Criminal Justice: Between Fragmentation and Unification*, in L. VAN DEN HERIK and C. STAHN (eds.), *The Diversification and Fragmentation of International Criminal Law*, Leiden, Martinus Nijhoff Publishers, 2012, p. 636.

⁹⁹⁵ Compare for example with Article 15 (4) ICC Statute. Consider ICC, Corrigendum to “Judge Fernández de Gurmendi’s Separate and Partially Dissenting Opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d’Ivoire”, *Situation in the Republic of Cote d’Ivoire*, Case No. ICC-02/11-15-Corr, PTC III, 5 October 2011, par. 8 (arguing that the system of judicial control over the Prosecutor’s decision to open an investigation was intended “to help insulate the Prosecutor from external pressure”).

independence may lead to abuse if no proper balance is found between independence and accountability.⁹⁹⁶

Furthermore, as several commentators have argued, the importance of political considerations (including uncertainties with regard to the timing and modalities of cooperation and arrest) may justify prosecutorial discretion. One scholar conceives the political implications of investigating and prosecuting as “the most compelling argument in favour of prosecutorial discretion.”⁹⁹⁷ However, Prosecutors tend to deny these political implications and proclaim that the exercise of prosecutorial discretion is solely based on objective criteria.⁹⁹⁸ For example, former ICC Prosecutor Moreno-Ocampo consistently argued that he exercises discretion “without political considerations.”⁹⁹⁹ However, reports have emerged that cast some doubt on the Prosecutor’s attitude.¹⁰⁰⁰ As one scholar suggests, such downplaying of political considerations may be understandable in light of accusations of politicisation.¹⁰⁰¹ The political aspects inherent in decisions to investigate and prosecute are impossible to deny.¹⁰⁰²

⁹⁹⁶ See C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years on*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 258 (“It is therefore over-simplistic to justify prosecutorial discretion by the rationales of independence and necessity of choice. Discretion protects independence, but lends itself to abuse if it is concentrated in the hands of a hierarchically organised”).

⁹⁹⁷ *Ibid.*, p. 256. Also other authors stress the important political consequences of decisions to investigate or to prosecute. Consider *e.g.* G.-J.A. KNOOPS, *Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective*, in «Criminal Law Forum», Vol. 15, 2005, pp. 365 – 366; L. CÔTÉ, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, in «Journal of International Criminal Justice», Vol. 3, 2005, p. 170 (arguing that Prosecutors “should not conceal the eminent political dimension of the exercise of prosecutorial discretion, particularly on the international scene, where conflicts are ongoing”).

⁹⁹⁸ C. STAHN, *Judicial Review of Prosecutorial Discretion: on Experiments and Imperfections*, in G. SLUITER and S. VASILIEV, *International Criminal Procedure: Towards a Coherent Body of Law*, London, CMP Publishing, 2009, p. 242; C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years on*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 248.

⁹⁹⁹ Consider *e.g.* Louis Moreno-Ocampo, *Address: The Rome Statute of the International Criminal Court: Tenth Anniversary Commemoration*, United Nations, July 2008, p. 15 (to be found at: http://www.icc-cpi.int/iccdocs/asp_docs/Publications/ASP-PUB-10th-Ann-ENG.pdf, last visited 10 February 2014).

¹⁰⁰⁰ See <http://www.guardian.co.uk/law/2010/dec/17/wikileaks-us-international-criminal-court>, last visited 10 February 2014 (referring to a cable which details how the Prosecutor publicly announced that he would look into actions of British forces in Iraq, but privately told “that he wishes to dispose of Iraq issues (ie. not to investigate them)”).

¹⁰⁰¹ R. GOLDSTON, *More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court*, in «Journal of International Criminal Justice», Vol. 8, 2010, p. 386.

¹⁰⁰² M.R. BRUBACHER, *Prosecutorial Discretion in the International Criminal Court*, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 76 (referring to the interrelation between law and politics and arguing that the Prosecutor’s decisions “are not made in a legal vacuum”); R. GOLDSTON, *More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court*, in «Journal of International Criminal Justice», Vol. 8, 2010, p. 387 (stating that “experience and common sense suggest that law can never be entirely divorced from its surrounding environment”). Consider also L. CÔTÉ, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, in «Journal of International Criminal

It should be noted that the political nature of prosecutorial decisions does not necessarily rule judicial review out of these inherently political decisions.¹⁰⁰³ Keep in mind, for example, the possibilities for judicial intervention over prosecutorial discretion under the ICC Statute. Judicial intervention may arguably take some political decisions away from the Prosecutor and allocate them to the Judges. However, GREENAWALT cautions that “judge-imposed standards are unlikely to prove a more effective or legitimate means of resolving the underlying policy questions than is prosecutorial discretion” and is sceptical about “converting” political decisions into “immutable norms that are less subject to evolution or reconsideration.”¹⁰⁰⁴

Additional justifications have been mentioned in the literature, including trust in the independent professional judgment of the Prosecutor and the ambition to foster the efficiency of investigations and prosecutions.¹⁰⁰⁵

(2) Transparency

Prosecutors’ decisions lack transparency and are sometimes incoherent. To take the example of the *ad hoc* tribunals, it was found that the criteria used in exercising prosecutorial discretion were vague and undetermined.¹⁰⁰⁶ Moreover, the consecutive Prosecutors of the *ad hoc* tribunals never made the Prosecution’s understanding of prosecutorial discretion public. Rather, internal guidelines were adopted in the absence of any guidance in the statutory frameworks of the *ad hoc* tribunals on how to exercise prosecutorial discretion.¹⁰⁰⁷ This

Justice», Vol. 3, 2005, p. 171 (stating that the real problem is the occult or secret nature of such political considerations).

¹⁰⁰³ C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years on*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 257 (however, the author notes that for some aspects of prosecutorial discretion (e.g. the allocation of resources) judicial review should be limited, whereas for other types of prosecutorial choices, stronger judicial review may be justified (e.g. equal application of the law)).

¹⁰⁰⁴ A.K.A. GREENAWALT, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, in «NYU Journal of International Law & Politics», Vol. 39, 2007, pp. 659 – 660 (the author adds that Judges are “arguably less institutionally competent [than the Prosecutor] to address such questions”). For similar reasons, GREENAWALT is also skeptical about the usefulness of *ex ante* prosecutorial guidelines.

¹⁰⁰⁵ C. STAHN, *Judicial Review of Prosecutorial Discretion: on Experiments and Imperfections*, in G. SLUITER and S. VASILIEV, *International Criminal Procedure: Towards a Coherent Body of Law*, London, CMP Publishing, 2009, pp. 241 – 242. STAHN further notes that international prosecutions are inherently selective in nature, but such argument seems to be circular in nature.

¹⁰⁰⁶ See the discussion *supra*, Chapter 3, II.2.

¹⁰⁰⁷ Several authors have expressed themselves critical about the lack of public prosecutorial guidelines at the *ad hoc* tribunals. See e.g. L. REYDAMS, *The ICTR Ten Years On: Back to the Nuremberg Paradigm?*, in «Journal

practice may be problematic in light of the broad prosecutorial discretion discussed previously. As one commentator puts it, “[b]road discretionary powers become a problem, if they are coupled with confidential and non-transparent decision-making processes which are often typical at the pre-trial stage.” “Such practices may easily distort public confidence, in particular by groups and individuals of affected communities.”¹⁰⁰⁸

In this regard, international Prosecutors are subject to a lesser degree of transparency and scrutiny than their national counterparts, who are typically bound by guidelines on prosecutorial discretion.¹⁰⁰⁹ Many international criminal law commentators advocate the adoption of *ex ante* prosecutorial guidelines.¹⁰¹⁰ DANNER refers to the ICTY NATO report as proof of how an *ex ante* standard ‘enhances’ the Prosecutor’s decision to decline investigations in controversial cases.¹⁰¹¹ They should outline the factors that are taken into consideration by the Prosecutor as well as those not considered.¹⁰¹² Many advantages have been associated with the adoption of prosecutorial guidelines. Outsiders can scrutinise decisions taken.¹⁰¹³ The guidelines help to assure that prosecutorial decisions are made in a

of International Criminal Justice», Vol. 3, 2005, p. 978 (referring to the fact that publication of doctrinal articles by the ICTR Prosecutor “offer very rare glimpses into a secretive process”).

¹⁰⁰⁸ C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years on*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 243.

¹⁰⁰⁹ *Ibid.*, p. 243; A.M. DANNER, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, in «American Journal of International Law», Vol. 97, 2003, p. 541. At the same token, it is clear that prosecutorial guidelines at the national echelon cannot easily be translated to the international level. E.g. the ‘futility of events’ would not be a useful indicator for the international prosecutor. See A. MCDONALD and R. HAVEMAN, *Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC*, Expert Consultation Process on General Issues Relevant to the ICC Office of the Prosecutor, 15 April 2003, p. 9.

¹⁰¹⁰ A.M. DANNER, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, in «American Journal of International Law», Vol. 97, 2003, p. 534 *et seq.*; A.M. DANNER, *Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel*, in «Stanford Law Review», Vol. 55, 2003, p. 1656; P. WEBB, *The ICC Prosecutor’s Discretion not to Proceed in the “Interests of Justice”*, in «Criminal Law Quarterly», Vol. 50, 2005, pp. 306 - 307; A.K.A. GREENAWALT, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, in «NYU Journal of International Law & Politics», Vol. 39, 2007, pp. 588, 652 (arguing that internal prosecutorial policy “can –and most likely will– moderate the problem.” However, the author warns that objective guidelines are no ‘panacea’); G.-J.A. KNOOPS, *Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective*, in «Criminal Law Forum», Vol. 15, 2005, p. 385; A. MCDONALD and R. HAVEMAN, *Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC*, Expert Consultation Process on General Issues Relevant to the ICC Office of the Prosecutor, 15 April 2003, p. 9.

¹⁰¹¹ A.M. DANNER, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, in «American Journal of International Law», Vol. 97, 2003, p. 541.

¹⁰¹² *Ibid.*, p. 542 (the author adds that explanatory comments on these factors, detailing the Prosecutor’s understanding thereof, are desirable (*ibid.*, pp. 542, 545)).

¹⁰¹³ R. GOLDSTON, *More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court*, in «Journal of International Criminal Justice», Vol. 8, 2010, p. 402 (in this sense,

transparent manner and that they respect the principles of equality and non-discrimination. They also ensure the predictability of the Prosecutor's actions.¹⁰¹⁴ Besides, they further insulate the Prosecutor from outside pressure. One commentator additionally notes the possible educational benefits of public prosecutorial guidelines.¹⁰¹⁵ Furthermore, the adoption of such guidelines would be in line with the recommendations of the UN Guidelines on the Role of Prosecutors.¹⁰¹⁶ At a regional level, the Council of Europe equally recommends that member states adopt prosecutorial guidelines.¹⁰¹⁷ As far as the ICC is concerned, these guidelines facilitate the review task of the Pre-Trial Chamber. Moreover, they may be considered by the Security Council when deciding on whether or not to refer a case to the Court.¹⁰¹⁸ Furthermore, they have an additional value since prosecutorial staff is drawn from various legal systems.¹⁰¹⁹

these guidelines offer "measurable benchmarks against which to gauge the Prosecutor's actions"). Consider also B.D. LEAPARD, How Should the ICC Prosecutor Exercise his or her discretion? The Role of Fundamental Ethical Principles, in «John Marshall Law Review», Vol. 43, 2010, pp. 564-565 (while the author argues that it may be difficult for the Prosecutor to draft comprehensive *ex ante* guidelines, it is argued that the Prosecutor should at least clarify why certain situations or cases deserve to be investigated or prosecuted respectively); A.M. DANNER, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, in «American Journal of International Law», Vol. 97, 2003, p. 512 (arguing that clear guidelines in the exercise of prosecutorial discretion are the "focal point for the critical evaluation of the Prosecutor's actions").

¹⁰¹⁴ R. GOLDSTON, More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court, in «Journal of International Criminal Justice», Vol. 8, 2010, p. 389, fn. 24; OTP, Draft Regulations of the Office of the Prosecutor, p. 47, fn. 79 (arguing that the OTP's understanding of the 'interests of justice' concept should be included in the Regulations of the OTP).

¹⁰¹⁵ R. GOLDSTON, More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court, in «Journal of International Criminal Justice», Vol. 8, 2010, pp. 405 - 406.

¹⁰¹⁶ See Article 17 U.N. Guidelines on the role of Prosecutors. Consider also V. O'CONNOR and C. RAUSCH (eds.), Model Codes for Post-Conflict Criminal Justice (Vol. II), Washington D.C., United States Institute of Peace Press, 2008, p. 94.

¹⁰¹⁷ CoE, Recommendation Rec(2000) 19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system, 6 October 2000, Recommendation 36 (a) : "With a view to promoting fair, consistent and efficient activity of public prosecutors, states should seek to: [...] - define general guidelines for the implementation of criminal policy; - define general principles and criteria to be used by way of references against which decisions in individual cases should be taken, in order to guard against arbitrary decision-making." The explanatory memorandum emphasises that "[t]hese requirements are even more pertinent in systems where the public Prosecutor is an independent authority or enjoys considerable discretion." Additionally, the Explanatory Memorandum emphasizes that "[t]hese criteria must be framed in such a way as to have the desired effect without rigidly impeding the necessary evaluation of each case individually and in the light of local circumstances, or creating a grey area, within which offenders may operate with impunity." See *ibid.*, pp. 22 - 23.

¹⁰¹⁸ OTP, Draft Regulations of the Office of the Prosecutor, p. 47, fn. 79.

¹⁰¹⁹ A.M. DANNER, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, in «American Journal of International Law», Vol. 97, 2003, p. 549.

However, it is important to understand that the adoption of these guidelines necessitates a reflection on the goals of international criminal prosecutions.¹⁰²⁰ In turn, decisions on the goals of international criminal prosecutions will influence the understanding of the factors that the Prosecutor must take into consideration.¹⁰²¹ For example, since reconciliation is considered to be one of the goals of international criminal proceedings, this may lead to a broader understanding of the ‘interests of justice’ criterion, including amnesties and forms of restorative justice.¹⁰²² In this sense, a clear view of the Prosecutor’s goals will further legitimise the prosecutorial choices that are made. Indeed, as one scholar puts it, the Prosecutor’s task is to “decide the essentially political question of the extent of society’s interest in seeking criminal punishment.”¹⁰²³ One scholar notes that the adoption of guidelines will enhance the Court’s *legitimacy* only if it shows coherence and a clear understanding of the Court’s goals and priorities.¹⁰²⁴ Additionally, as previously noted, it will be necessary to identify a hierarchy of these different goals.¹⁰²⁵ For example, some of the proclaimed goals of international criminal prosecution may justify a focus on ‘those most responsible’, such as deterrence or the expressive function.¹⁰²⁶ Other goals, such as (specific) deterrence and

¹⁰²⁰ A.K.A. GREENAWALT, Justice Without Politics? Prosecutorial Discretion and the International Criminal Court, in «NYU Journal of International Law & Politics», Vol. 39, 2007, p. 601 (the author argues, more specifically on *prosecutorial* goals, that these are not clear from the Rome Statute, apart from a preambular reference to crime prevention); R. RASTAN, Comment on Victor’s Justice & the Viability of Ex ante Standards, in «John Marshall Law Review», Vol. 43, 2010, p. 593.

¹⁰²¹ J. GALBRAITH, The Pace of International Criminal Justice, in «Michigan Journal of International Law», Vol. 31, 2009, p. 92 (noting that the goals of international criminal justice influence the exercise of prosecutorial discretion).

¹⁰²² A.M. DANNER, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, in «American Journal of International Law», Vol. 97, 2003, p. 544.

¹⁰²³ R. GOLDSTON, More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court, in «Journal of International Criminal Justice», Vol. 8, 2010, p. 389.

¹⁰²⁴ M.M. DEGUZMAN, Choosing to Prosecute: Expressive Selection at the International Criminal Court, in «Michigan Journal of International Law», Vol. 33, 2012, pp. 298 – 299.

¹⁰²⁵ *Ibid.*, p. 267. The author, speaking on the ICC, suggests that the gravity has been used as a ‘stand-in’ to cover up for the lack of agreement of on the goals and priorities of the ICC. Consider also H. OLÁSULO, The Prosecutor of the ICC before the Initiation of Investigations, in «International Criminal Law Review», Vol. 3, 2003, p. 110 (arguing, with regard to Article 53 (2) (c) ICC Statute, that it is unclear what the political goals are that have to be achieved: the Prosecutor needs to first define these goals and then assess the convenience or not of a criminal prosecution for achieving these goals); A. MCDONALD and R. HAVEMAN, Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC, Expert Consultation Process on General Issues Relevant to the ICC Office of the Prosecutor, 15 April 2003, pp. 2, 8 (stating that “underlying the issue of prosecutorial discretion and when and how it can and should be exercised is the deeper and much more difficult question of what the Court is actually established to achieve”).

¹⁰²⁶ Consider H. TAKEMURA, Big Fish and Small Fish Debate – An Examination of the Prosecutorial Discretion, in «International Criminal Law Review», Vol. 7, 2007, p. 679. The author admits that “[a]fter all, almost every reason [for] the existence of the existence of an *ad hoc* tribunal contributes to the preference for focusing on big fish, such as limited budget, limited temporal jurisdiction, the massive scale of crimes and the consideration for international peace and security especially in case of [a] chapter VII oriented international or hybrid tribunal.” Consider also F. GUARIGLIA, The Selection of Cases by the Office of the Prosecutor of the International Criminal Court, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International*

retribution may militate against such a focus. Ranking goals is a difficult undertaking, particularly given that these goals should not necessarily be static.¹⁰²⁷

A related question, then, is whether the so adopted prosecutorial guidelines should be made public. Arguably, publication runs the risk of leading the potential perpetrators to believe that they are not at risk of being prosecuted.¹⁰²⁸ On the other hand, publication is necessary to enable external control. As previously noted, the primary value of such guidelines is that they facilitate external scrutiny over prosecutorial decision-making. In fact, public prosecutorial guidelines may be a valuable means for countering pressure exercised by external actors (i.e. states).¹⁰²⁹

GREENAWALT, while supportive of the idea of *ex ante* prosecutorial guidelines, warns that it may bring unrealistic expectations. He notes that prosecutorial guidelines are of little value if the decisions that have to be taken do not lend themselves to rule-based decision-making.¹⁰³⁰ According to the author, this scepticism is justified so long as scholars fail to come up with objective decisional rules that can be readily applied by the Prosecutor.¹⁰³¹ Abstract *ex ante* guidelines on the exercise of prosecutorial discretion may be difficult to establish for the ICC, since, for example, states have taken specific approaches to transitional justice.¹⁰³² This makes it difficult to draft general rules as to when it is necessary to defer to national transitional justice efforts. Such guidelines may fail to fully grasp the complexities and contingencies of a situation.¹⁰³³ To a certain extent, the application of prosecutorial discretion will always need to be context-specific. Hence, prosecutorial guidelines will always be open-ended and vague, leaving too much flexibility to the Prosecutor to be of any use.¹⁰³⁴

Criminal Court, Leiden, Koninklijke Brill, 2009, p. 210 (holding that the prosecution of “those in leadership positions will normally provide a ‘broader narrative’, tell ‘a more complete story’ about the crimes and their context than the prosecution of a low-level perpetrator”).

¹⁰²⁷ A. MCDONALD and R. HAVEMAN, *Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC*, Expert Consultation Process on General Issues Relevant to the ICC Office of the Prosecutor, 15 April 2003, p. 9 (the authors argue that while the ICC Prosecutor may initially focus on a more ‘exemplary’ or ‘symbolic’ role, “more utilitarian functions, such as crime control and deterrence, might assume greater significance [in a later phase]”).

¹⁰²⁸ A.M. DANNER, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, in «American Journal of International Law», Vol. 97, 2003, pp. 546 -547.

¹⁰²⁹ *Ibid.*, p. 549.

¹⁰³⁰ A.K.A. GREENAWALT, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, in «NYU Journal of International Law & Politics», Vol. 39, 2007, p. 654.

¹⁰³¹ *Ibid.*, p. 655.

¹⁰³² *Ibid.*, p. 655.

¹⁰³³ *Ibid.*, p. 656.

¹⁰³⁴ *Ibid.*, p. 656.

Instead, GREENAWALT supports a ‘political deference’ model, which implies that the Prosecutor should seek to outsource difficult political questions to external actors that are better suited and equipped to answer such questions.¹⁰³⁵ This mirrors the approach that was taken by the ICTY Prosecutor with regard to the NATO bombing campaign.¹⁰³⁶

Several authors have recently focused on *legitimacy* insofar that guidelines offer a way of measuring the exercise of prosecutorial discretion.¹⁰³⁷ It has been defined as “the justification of authority of the law.”¹⁰³⁸ Legitimacy does not follow from the political authority that created the institution but, rather, from the fairness of its procedures and punishments.¹⁰³⁹ Claims to legitimacy will be undermined when the law is not applied even-handedly.¹⁰⁴⁰ Hence, guidelines help to assure that prosecutorial decisions are perceived as legitimate.¹⁰⁴¹

For the reasons outlined above, the ICC Prosecutor’s publication of several policy papers may be a step in the right direction. Currently, however, these policy papers do not provide sufficient clarity with regard to the different criteria considered in decisions on investigations and prosecutions.¹⁰⁴² While it is not the purpose of this section to draft such guidelines, it should be noted that some scholars have already proposed lists of criteria, for example, with

¹⁰³⁵ *Ibid.*, p. 671, in general on political deference, see *ibid.*, pp. 660 – 673.

¹⁰³⁶ See *supra*, Chapter 3, II.2.

¹⁰³⁷ In general, see H. TAKEMURA, Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court, in «Amsterdam Law Forum», Vol. 4, 2012, pp. 3 -15. Consider also G.-J.A. KNOOPS, Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective, in «Criminal Law Forum», Vol. 15, 2005, p. 384.

¹⁰³⁸ H. TAKEMURA, Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court, in «Amsterdam Law Forum», Vol. 4, 2012, p. 5; consider also A.M. DANNER, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, in «American Journal of International Law», Vol. 97, 2003, pp. 510, 535.

¹⁰³⁹ D. LUBAN, Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of the International Criminal Law, in S. BESSON and J. TASIOLAS (eds.), *The Philosophy of International Law*, New York, Oxford University Press, 2010, pp. 569, 579; H. TAKEMURA, Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court, in «Amsterdam Law Forum», Vol. 4, 2012, p. 8.

¹⁰⁴⁰ R. CRYER, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge, Cambridge University Press, 2005, p. 195; M.J. STRUETT, *The Politics of Discursive Legitimacy: Understanding the Dynamics and Implications of Prosecutorial Discretion at the International Criminal Court*, in S.C. ROACH, *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court*, Oxford, Oxford University Press, 2009, p. 107 (in referring to the ICC, the author notes: “The legitimacy of the International Criminal Court (ICC) depends ultimately on its capacity to persuade observers that the exercise of its powers to investigate, prosecute, and punish violations of international criminal law (ICL) is consistent with the application of rules that are universal in nature”).

¹⁰⁴¹ A.M. DANNER, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, in «American Journal of International Law», Vol. 97, 2003, p. 536.

¹⁰⁴² R. GOLDSTON, More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court, in «Journal of International Criminal Justice», Vol. 8, 2010, p. 403.

regard to the consideration of the ‘interests of justice’¹⁰⁴³ In any case, the adoption of these guidelines is a welcome improvement *vis-à-vis* the *ad hoc* tribunals, which explained prosecutorial choices on a case-by-case basis and did not make any prosecutorial guidelines public.¹⁰⁴⁴

(3) *Accountability for prosecutorial decision-making*

It can be concluded from the overview that some restraints (institutional or judicial in nature) of prosecutorial discretion can be observed at all of the international(ised) tribunals scrutinised above. However, it appears that such forms of accountability, including forms of judicial oversight, are much more elaborate at the ICC than, for example, at the *ad hoc* tribunals.¹⁰⁴⁵ The more limited restraints of prosecutorial discretion in selecting cases for investigation and prosecution at the *ad hoc* tribunals should be understood in light of the more circumscribed character of their mandate.

Nevertheless, it was shown above how there is a noticeable evolution towards more judicial oversight over prosecutorial discretion. This is also true at the *ad hoc* tribunals.¹⁰⁴⁶ In *Ntuyahaga*, the ICTR Trial Chamber could rightly hold that “the Prosecutor has the sole responsibility for prosecutions and thus the decision on whether or not to proceed in any given matter rests with the Prosecutor.”¹⁰⁴⁷ However, different procedural amendments have changed this picture. As an example, one can refer to the judicial review of the indictment at the ICTY prior to its confirmation. It entails an assessment of whether the indictment concentrates on one or more of the most senior leaders suspected of being most responsible for the crimes within the tribunal’s jurisdiction.

¹⁰⁴³ Seven criteria were identified by WEBB, to know (1) gravity of the crime; (2) the interests of the victims; (3) the age or infirmity of the alleged perpetrator; (4) the role of the alleged perpetrator in the alleged crime; (5) international peace and security concerns; (6) transnational justice concerns and (7) resources. P. WEBB, *The ICC Prosecutor’s Discretion not to Proceed in the “Interests of Justice”*, in «Criminal Law Quarterly, Vol. 50, 2005, p. 346.

¹⁰⁴⁴ See discussion *supra*, Chapter 3, II.2.

¹⁰⁴⁵ Confirming, see e.g. N.J. JURDI, *The International Criminal Court and National Courts*, Farnham, Ashgate Publishing Limited, 2011, p. 98.

¹⁰⁴⁶ See *supra*, Chapter 3, II.2.

¹⁰⁴⁷ ICTR, *Decision on the Prosecutor’s Motion to Withdraw the Indictment, Prosecutor v. Ntuyahaga*, Case No. ICTR-98-40-T, T. Ch. I, 18 March 1999, p. 6.

The ICC is the only tribunal under review which provides for judicial oversight over prosecutorial decisions *not* to investigate or *not* to prosecute.¹⁰⁴⁸ Article 53 (3) ICC Statute provides for the possibility of judicial scrutiny over the exercise of ‘negative’ prosecutorial discretion. Such an overview may be explained by the Statute’s unique referral mechanism and the wish of the drafters of the ICC Statute that the Prosecutor provide reasons for not proceeding to the referring State or the Security Council, so that they can ask for such a decision to be reviewed.¹⁰⁴⁹ Overall, it is clear that such forms of judicial oversight have the potential of reconciling prosecutorial discretion with the need for accountability.¹⁰⁵⁰

III. PRINCIPLE OF (PROSECUTORIAL) OBJECTIVITY

III.1. Introduction

The ‘principle of objectivity’ (or the obligation to establish the truth and present incriminating and exonerating evidence equally) in conducting investigations is traditionally associated with civil law criminal justice systems.¹⁰⁵¹ In these systems, the Prosecutor is required to investigate and examine incriminating and exonerating facts and circumstances equally.¹⁰⁵² The Prosecutor usually is a (quasi-) judicial officer, who enjoys the same independence as

¹⁰⁴⁸ However, some uncertainties still surround this power. See *supra*, fn. 211 - 212, and accompanying text.

¹⁰⁴⁹ STL, RPE: Explanatory Memorandum, 25 November 2010, par. 9.

¹⁰⁵⁰ Consider e.g. C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years on*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, pp. 278 – 279 (noting that judicial checks do not necessarily conflict with prosecutorial discretion).

¹⁰⁵¹ Compare K. AMBOS, *International Criminal Procedure: Adversarial, Inquisitorial, or Mixed?*, in «*International Criminal Law Review*», Vol. 1, 2003, p. 9 (“the obligation to establish the truth and present not only inculpatory, but also exculpatory evidence [...] may be seen as a typical feature of the civil law procedure”).

¹⁰⁵² For example, §160 (2) of the German *Strafprozessordnung* (StPO) requires the public prosecution office to not only investigate incriminating but also exonerating circumstances. A similar duty is incumbent on the Austrian Prosecutor and derives from §3 of the Austrian *Strafprozessordnung* (StPO). For Italy, consider Article 358 of the Italian *Codice di procedura penale*. Similarly, the Belgian Prosecutor has a duty to protect the public interest, by looking for the material truth. He or she should look for evidence both in favour and against the accused. See C. VAN DEN WYNGAERT, *Strafrecht en Strafprocesrecht*, Maklu, Antwerpen-Apeldoorn, 2009, p. 871; C. VAN DEN WYNGAERT, *Criminal Procedures in the European Community*, Brussels, Butterworths, 1993, p. 14. Consider also N. JÖRG, S. FIELDS and C. BRANTS, *Are Inquisitorial and Adversarial Systems Converging?*, in P. FENNELL, C. HARDING, N. JÖRG and B. SWART (eds.), *Criminal Justice in Europe, a Comparative Study*, Oxford, Clarendon Press, 1995, p. 47 (arguing that Prosecutors in civil law criminal justice systems would be acting in breach of Rules of professional ethics where they would not investigate circumstances which are favourable to the accused).

Judges do.¹⁰⁵³ Far from being a partisan actor, the Prosecutor is expected to perform his or her functions in an objective manner. In those criminal justice systems where an Investigating Judge is in charge of the investigation, he or she is equally required to investigate all evidence *à charge* and *à décharge*.¹⁰⁵⁴ Entrusting such a role to the Prosecutor or investigating magistrate is sometimes criticised insofar that it substantially weakens the position of the Defence by preventing or limiting the possibilities of defence investigations.¹⁰⁵⁵ Moreover, it has been questioned as to whether exonerating facts and circumstances are investigated with the same diligence in practice.¹⁰⁵⁶

Since parties are expected to conduct their own investigation in adversarial criminal justice systems prior to the partisan contest at trial, it may seem objectionable that a duty is incumbent on the Prosecutor to look for exculpatory evidence. Investigations are traditionally guided by self-interest rather than the public interest.¹⁰⁵⁷ Moreover, in common law criminal justice systems, the investigations are normally in the hands of the police and the Prosecutor traditionally only assumes responsibility once the investigation is finished.¹⁰⁵⁸ However, the duty of objectivity becomes important when Prosecutors, for example in the U.S., gradually

¹⁰⁵³ For example, with regard to The Netherlands, consider BALLIN, who notes that Prosecutors formally are part of the judiciary and are referred to as ‘magistrates’. See M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, pp. 41 – 42; Consider also VERREST, describing the role of the Public Prosecution Service as that of a magistrate: P.A.M VERREST, *Raison d’être: een onderzoek naar de rol van de rechter-commissaris in ons strafproces*, Den Haag, Boom Juridische Uitgevers, 2011, pp. 221 – 244 (non-commercial edition).

¹⁰⁵⁴ See Article 81 (1) Code of Criminal Procedure (France) and Article 56 (1) Code of Criminal Procedure (Belgium).

¹⁰⁵⁵ J.R. SPENCER, *Evidence*, in M. DELMAS-MARTY and J.R. SPENCER (eds.), *European Criminal Procedure*, Cambridge, Cambridge University Press, 2002, p. 626.

¹⁰⁵⁶ Consider *e.g.* C. VAN DEN WYNGAERT, *Criminal Procedures in the European Community*, Brussels, Butterworths, 1993, p. 14 (noting that in practice “the dynamics of the proceedings usually put the *ministère public* in the role of a partisan prosecutor, and thus of a real party in the proceedings”); H-H. KÜHNE, Germany, in C. VAN DEN WYNGAERT, *Criminal Procedures in the European Community*, Brussels, Butterworths, 1993, p. 141 (“[e]mpirical data demonstrate[s], however, that prosecutors usually do not obey this legal rule and predominantly look for incriminating evidence”).

¹⁰⁵⁷ N. JÖRG, S. FIELDS and C. BRANTS, *Are Inquisitorial and Adversarial Systems Converging?*, in P. FENNELL, C. HARDING, N. JÖRG and B. SWART (eds.), *Criminal Justice in Europe, a Comparative Study*, Oxford, Clarendon Press, 1995, pp. 48 - 49 (although the authors note a trend in adversarial justice systems with the development of an organised police force and the acceptance of the police power to detain and interrogate suspects, they note that this changed status of parties has not yet resulted in the imposition of a clear truth-finding duty on the police to seek both incriminating and exonerating evidence).

¹⁰⁵⁸ K. AMBOS, *The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports*, in «European Journal of Crime, Criminal Law and Criminal Justice», Vol. 8/2, 2000, p. 104; G.A. MCCLELLAND, *Non-Adversary Approach to International Criminal Tribunals*, in «Suffolk Transnational Law Review», Vol. 26, 2002, p. 14 (noting that the Prosecutor may only be tangentially involved in the investigation prior to trial).

assume a more important investigative role.¹⁰⁵⁹ Nevertheless, the U.S. Prosecutor's ethical duties in this regard appear to be quite vague. It is true that the Prosecutor is traditionally thought "to seek justice rather than victory."¹⁰⁶⁰ Furthermore, rules of professional ethics often require the Prosecutor to adhere to values of objectivity or impartiality in conducting investigations. These rules, including the ABA Model Rules of Professional Conduct or the ABA Standards for Criminal Justice, have held that the Prosecutor fulfils the role of a 'minister of justice'.¹⁰⁶¹ Nevertheless, in line with the practice in international criminal law, it seems that the exact value of such (lofty) statements remains ambiguous.¹⁰⁶² Clearly, in common law criminal justice systems, there is a tension between the role of the Prosecutor as a party in the proceedings and his or her role as an administrator of justice.

¹⁰⁵⁹ Consider e.g. R.K. LITTLE, Proportionality as an Ethical Precept for Prosecutors in their Investigative Role, in «Fordham Law Review», Vol. 68, 1999, pp. 728 - 729 (The author argues that "much of the modern-day prosecutor's time is spent making investigative decisions." While the author argues that this is particularly the case for proactive investigations or complicated investigations such as organised crime, and to a lesser extent for reactive or routine investigations "the importance of the investigative role lies [...] in the significance of the role in the matters where it arises"); N.L. PHILIPS and S. SMITH, Reinterpreting the Ethical Duties of a Prosecutor: Y-STR as a Model Investigative Tool in «The Georgetown Journal of Legal Ethics», Vol. 22, 2009, pp. 1083 – 1084.

¹⁰⁶⁰ See e.g. *Berger v. United States*, 295 U.S. 78 (1935), 88 ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (emphasis added)); *John L. Brady v. State of Maryland*, 373 U.S. 83 (1963), 87 (where the Prosecutor had withheld exculpatory evidence from the accused, the Supreme Court held that prosecutors should seek justice and not victory). Consider also ABA, Model Code of Professional Responsibility, 1986, EC 7-13. This broad ethical duty has been criticised as offering little guidance in practice. Consider e.g. C. ZACHARIAS, Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics, in «Notre Dame Law Review», Vol. 69, 1993, p. 292 (arguing that in the absence of other constraints, such rule offers minimal guidance).

¹⁰⁶¹ See the Commentary to Rule 3.8 of the Model Rules of Professional Conduct of 1995 (http://www.abanet.org/cpr/mrpc/rule_3_8_comm.html, last visited 10 February 2014). Consider also ABA, Standards for Criminal Justice, 1993, Standard 3-1.2.

¹⁰⁶² Consider e.g. K. BRESLER, Pretty Phrases: The Prosecutor as Minister of Justice and Administration of Justice, in «Georgetown Journal of Legal Ethics», Vol. 9, 1995-1996, pp. 1301 – 1305 (noting that describing prosecutors as 'ministers of justice' is meaningless where the same terms were used to describe all other actors involved in criminal proceedings (p. 1302)); N.L. PHILIPS and S. SMITH, Reinterpreting the Ethical Duties of a Prosecutor: Y-STR as a Model Investigative Tool in «The Georgetown Journal of Legal Ethics», Vol. 22, 2009, p. 1084 (the authors note that the increase in investigatory duties incumbent on prosecutors does not correspond to additional ethical rules, guidelines and constraints. The authors argue that the prosecutor's ethical duties when undertaking an investigatory role "are in the nebulous middle ground between creating the opposition's case and that of an ordinary advocate"); M. LANGER, The Rise of Managerial Judging in International Criminal Law, in «American Journal of Comparative Law», Vol. 53, 2005, p. 839 (arguing that the Prosecutor is in the first place a party to the proceedings, notwithstanding rhetoric to the contrary, labeling the Prosecutor a 'minister of justice'); F. BENSOUA, The ICC Statute – An Insider's Perspective on a Sui Generis System for Global Justice, in «North-Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2010 - 2011, p. 280 (the author notes that many adversarial system have in codes of conduct rules that prosecutors cannot ignore or bury exonerating evidence. However, this falls short from an activity duty).

In a similar vein, in England and Wales, the role of Prosecutors within the criminal process, and with regard to investigations more precisely, has gradually increased in recent years. Here too, professional ethics require Prosecutors to be objective and thereby adopt a “quasi-judicial role” or to behave as “ministers of justice.”¹⁰⁶³ However, the role of UK Prosecutors still falls short of an obligation to actively oversee the investigative activities.¹⁰⁶⁴ However, since investigative acts are mostly carried out by the police, it is relevant to assess whether a duty to equally search for incriminating and exonerating evidence is incumbent on these police officers. The short answer is that it remains uncertain as to whether or not such a duty for police officers exists.¹⁰⁶⁵ In England and Wales, the Code of Practice under the Criminal Procedure and Investigations Act 1996 provides that ‘[i]n conducting an investigation, the investigator should pursue all reasonable lines of enquiry, whether these point towards or away from the suspect’.¹⁰⁶⁶ This provision has been interpreted as putting a positive duty on the police to actively search for exonerating evidence.¹⁰⁶⁷

Several international (soft law) documents require Prosecutors to act objectively while performing their investigative role. According to the UN Guidelines on the Role of Prosecutors (‘Havana Guidelines’), Prosecutors are expected to ‘act with objectivity’, should ‘take proper account of the position of the suspect and the victim’ and ‘pay attention to all

¹⁰⁶³ CPS, Code for Crown Prosecutors, February 2010 (‘Code for Crown Prosecutors’), par. 2.4 (‘Prosecutors must be fair, independent and objective’). Critical is JACKSON, who notes that the characterisation of the prosecutorial role in “vague self-legitimising terms”, such as “quasi-judicial”, is not helpful where such terminology fails to delineate the precise role that prosecutors should play in the criminal process. See J. JACKSON, *The Ethical Implications of the Enhanced Role of the Public Prosecutor*, in «Legal Ethics», Vol. 9, 2006, pp. 37 – 38.

¹⁰⁶⁴ J.D. JACKSON, *The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?*, in «Modern Law Review», Vol. 68, 2005, p. 760, fn. 123.

¹⁰⁶⁵ N. JÖRG, S. FIELDS and C. BRANTS, *Are Inquisitorial and Adversarial Systems Converging?*, in P. FENNEL, C. HARDING, N. JÖRG and B. SWART (eds.), *Criminal Justice in Europe, a Comparative Study*, Oxford, Clarendon Press, 1995, p. 49 (the authors note the development whereby adversarial criminal justice systems increasingly adopt inquisitorial investigative instruments, including the police powers to detain and interrogate suspects. This necessarily distorts the equality between parties. They add that “[o]ne response to this changed status of parties might have been to place a clear truth-finding duty on the police to seek out both exculpatory and inculpatory evidence. But such profound change has not yet occurred”).

¹⁰⁶⁶ Article 3 (5) Code of Practice under Criminal Procedure and Investigations Act 1996 (s 23(1)).

¹⁰⁶⁷ Consider e.g. J.R. SPENCER, *Evidence*, in M. DELMAS-MARTY and J.R. SPENCER (eds.), *European Criminal Procedure*, Cambridge, Cambridge University Press, 2002, pp. 626-627 (arguing that such provision puts an affirmative obligation on the Prosecutor to search for evidence *à charge* and *à décharge* equally); C.J.M. SAFFELING, *Towards an International Criminal Procedure*, Oxford, Oxford University Press, 2001, p. 75 (arguing that the English police must be objective, in the sense that the police must not only consider whether there is sufficient evidence to charge a particular suspect but should also establish that all reasonable alternatives have been rebutted); J.D. JACKSON, *The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?*, in «Modern Law Review», Vol. 68, 2005, p. 760, fn. 122. For a divergent view, consider B. SWART, *Damaška and the Face of International Criminal Justice*, in «Journal of International Criminal Justice», Vol. 6, 2008, p. 109, fn. 81.

relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect.¹⁰⁶⁸ Also the more detailed ‘Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors’, which were adopted by the International Association of Prosecutors (IAP), should be mentioned. These standards require Prosecutors to carry out their functions impartially and to act with objectivity when they participate in an investigation.¹⁰⁶⁹ They also require the Prosecutor to ‘have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect’ and ‘to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the accused’.¹⁰⁷⁰

On a regional level, Recommendation (2000)19 of the Council of Europe on ‘the Role of Public Prosecution in the Criminal Justice System’ as well as the ‘Budapest Guidelines’, which were adopted by the Conference of Prosecutors General in 2005, may be noted. Both documents require that public Prosecutors carry out their functions ‘fairly, impartially and objectively’ and have regard ‘to all relevant circumstances of a case including those affecting the suspect, whether they are to his advantage or disadvantage’.¹⁰⁷¹

III.2. The *ad hoc* tribunals

The Statutes of the *ad hoc* tribunals do not mandate that the Prosecutor investigate incriminating and exonerating evidence equally.¹⁰⁷² Nevertheless, the ICTY emphasised in *Kupreškić et al.* that the role of the Prosecutor is not limited to that of a party to adversarial proceedings. Rather, it is also that of an “organ of international criminal justice, whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence in order to assist the Chamber discover the truth in a judicial setting.”¹⁰⁷³

¹⁰⁶⁸ Article 13 (b) UN Guidelines on the Role of the Prosecutors 1990.

¹⁰⁶⁹ Article 3(a) and (c) and 4.2 (a) and (b) of the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors 1999.

¹⁰⁷⁰ *Ibid.*, Article 3(d) and (e).

¹⁰⁷¹ Articles 24 (a) and 26 of Recommendation (2000)19 on the Role of Public Prosecution in the Criminal Justice System, Committee of Ministers, Council of Europe, 6 October 2000; CoE, European Guidelines on Ethics and Conduct for Public Prosecutors “The Budapest Guidelines”, as adopted by the Conference of Prosecutors General of Europe on 31 May 2005, guidelines III.b and III.f.

¹⁰⁷² Article 54 (1) (a) ICC Statute.

¹⁰⁷³ ICTY, Decision on Communication Between the Parties and their Witnesses, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, T. Ch. II, 21 September 1998, p. 3.

Absent any express obligation incumbent on the Prosecutor to present ‘not only inculpatory, but also exculpatory evidence’, it is unclear what the exact value of this pronouncement is.¹⁰⁷⁴ The only obligation to assist the Defence provided for under the RPE follows from the Prosecutor’s disclosure obligations regarding exculpatory materials in the Prosecution’s possession. More precisely, the Prosecutor should disclose to the Defence ‘material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence’.¹⁰⁷⁵ This falls short of any positive obligation on the Prosecutor to *actively search and look* for exculpatory evidence.¹⁰⁷⁶

Similar to Trial Chamber II in the *Kupreškić et al.* case, Judge Shahabuddeen underscored in his dissent in the *Barayagwiza* case that, while the Prosecutor is a party to the proceedings and should not be neutral, he is not a partisan actor. Prosecutors should consider themselves “ministers of justice assisting in the administration of justice.”¹⁰⁷⁷ They represent the public interest of the international community. Hence, they should act with the objectivity and fairness that is appropriate to that circumstance.¹⁰⁷⁸

Furthermore, the jurisprudence occasionally confirmed the responsibility incumbent on the Prosecutor to represent the interests of the international community, including victims and

¹⁰⁷⁴ S. ZAPPALÀ, *Human rights in International Criminal Proceedings*, Oxford, Oxford University Press, 2003, p. 41 (“Nonetheless, until the adoption of the norms provided for by the ICC Statute no appropriate legal framework supported this aspiration”); M. FAIRLIE, *The Marriage of Common and Continental Law at the ICTY*, in «International Criminal Law Review», Vol. 4, 2004, pp. 314 - 315 (noting that such consideration by the Trial Chamber was only *obiter dicta* and disregards the procedural design of the Prosecutor’s responsibilities); S. VASILIEV, Trial, in L. REYDAMS, J. WOUTERS and C. RYNGAERT (eds.), *International Prosecutors*, Oxford, Oxford University Press, 2012, p. 708 (noting that (“[t]his *obiter dictum* neatly expresses a normative sentiment among the judges but is wishful thinking at best because it requires the Prosecutors to do more than they actually can and may deliver in the context of the adversarial trial proceedings”)); G. BOAS, J.L. BISCHOFF, N.L. REID and B. DON TAYLOR III, *International Criminal Law Practitioner Library, Vol. III: International Criminal Procedure*, Cambridge, Cambridge University Press, 2011, p. 106; M. FEDOROVA, *The Principle of Equality of Arms in International Criminal Proceedings*, Antwerp, Intersentia, 2012, (non-commercial edition), pp. 152 – 153.

¹⁰⁷⁵ Rule 68 ICTY and ICTR RPE; Rule 68 (B) SCSL RPE.

¹⁰⁷⁶ Consider in that regard the wording of *Kupreškić*, which states that the Prosecutor ‘is not, or not only, a party to adversarial proceedings’ (emphasis added). See ICTY, Decision on Communication Between the Parties and their Witnesses, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, T. Ch. II, 21 September 1998, par. 3. For a confirming view, see M. HARMON and M. KARAGIANNAKIS, *The Disclosure of Exculpatory Material by the Prosecution to the Defence under Rule 68 of the ICTY Rules*, in R. MAY et al. (eds.), *Essays on ICTY Procedure and Evidence*, The Hague, Kluwer Law International, 2001, p. 321.

¹⁰⁷⁷ ICTR, Decision (Prosecutor’s Request for Review or Reconsideration), *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 31 March 2000, Separate Opinion of Judge Shahabuddeen, par. 67-68; ICTY, Decision on Admissibility of Prosecution Investigator’s Evidence, *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.2, A. Ch., 30 September 2002, Partial Dissenting Opinion of Judge Shahabuddeen, par. 18.

¹⁰⁷⁸ *Ibid.*, par. 18.

witnesses.¹⁰⁷⁹ Most clearly, the Appeals Chamber has confirmed that one of the purposes of the Prosecution's investigative function is "to assist the Tribunal to arrive at the truth and to do justice for the international community, victims, and the accused."¹⁰⁸⁰

To some extent, there is support for the Prosecutor's position as a minister of justice, going beyond his or her role as a partisan actor, in the 'Standards of Professional Conduct for Prosecution Counsel' (Regulation No. 2) that apply to the staff of the ICTY and ICTR OTP.¹⁰⁸¹ Among others, these standards refer to counsel as 'officers of the court', implying broader duties and responsibilities than those of the Defence.¹⁰⁸² This includes the obligation to 'serve and protect the public interest, including the interests of the international community, victims and witnesses, and to respect the fundamental rights of suspects and accused' and to 'be, and to appear to be, consistent, objective and independent in the conduct of investigations'.¹⁰⁸³ Of equal importance is the Prosecutor's obligation to assist the tribunal to arrive at the truth and to do justice for the international community, victims and the accused.¹⁰⁸⁴ Also, the ICTY Manual on Developed Practice confirms---as best practice---that prosecution staff should be prepared to investigate "with an open mind" and to consider conflicting evidence, especially at the early stages of the investigation.¹⁰⁸⁵

¹⁰⁷⁹ Consider *e.g.* ICTY, Decision on Prosecutor's Appeal on Admissibility of Evidence, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, A. Ch., 16 February 1999, par. 25; ICTR, Decision on Interlocutory Appeals of Decision on Witness Protection Orders, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73 & ICTR-98-41-AR73 (B), A. Ch., 6 October 2005, par. 44; ICTR, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, 22 September 2008, T. Ch. II, p. 22.

¹⁰⁸⁰ ICTR, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Disclosure Suite in Discharging Disclosure Obligations, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.7, A. Ch., 30 June 2006, par. 9, as reiterated in ICTR, Decision on Defence Motion for Disclosure of RPF Material and for Sanctions against the Prosecution, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 19 October 2006, par. 11; ICTY, Transcript, *Prosecutor v. Stakić*, Case No. IT-97-24, T. Ch., 25 November 2002, p. 9437.

¹⁰⁸¹ Prosecutor's Regulation No. 2 of 1999, Standards of Professional Conduct – Prosecution Counsel.

¹⁰⁸² Article 1 of Prosecutor's Regulation No. 2.

¹⁰⁸³ Article 2 (a) and 2 (c) of Prosecutor's Regulation No. 2. Confirming, see F. MÉGRET, *Accountability and Ethics*, in L. REYDAMS, J. WOUTERS and C. RYNGAERT (eds.), *International Prosecutors*, Oxford, Oxford University Press, 2012, p. 440.

¹⁰⁸⁴ Article 2 (h) of Prosecutor's Regulation No. 2.

¹⁰⁸⁵ ICTY Manual on Developed Practices, p. 15 ("Particularly in the early stages of an investigation, prosecutors and investigators should keep an open mind about the responsibility of individuals, and should be prepared to consider conflicting evidence, alter the direction of an investigation, and avoid focusing on simply trying to build a selective case against a particular individual because of early discovery of some evidence that appears to inculpate that individual"). Consider M. FEDOROVA, *The Principle of Equality of Arms in International Criminal Proceedings*, Antwerp, Intersentia, 2012, (non-commercial edition), p. 170 (noting that "[t]his approach appears to direct towards objectivity in conducting investigations").

Overall, however, the reference to the Prosecutor and to members of the prosecution staff as ‘ministers of justice’ should be understood in conformity with the Prosecution’s procedural role at the *ad hoc* tribunals, in particular its disclosure obligations.¹⁰⁸⁶ On a more general level, the RPEs of the *ad hoc* tribunals conceive the criminal procedure as a contest between two parties.¹⁰⁸⁷ It follows that the use of vague terminology (such as ‘organ of international criminal justice’ or ‘minister of justice’) in referring to prosecutorial ethics is not helpful in clarifying the Prosecutor’s role during investigations.¹⁰⁸⁸ Rather, such terminology should be understood in light of the overall structure and design of proceedings. Such phrases should be understood and are only meaningful in light of the concrete function of prosecutorial practice.

Staff of the ICTR OTP acknowledged their ongoing duty to disclose any exculpatory evidence to the Defence. In that regard, every trial team assesses the files on a continuing basis for potentially exculpatory evidence.¹⁰⁸⁹ On the other hand, the ICTR practice seems to confirm that there is no policy for the Prosecution to go out and to actively search for and gather exculpatory evidence.¹⁰⁹⁰ Rather, the Prosecution will look for evidence that supports the

¹⁰⁸⁶ As confirmed in the jurisprudence. See *e.g.* ICTY, Decision on the Appellant’s Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, A. Ch., 26 September 2000 par. 32 (referring to the status of the Prosecutor and the prosecution staff as ministers of justice assisting in the administration of justice while also reiterating that the Prosecution is under a legal obligation to continually disclose exculpatory evidence under Rule 68); ICTY, Decision on Motions to Extend Time for Filing Appellant’s Briefs, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, A. Ch., 11 May 2001, par. 14 (also referring to the role of the Prosecutor as a ‘minister of justice’ in the context of its obligations under Rule 68); ICTR, Decision on Defence Motions Alleging Violation of the Prosecutor’s Disclosure Obligations Pursuant to Rule 68, *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, T. Ch. II, 22 September 2008, p. 22 (reprimanding the Prosecutor for its lack of diligence in disclosing exculpatory material and reminding the Prosecution of its responsibility as ministers of justice to assist the Chamber discover the truth about the allegations in the indictment).

¹⁰⁸⁷ J. JACKSON, Finding the Best Epistemic Fit for International Criminal Tribunals, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 25; M. LANGER, The Rise of Managerial Judging in International Criminal Law, in «American Journal of Comparative Law», Vol. 53, 2005, p. 861 (“In a criminal procedure structured this way [as a competition between two cases], there are few incentives for impartial investigations that seek all kinds of evidence”).

¹⁰⁸⁸ Compare J. JACKSON, The Ethical Implications of the Enhanced Role of the Public Prosecutor, in «Legal Ethics», Vol. 9, 2006, pp. 37 – 38.

¹⁰⁸⁹ Interview with a member of the OTP, ICTR-09, Arusha, 20 May 2008, p. 3.

¹⁰⁹⁰ Interview with Ms. Christine Graham of the OTP, ICTR-14, Arusha, 28 May 2008, p. 4 (“There is nothing affirmative in the rules that says we have to go out and collect that [exculpatory] evidence. It says that if we have the evidence, in a signed statement, then we have to disclose it”); *ibid.*, p. 4 (“It may not necessarily mean that the statement of witness number 2 and 3 is taken, because it does not support our case, from an investigation point of view. However, the whole point of an adversarial system is that the other party must have its own resources to do its own investigation. If they do a good job, they should go and find these things”). Interview with Dr. Alex Obote Odora of the OTP, ICTR-11, Arusha, 21 May 2008, p. 5 (“But to specifically go and look for exculpatory materials? I do not recall any policy like that. In the course of our work, as you work on a particular file and you get exculpatory material, you disclose”); Interview with a member of the OTP, ICTR-12, Arusha, 21 May 2008, p. 3 (“But simply to look for inculpatory evidence, that is a bit broad in my view”); Interview with a member of the OTP, ICTR-17, Arusha, 3 June 2008, p. 4 (“The obligation set out in Rule 68

charges when collecting evidence. One member of the ICTR OTP explained that when, in the course of the investigation, an interview with a witness reveals information that is unfavourable to the Prosecution's case, there is no obligation to take that witness statement. In practice, no statement is necessarily taken.¹⁰⁹¹ Another member of the OTP gave the example of a potential witness who is the suspect's sister and therefore unlikely to tell the investigators about her brother's guilt. In a case like this, the Prosecution investigators will not interview her.¹⁰⁹²

However, at least one interviewee held a different view, contending that in case the Prosecution hears of a witness that may provide exculpatory evidence, the Prosecution is obligated to gather such evidence.¹⁰⁹³ One other member of the ICTR OTP underlined the fact that if the Prosecution does learn that a witness may provide exculpatory evidence regarding a suspect, the prosecution investigators should follow up on this in order to be prepared for

and the jurisprudence which defines Rule 68, does not, as far as I know, oblige us to actively seek out evidence that helps the Defence, unlike the ICC. In this model there is no active obligation to do that, there is just an active obligation to disclose evidence falling within Rule 68, once it has been collected").

¹⁰⁹¹ Interview with Ms. Christine Graham of the OTP, ICTR-14, Arusha, 28 May 2008, p. 4.

¹⁰⁹² Interview with a member of the OTP, ICTR-15, Arusha, 29 May 2008, p. 6 ("We look for evidence that supports our charge. For example, if we know that X is the sister of a suspect, and X is not likely to tell us about the guilt of the brother, ordinary logic dictates that this is not where you go. You do not waste resources to go there. But if you know that there is a sure source that can give you evidence of an incriminating nature, you go there. And in the process of talking to that witness, examining the witness critically, you may discover that there is also exculpatory material. Once that comes into your possession, you have an obligation to disclose that under the rules").

¹⁰⁹³ Interview with a member of the OTP, ICTR-16, Arusha, 4 June 2008, p. 5 ("*Q. For example, if you have a witness who suggests you speak to another person to get exculpatory evidence, would you look and search for that evidence? A. Absolutely. You have to do that. You have to satisfy yourself, at least. It is about justice. It is not just about completion. Once you suspect somebody, it is a very heavy penalty for that person. That person is subject to arrest and incarceration before his trial comes. That in itself is a penalty. You have to be very careful that you satisfy yourself about that. At least, even if you do not have the ability to get to the witness, you should as soon as possible reveal this to defence counsel. You say that, "look, I have this document, and I want you to look at this."* Of course you do not go to exactly that level. We assume that he is a well-trained lawyer, so that when we say "this is exculpatory," he will definitely find that witness. He will follow it up. You may weigh the evidence and find that even if one witness says that the suspect did not participate, he is one voice that we can ignore because there is overwhelming evidence to the contrary. [...] That does not mean that you should ignore it. You should be aware. But there is a point where you should say, "look, we have proof beyond reasonable doubt." This is other doubt. If there are two or three people who say that this never happened, that is where the balance of the adversarial and the inquisitorial systems has to be struck"). *Ibid.*, p. 4 ("you may find from assessing the demeanor of a witness or in the course of finding the accused person that a witness has very interesting perceptions as to what happened. If one of them is sure that your suspect did not do it, you have an obligation to follow that evidence to see whether it is credible. Although you may have 10 or 20 witnesses who say that your suspect is responsible, if you find that one person who says he was not there, or he was not responsible, or that he tried to save people, you have an obligation to disclose it and to find out more, and also to change your accused person if you find out more").

what the Defence may say at trial.¹⁰⁹⁴ However, first and foremost, it appears that trial strategies underlie the collection of such exonerating evidence.

III.3. The Special Court for Sierra Leone

In a similar vein, the procedural framework of the Special Court does not provide for an obligation incumbent on the Prosecution to actively search for exculpatory evidence. The Prosecution's responsibilities are limited to the disclosure of (possibly) exculpatory evidence in its possession.¹⁰⁹⁵ The Special Court's jurisprudence likewise confirms the Prosecutor's role as a 'minister of justice'.¹⁰⁹⁶ It has been argued that a broader role for the Prosecutor, encompassing an obligation to actively 'investigate on the alternative forensic scenarios than those which led to the indictment and tend to suggest the accused's guilt' follows from the 'Code of Professional Conduct for Counsel with the Right to Audience before the Special Court of Sierra Leone'.¹⁰⁹⁷ Article 24 (B) of this Code states on 'impartiality':

"Prosecution Counsel shall assess the materiality of facts and the probative value of evidence according to all relevant circumstances and irrespective of whether they are to the disadvantage of the suspect or accused."

Indeed, this provision not only requires the Prosecutor to assess the probative value of the evidence (which may be interpreted as being on par with the responsibility of the Prosecutor of the *ad hoc* tribunals to assess the evidence gathered and disclose exonerating evidence) but also to assess 'the materiality of the facts' 'according to all relevant circumstances'.¹⁰⁹⁸ This latter obligation arguably requires the Prosecutor to assess all circumstances (incriminating

¹⁰⁹⁴ Interview with a member of the OTP, ICTR-13, Arusha, 21 May 2008, p. 3.

¹⁰⁹⁵ Rule 68 SCSL RPE.

¹⁰⁹⁶ SCSL, Decision on Complaint Pursuant to Article 32 of the Code of Professional Conduct for Counsel with the Right to Audience before the Special Court for Sierra Leone, *Prosecutor v. Sesay*, President, SCSL-04-15-CCC32, 20 February 2006, par. 30 (citing the Separate Opinion of Judge Shahabuddeen to the Barayagwiza decision with approval).

¹⁰⁹⁷ SCSL, Code of Professional Conduct for Counsel with the Right to Audience before the Special Court of Sierra Leone, as adopted on 14 May 2005 and amended on 13 May 2006 (pursuant to Rule 46 (G) SCSL RPE). Contrary to what the title of this Code of Conduct may suggest, Article 2 clarifies that the Code does not solely apply to counsel that appear or have appeared before the Court, but also to people that act or have acted on behalf of the Prosecutor, the Defence, witnesses or any other person before the Court. See S. VASILIEV, Trial, in L. REYDAMS, J. WOUTERS and C. RYNGAERT (eds.), *International Prosecutors*, Oxford, Oxford University Press, 2012, p. 708.

¹⁰⁹⁸ Article 24 (B) Code of Professional Conduct for Counsel with the Right to Audience before the Special Court of Sierra Leone.

and exonerating) relevant to the case. However, it cannot be denied that such a rule of professional ethics falls short of a clear-cut procedural obligation on the Prosecutor ‘to investigate incriminating and exonerating evidence equally’.¹⁰⁹⁹ Besides, it is debatable as to whether such an obligation requires the Prosecutor to go out and actively search for exonerating items of evidence. Interviews with prosecution staff at the Special Court confirmed that in practice, the prosecution staff does not actively search for exculpatory evidence.¹¹⁰⁰

III.4. The International Criminal Court

Unlike the Prosecutors of the *ad hoc* tribunals, their ICC counterpart carries an explicit statutory duty to ‘investigate incriminating and exonerating circumstances equally’.¹¹⁰¹ In order to ‘establish the truth’, the Prosecution is required to ‘investigate all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute’.¹¹⁰² This duty is limited to the investigation phase.¹¹⁰³ Several provisions of the Code of Conduct for the Office of the Prosecutor reflect this principle of objectivity.¹¹⁰⁴ As the Appeals Chamber has stated: “[t]he fact that the Prosecutor is required ‘to investigate incriminating and exonerating circumstances equally’, pursuant to article 54 (1) (a) of the Statute, means that the Prosecutor will be aware, during the course of his investigations, of material that may be of assistance to the Defence.”¹¹⁰⁵ This duty of objectivity was also explicitly included in the Draft Regulations of the Office of the Prosecutor, in the form of a ‘truth-seeking standard’. This encompasses the Prosecution’s obligation to investigate ‘both incriminating

¹⁰⁹⁹ Compare Article 54 (1) (a) ICC Statute.

¹¹⁰⁰ Consider e.g. Interview with a member of the OTP, SCSL-08, Freetown, 22 October 2009, pp. 2-3 (“You are not obliged to go out there and investigate for exculpatory information, like you have in the case of the ICC where you have to go and find exculpatory information. But if you, in the course of the investigation, in any form come into contact with information that will assist the Defence and the accused, that forms the exculpatory aspect and you have to disclose it and there is a very high standard relating to disclosure. The minimum, the least thing that will assist the Defence must be disclosed”).

¹¹⁰¹ Article 54 (1) (a) ICC Statute.

¹¹⁰² Article 54 (1) (a) ICC Statute.

¹¹⁰³ Article 54 (1) (a) ICC Statute (‘In order to establish the truth, extend the *investigation...*’ (emphasis added)).

¹¹⁰⁴ Article 49 (b) of the Code of Conduct for the Office of the Prosecutor: Prosecutors shall ‘[c]onsider all relevant circumstances when assessing evidence, irrespective of whether they are to the advantage or disadvantage of the prosecution’ and Article 49 (c): Prosecutors shall ensure that all necessary and reasonable enquiries are made and the result disclosed in accordance with the requirements of a fair trial, whether they point to the guilt or innocence of the suspect’.

¹¹⁰⁵ ICC, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. 01/04-01/06-1433 (OA11), A. Ch., 11 July 2008, par. 36.

and exonerating circumstances as a matter of equal priority and with equal diligence'. However, this standard was removed in the final version of the Regulations.¹¹⁰⁶ The Prosecution considers the investigation into potentially exonerating information and evidence to be a 'continuous' and 'simultaneous' process. Therefore, the search for such information or evidence is not the task of a separate investigative team.¹¹⁰⁷ In the event that the Prosecutor encounters potentially exonerating information by questioning witnesses, the Prosecution will actively pursue such leads and try to identify new witnesses and evidence.¹¹⁰⁸

It follows that the Prosecution acts as an 'officer of justice', rather than a partisan actor.¹¹⁰⁹ This explicit obligation of objectivity was intended "to build a bridge between the adversarial common law approach to the role of the Prosecutor and the role of the Investigating Judge in certain civil law systems."¹¹¹⁰ One commentator acknowledged the time-saving potential of such a prosecutorial obligation. FRIMAN argues that "an objective investigation with some type of defence involvement has a potential for narrowing the scope of the prosecution case."¹¹¹¹ Among others, it allows for some coordination between the Defence's and the Prosecution's investigations, even some level of Defence involvement in the Prosecutor's investigation, including "the presence of both the prosecution and the suspect/defence during certain investigative measures, the Prosecutor's compliance with requests by the suspect/defence to take investigative measures, and the seeking of the Prosecutor's view in cases envisaged in Rule 116 (2) [requests by the Defence for the collection of evidence]."¹¹¹² In deciding upon requests by the Defence to undertake investigative acts, the Prosecutor then needs to have due regard to his or her obligation to investigate exonerating circumstances

¹¹⁰⁶ Regulation 10 of the ICC Draft Regulations of the Office of the Prosecutor. However, a footnote added that 'parties to proceedings cannot derive rights from this ethical obligation to investigate exonerating and incriminating circumstances equally'.

¹¹⁰⁷ ICC, Transcript, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009, pp. 16-17.

¹¹⁰⁸ *Ibid.*, pp. 34.

¹¹⁰⁹ K. KRESS, The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise, in «Journal of International Criminal Justice», Vol. 1, 2003, p. 608. Consider also M. MIRAGLIA, The First Decision of the ICC Pre-Trial Chamber: International Criminal Procedure under Construction, in «Journal of International Criminal Justice», Vol. 4, 2006, p. 194 (arguing that the Prosecutor is an organ of justice and not a *super partes* organ).

¹¹¹⁰ M. BERGSMO and P. KRUGER, Article 54, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1078.

¹¹¹¹ OTP, Informal Expert Paper: Measures Available to the International Criminal Court to Reduce the Length of Proceedings, 2003, par. 23.

¹¹¹² *Ibid.*, par. 26. On such requests, see *supra*, Chapter 3, I.3.2.

equally.¹¹¹³ Nevertheless, the ICC's statutory documents do not formally provide for the possibility for the Defence to request the Prosecutor to conduct certain investigative actions.¹¹¹⁴ Besides, the principle of objectivity may not be understood to imply that the Defence should exclusively rely on the investigations conducted by the Prosecutor.¹¹¹⁵

Some authors have expressed scepticism about the realisation in practice of such nonpartisan attitude, given the primarily adversarial nature of proceedings.¹¹¹⁶ In *Mbarushimana*, for example, the Prosecution was reprimanded by PTC II, which found the confrontational questioning methods used by some investigators to be inappropriate in light of their duty of objectivity and held that such techniques may significantly weaken the probative value of evidence so obtained.¹¹¹⁷ More precisely, the Pre-Trial Chamber stated that:

“[t]he reader of the transcripts of interviews [of insider witnesses] is repeatedly left with the impression that the investigator is so attached to his or her theory or assumption that he or she does not refrain from putting questions in leading terms and from showing resentment, impatience or disappointment whenever the witness replies in terms which are not entirely in line with his or her expectations. Suggesting that the witness may not be “really remembering

¹¹¹³ *Ibid.*, par. 28.

¹¹¹⁴ W. WEI, Die Rolle des Anklägers eines internationalen Strafgerichtshofs, Frankfurt am Main, Peter Lang, 2007, p. 36. However, the Prosecution seems willing to accommodate such requests. Consider the exchange between the Ngudjolo Chui defence team and an OTP head of investigations on the witness stand: “Q. [...] are you able to favourably receive possible requests from the Defence with regards to possible exoneration investigations and, if this is the case, could you guarantee to the Defence teams that the – there would be total objectivity in the accomplishment of the duties which are so required?” “A. The Prosecution has an equal obligation to investigate the exonerating facts and, of course, that would be conducted with the required objectivity”. See ICC, Transcript, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009, p. 72.

¹¹¹⁵ OTP, Informal Expert Paper: Measures Available to the International Criminal Court to Reduce the Length of Proceedings, 2003, par. 28.

¹¹¹⁶ Consider e.g. M. DAMAŠKA, Problematic Features of International Criminal Procedure, in A. CASSESE (ed.), *The Oxford Companion to International Criminal Justice*, Oxford, Oxford University Press, 2009, p. 176 (arguing that where two cases exist at the pre-trial and trial stage, notwithstanding the requirement that Prosecutors adopt non-partisan attitudes, “it becomes difficult for them to refrain from using their evidence selectively, focusing only on information favourable to their allegations”); A. ZAHAR and G. SLUITER, *International Criminal Law: A Critical Introduction*, Oxford, Oxford University Press, 2008, p. 374 (the authors are critical about the effective realisation of such impartial role in an adversarial model); K. AMBOS, Confidential Investigations (Article 54 (3)(e) ICC Statute) vs. Disclosure Obligations: the Lubanga Case and National Law, in «New Criminal Law Review», Vol. 12, 2009, pp. 566 - 567 (noting the tension between the two roles of the Prosecution, on the one hand to vigorously pursue criminal conduct and to gather incriminating facts and on the other hand to act as an objective investigation organ that also has to take into consideration the interests of defendants and to look for exonerating evidence); C. BUISMAN, Ascertainment of the Truth in International Criminal Justice, 2012, (available at: <http://bura.brunel.ac.uk/handle/2438/6555>, last visited 18 November 2013), p. 250 (“It is debatable whether the notion of a truly independent Prosecutor searching for evidence that undermines his own case is a workable concept in international criminal justice systems”).

¹¹¹⁷ See ICC, Decision on the Confirmation of Charges, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-465-Red, PTC II, 16 December 2011, par. 51.

exactly what was said”, complaining about having “to milk out” from the witness details which are of relevance to the investigation, lamenting that the witness does not “really understand what is important” to the investigators in the case, or hinting at the fact that the witness may be “trying to cover” for the Suspect, seem hardly reconcilable with a professional and impartial technique of witness questioning.”¹¹¹⁸

To some extent, this practice illustrates the difficulties in ascribing a more neutral role to the Prosecutor in conducting investigations (through an active duty to search for exculpatory evidence) while following a two-case approach during trial. DAMAŠKA noted that a non-partisan role during investigations:

“is easier to postulate in theory than to achieve in practice. For if prosecutors know that at the trial the defense’s case follows their own case, a procedural dynamic develops in which it becomes difficult for them to refrain from using evidence selectively. No wonder when truth is expected to emerge from two competing vectors, their sum is skewed whenever one side exaggerates while the other side refrains from doing so.”¹¹¹⁹

While DAMAŠKA’s fears relate to the selective use of evidence at trial, this does not necessarily influence the Prosecutor’s gathering of evidence. However, the aforementioned passages in the confirmation of charges decision in *Mbarushimana* may be seen as proof of partisan postures contaminating the ‘neutral’ role of the Prosecutor in conducting investigations.

Also, one can refer to what Trial Chamber I described in the *Lubanga* case as the unsupervised reliance on intermediaries, and which led the Chamber to conclude that the evidence by a series of witnesses could not safely be relied upon. It is recalled that the Trial Chamber held that:

“A series of witnesses have been called during this trial whose evidence, as a result of the essentially unsupervised actions of three of the principal intermediaries, cannot safely be relied on. The Chamber spent a considerable period of time investigating the circumstances of a substantial number of individuals whose evidence was, at least in part, inaccurate or dishonest.

¹¹¹⁸ *Ibid.*, par. 51.

¹¹¹⁹ M. DAMAŠKA, What is the Point of International Criminal Justice, in «Chicago-Kent Law Review», Vol. 83, 2008, p. 338.

The prosecution's negligence in failing to verify and scrutinise this material sufficiently before it was introduced led to significant expenditure on the part of the court. An additional consequence of the lack of proper oversight of the intermediaries is that they were potentially able to take advantage of the witnesses they contacted."¹¹²⁰

In addition, since the intermediaries relied upon were former child soldiers, the Trial Chamber acknowledged that they were vulnerable to manipulation because of their youth and likely exposure to the conflict.¹¹²¹ Besides, one of the intermediaries that assisted the OTP's work had previously worked for the Congolese intelligence services and was assisted by at least one person who, at the time being, was employed by the Congolese intelligence services. Remarkably, the intermediary ('P-0316') testified that he had always remained loyal to his government.¹¹²² The Trial Chamber stated that it "is particularly concerned that the prosecution used an individual as an intermediary which such close ties to the government that had originally referred the situation in the DRC to the Court."¹¹²³ The Trial Chamber added that:

"Given the likelihood of political tension, or even animosity, between the accused and the government, it was wholly undesirable for witnesses to be identified, introduced and handled by one or more individuals who, on account of their work or position, may not have had, to a sufficient degree or at all, the necessary qualities of independence and impartiality. Whilst it is acceptable for individuals in this category to provide information and intelligence on an independent basis, they should not become members of the Prosecution team. Moreover, any information and intelligence they provide should be verified and scrutinised by the prosecution, in order to avoid any manipulation or distortion of evidence."¹¹²⁴

Clearly, since the Congolese government referred the situation in the DRC to the Court, the reliance on intermediaries with close ties to the government casts doubt on the neutrality of the Prosecutor.

¹¹²⁰ ICC, Judgement pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 482. See *supra*, Chapter 2, VII.1.

¹¹²¹ *Ibid.*, par. 482.

¹¹²² *Ibid.*, par. 367.

¹¹²³ *Ibid.*, par. 368.

¹¹²⁴ *Ibid.*, par. 368.

Further reference can be made to the broad use by the Prosecutor in the *Lubanga* case of confidentiality agreements pursuant to Article 54 (3) (e) ICC Statute and the potential tension of these agreements with the Prosecutor's requirement of objectivity. It is recalled that the Trial Chamber stayed the proceedings after the Prosecutor appeared unable to disclose exculpatory materials in its possession which were obtained through confidentiality agreements to the Defence or to the Trial Chamber.¹¹²⁵ These exculpatory materials included evidence that tended to suggest that the accused had acted in self-defence, that he was acting under duress or compulsion, that he had made efforts to demobilise child soldiers and that he had insufficient control over the persons who allegedly perpetrated the crimes he was charged for.¹¹²⁶ In short, the Appeals Chamber stated that such confidentiality agreements may only be used to generate new evidence. It further stated that the use of such agreements should not lead to violations of the rights of the suspect or the accused person.¹¹²⁷ The Prosecutor remains bound by his or her obligations under Article 54 (1) (e) ICC Statute to "[f]ully respect the rights of persons arising under this Statute" including the suspect or the accused person's disclosure rights.¹¹²⁸ Hence, the Prosecutor should apply Article 54 (3) (e) "in a manner that will allow the Court to resolve the potential tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial."¹¹²⁹

In his separate opinion to the Appeals Chamber decision on the Prosecutor's appeal to the stay of proceedings, Judge Pikis argued that the Prosecutor may have breached his obligation of objectivity. More precisely, the Prosecutor should have used the 'lead-evidence' obtained through confidentiality agreements "to generate evidence reproducing or corresponding to

¹¹²⁵ ICC, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-1401, T. Ch. I, 13 June 2008. Most of this confidential evidence was obtained from the UN. In this regard, consider Article 18 (3) of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 2283 UNTS 195, entry into force 4 October 2004 ('The United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations').

¹¹²⁶ *Ibid.*, par. 22.

¹¹²⁷ ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled "Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008", *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-1486 (OA 13), A. Ch., 21 October 2008, par. 1 – 2.

¹¹²⁸ *Ibid.*, par. 42.

¹¹²⁹ *Ibid.*, par. 44.

evidential material collected from the providers”. Otherwise, the Prosecutor would fall short of his obligation of objectivity.¹¹³⁰ Hence, insofar that the information was not used to gather exonerating evidence corresponding to the evidence obtained through confidentiality agreements the Prosecutor may have breached his or her obligation of objectivity under Article 54 (1) (a) ICC Statute. According to Judge Pikis, “[t]here is nothing to suggest that any consistent effort was made to generate evidence from the material received. On the contrary, the indications are that little, if anything, was done in that direction, resting on the hope that the providers would consent to disclosure of such confidential material to the accused.”¹¹³¹ However, whether the Prosecutor did in fact fall short of his obligation of objectivity is difficult to assess. Before the Trial Chamber, the Prosecution argued that it was looking in its documents to identify alternatives in case the information providers would not agree to restrictions on the disclosure of exculpatory evidence being lifted.¹¹³² Later, the Prosecution suggested that “the exculpatory value of the non-disclosed material has been covered in other documents or information that have already been served.”¹¹³³ However, the Trial Chamber rejected such arguments insofar that it would not offer a valuable solution insofar as it would require the Trial Chamber to see the original evidence for it to assess whether it was analogous.¹¹³⁴ Besides, as Pikis argued, this ‘alternative evidence’ would not offer a solution to the Prosecutor’s disclosure obligations with regard to exculpatory evidence in its possession.¹¹³⁵ While this ‘alternative evidence’ arguably may not meet the Prosecutor’s

¹¹³⁰ ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled “Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-1486 (OA 13), A. Ch., 21 October 2008, Separate Opinion of Judge Georghios M. Pikis, par. 41 (“As may be gathered from the position of the Prosecutor advanced before the Trial Chamber, he is not free of responsibility for the failure to generate evidence reproducing or corresponding to evidential material collected from the providers. Article 54 (1) (a) of the Statute binds the Prosecutor to collect not only inculpatory but exculpatory evidence too. The omission of the Prosecutor in this case to gather exculpatory evidence of which he was aware is another reason marking the failure of the Prosecutor to make disclosure of exculpatory evidence to the defence”).

¹¹³¹ *Ibid.*, par. 42.

¹¹³² ICC, Transcript, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-T-52, T. Ch. I, 10 October 2007, p. 18.

¹¹³³ ICC, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-1401, T. Ch. I, 13 June 2008, par. 60; S. SWOBODA, The ICC Disclosure Regime – A Defence Perspective, in «Criminal Law Forum», Vol. 19, 2008, p. 469.

¹¹³⁴ R. KATZMAN, The Non-Disclosure of Confidential Exculpatory Evidence and the *Lubanga* Proceedings: How the ICC Defense System Affects the Accused’s Right to a Fair Trial, in «Northwestern Journal of International Human Rights», Vol. 8, 2009, p. 91.

¹¹³⁵ ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled “Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and

disclosure obligations, it is not possible to assess whether this ‘alternative evidence’ would, in fact, be sufficient for the Prosecutor to respect his obligation of objectivity.

It may be added that the ECtHR has also occasionally expressed a certain mistrust of prosecutorial objectivity. In *Sanoma Uitgevers BV v. The Netherlands*, for example, the Grand Chamber emphasised that while the Dutch public Prosecutor “like any public official, is bound by requirements of basic integrity, in terms of procedure [...] [he or she] is a “party” [...] “and can hardly be seen as objective and impartial so as to make the necessary assessment of the various competing interests.”¹¹³⁶

III.5. The Internationalised criminal tribunals

§ ECCC

The Co-Prosecutors are under an obligation to be ‘independent’ in the execution of their duties.¹¹³⁷ Unlike the Co-Investigating Judges, they are not subject to an explicit obligation to investigate incriminating and exonerating circumstances evenly. However, like the Prosecutors of the *ad hoc* tribunals and the Special Court, the Co-Prosecutors are obliged to disclose to the Co-Investigating Judges ‘any material that in the actual knowledge of the Co-Prosecutors may suggest the innocence or mitigate the guilt of the suspect or the charged person or affect the credibility of the prosecution evidence’ as soon as possible after the introductory submission is filed.¹¹³⁸ Besides, since proceedings are mainly of a civil law nature, it may be argued that the Co-Prosecutors should assist the Court in its truth-finding mission, and, accordingly, equally investigate facts and circumstances *à charge* and *à décharge*. Notably, the Co-Prosecutors are appointed by the Supreme Court of the Magistracy

the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-1486 (OA 13), A. Ch., 21 October 2008, Separate Opinion of Judge Georgios M. Pikis, par. 42. Also Trial Chamber I doubted whether the disclosure of similar evidence can ever suffice where the Defence is entitled to the disclosure of both items. See ICC, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-1401, T. Ch. I, 13 June 2008, par. 60.

¹¹³⁶ ECtHR, *Sanoma Uitgevers BV v. The Netherlands*, Application No. 38224/03, Judgment (Grand Chamber) of 14 September 2010, par. 93.

¹¹³⁷ It follows from Article 19 (2) ECCC Law that the Co-Prosecutors should be ‘independent’ and not seek or receive instructions from governments or other sources. However, no reference is made to a requirement of impartiality. Consider also Article 6 ECCC Agreement.

¹¹³⁸ Rule 53 (4) ECCC IR.

and should, as far as the national Co-Prosecutor is concerned, be selected from among the Cambodian professional Judges.¹¹³⁹ Consequently, they may be expected to behave as ‘officers of the court’. However, to a certain extent, the Co-Prosecutors’ obligation to actively pursue exonerating circumstances or facts remains uncertain, both during the preliminary investigation and thereafter.

During interviews, members of the Office of the Co-Prosecutors maintained, first and foremost, that the Co-Prosecutors should strive to get to the truth. The Co-Prosecutors are under an obligation to not only gather incriminating evidence:

“[i]f, in the judicial investigation phase or the trial phase we come across something that is exculpatory that would affect the outcome of the case we feel that we have an obligation to provide that to the investigative judges and the defense. In the preliminary investigation, my view has been and always is that our role is to pursue suspects for these crimes. But at the same time as we come across and identify exculpatory evidence, [our role is] to collect that and to make sure that goes across with the introductory submission.”¹¹⁴⁰

However, such an obligation is nowhere mentioned explicitly. Rather, the obligation to gather exculpatory evidence follows from the understanding by the Co-Prosecutors of their role.¹¹⁴¹ Staff members emphasise that they are public officials, investigating crimes on behalf of the public interest and society.¹¹⁴² They emphasise that the Co-Prosecutors mission is to discover the truth.¹¹⁴³

¹¹³⁹ Article 18 new ECCC Law, Article 6 (5) ECCC Agreement.

¹¹⁴⁰ Interview with a member of the OCP, ECCC-11, Phnom-Penh, 9-11 November 2009, p. 3.

¹¹⁴¹ *Ibid.*, p. 3. Consider also *ibid.*, p. 4 (“during the preliminary investigation we have a joint role. Our first role is to make sure that we are finding inculpatory evidence to help bring people to account. But when we discover or when we feel that the person that we are investigating or the crime that we are investigating did not occur or the person is not guilty or there would be something that would really diminish or undermine the allegation that the person was involved or that the crime happened, we would have to actively pursue that. [...] [I]n principle if anything would indicate that person’s innocence, there is definitely an obligation for us to pursue that. Otherwise we are starting a process which we do not really believe in or we do not believe that it is necessarily true. That is not our business. That is our responsibility to justice generally, as opposed to our particular duty to make sure that we collect inculpatory evidence”).

¹¹⁴² Interview with a member of the OCP, ECCC-14, Phnom-Penh, 13 November 2009, p. 3 (“in any system, the prosecutor’s role is one of an executive, or part of the executive, who basically investigates crime on behalf of the public interest and society at large, and if he or she finds sufficient evidence, proceeds with charges”); *ibid.*, p. 3 (“that’s my view, that the prosecutor, just like a judge, is being a public official”).

¹¹⁴³ Interview with a member of the OCP, ECCC-14, Phnom-Penh, 13 November 2009, p. 4 (“When a Prosecutor looks for evidence in investigating a crime, he or she looks for evidence of a crime and the truth of that matter. That means, irrespective whether it is inculpatory or exculpatory, you are searching for the truth”); Interview with a member of the OCP, ECCC-11, Phnom-Penh, 9-11 November 2009, p. 3 (“It is to get to the truth”).

One interviewee stressed the fact that the Office of the Co-Prosecutors proposed an amendment to enlarge the provision on disclosure of exculpatory evidence.¹¹⁴⁴ More precisely, insofar that the current obligation in the Internal Rules for the Co-Prosecutors to provide exculpatory evidence seems to end with the sending of the introductory submission to the Co-Investigating Judges, the Office of the Co-Prosecutors requested that the Rules be amended to maintain that there is an obligation to provide exculpatory evidence to the Judges whenever exculpatory evidence is found and throughout the entire proceedings.¹¹⁴⁵

Other staff members of the Office of the Co-Prosecutors are less convinced of the Co-Prosecutors' role in gathering exculpatory evidence. One staff member holds the view that:

“The key role of the prosecution is to find inculpatory evidence. But of course, during the course of our evidence, if we find exculpatory evidence, we will then put them in the case file, along with the inculpatory ones.”¹¹⁴⁶

From the foregoing, it appears that there are divergent views within the Co-Prosecutors' Office regarding the duty to investigate incriminating and exonerating circumstances evenly.

In turn, the Co-Investigating Judges should be impartial and independent in executing their function.¹¹⁴⁷ They may take such investigative measures that are ‘conducive to ascertaining the truth’ and should, to that extent, equally investigate incriminating and exonerating circumstances.¹¹⁴⁸ Hence, the judicial investigation should be objective in nature.¹¹⁴⁹ On one occasion, the Pre-Trial Chamber established that the Co-Investigating Judges had committed an error when they stated that “an investigating judge may close a judicial investigation once

¹¹⁴⁴ *Ibid.*, p. 3.

¹¹⁴⁵ *Ibid.*, pp. 3-4.

¹¹⁴⁶ Interview with a member of the OCP, ECCC-13, Phnom-Penh, 10 November 2009, p. 2.

¹¹⁴⁷ Article 5 (2) and (3) ECCC Agreement. Consider also Article 25 ECCC Law according to which Co-Investigating Judges should have ‘a spirit of impartiality’ and should be independent as well as Article 2 ECCC Code of Judicial Ethics, according to which ‘Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions’.

¹¹⁴⁸ Rule 55 (5) ECCC IR.

¹¹⁴⁹ It may be noted that a considerable amount of litigation concerns the alleged partiality of the Co-Investigating Judges or of members of the OCIJ. Consider *e.g.* ECCC, Decision on IENG Sary's and on Ieng Thirith's Application under Rule 34 to Disqualify Judge Marcel Lemonde, *NUON Chea et al.*, Case No. 002/07-12-2009-ECCC/PTC (05), PTC, 15 June 2010; ECCC, Decision on IENG Sary's Rule 35 Application for Judge Lemonde's Disqualification, *NUON Chea et al.*, Case No. 002/07-12-2009 (07), 29 March 2010; ECCC, Decision on NUON Chea's Application for Disqualification of Judge Marcel Lemonde, *NUON Chea et al.*, Case No. 002/29-10-2009-ECCC/PTC (04), PTC, 23 March 2010. However, such claims were never upheld by the Pre-Trial Chamber.

he has determined that there is *sufficient evidence* to indict a charged person” (principle of sufficiency).¹¹⁵⁰ Instead, the Judges should first close their investigation when they consider that they have accomplished all acts deemed necessary to ascertain the truth. Before issuing a closing order, they should then (upon receiving the final submissions from the Co-Prosecutors) assess whether there is sufficient evidence to send the charged person to trial.¹¹⁵¹ Their obligation to search for exculpatory evidence implies that they have to review documents and other materials, when there is “*prima facie* reason to believe” that these may contain exonerating evidence.¹¹⁵²

§ STL

It follows from Rule 55 (C) of the STL RPE that the Prosecutor should ‘assist the Judges in establishing the truth’. According to the Pre-Trial Judge, “the Prosecutor must act, not merely as a party to the proceedings, but also as an agent of Justice, representing and safeguarding the public interest.” In that capacity according to Rule 55 (C), he shall “assist the Tribunal in establishing the truth and protect the interests of the victims and witnesses. He shall also respect the fundamental rights of suspects and accused.”¹¹⁵³ This language reflects the ICTY’s and the Special Court’s case law by describing the Prosecutor as a ‘minister of justice’. Further in line with the *ad hoc* tribunals’ and the Special Court’s procedural set-ups, the Prosecutor is obligated to disclose exculpatory materials, notwithstanding certain exceptions.¹¹⁵⁴ The Prosecutor’s role is that of an ‘organ of justice’. However, like the *ad hoc* tribunals, he or she is neither obligated to actively search for exculpatory material nor to investigate incriminating and exonerating circumstances equally. The Prosecutor is thus meant to investigate from a prosecutorial perspective.

¹¹⁵⁰ ECCC, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC24), PTC, 18 November 2009, par. 37 (emphasis added). The Co-Investigating Judges reasoned that where it is an impossible task to conduct an exhaustive search for all evidence, “[t]he logic underpinning a criminal investigation is that the principle of *sufficiency of evidence* outweighs that of the *exhaustiveness*” (emphasis added).

¹¹⁵¹ Rules 66 (1) and 67 ECCC IR.

¹¹⁵² ECCC, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC24), PTC, 18 November 2009, par. 36.

¹¹⁵³ STL, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06, PTJ, 29 April 2009, par. 25.

¹¹⁵⁴ Rule 113 (A) STL RPE.

§ SPSC

At the SPSC, requirements of objectivity and impartiality on the Public Prosecutor derived from the constitution of East-Timor.¹¹⁵⁵ They were reflected in the TRCP which required the Public Prosecutor to conduct criminal investigations ‘in order to establish the truth’, and further that ‘[i]n doing so, the public Prosecutor should investigate incriminating and exonerating circumstances equally’.¹¹⁵⁶ Such a prosecutorial role coincides with the ICC’s procedural model and requires the Public Prosecutor to actively investigate exonerating circumstances and leads.

§ Conclusion

Overall, the previous overview indicates that not at all tribunals under review, an obligation of objectivity is incumbent on the Prosecutor. More precisely, not at all tribunals scrutinised there is an active duty incumbent on the Prosecution to go out and gather exonerating evidence, over and above the disclosure obligations that pertain to (potentially) exonerating information and evidence in the Prosecution’s possession. More troublesome is the finding that staff members within the Prosecutor’s office hold different opinions on whether or not the Prosecutor should actively search for exculpatory evidence. At least, this was the case at the ICTR and the ECCC. It illustrates how the use of terminology such as ‘organs of international criminal justice’ is not of any use insofar that such phrases mean different things to different people and so long as Prosecutors define their ethical obligations in different ways. Moreover, to describe the Prosecutor as an ‘organ of international criminal justice’ may, in the absence of any express obligation to gather exculpatory evidence, work to the disadvantage of the accused. Indeed, as one commentator puts it, such a characterisation “allowed the [ICTY]

¹¹⁵⁵ Section 132 (3) of the Constitution of East-Timor (2002) (“In performing their duties, Public Prosecutors shall be subject to legality, objectivity and impartiality criteria, and obedience toward directives and orders as established by law”). According to Section 4.1 UNTAET Regulation 2000/16, Public Prosecutors shall perform their function impartially. They should “act without bias and prejudice and in accordance with their impartial assessment of the facts and their understanding of the applicable law in East Timor, without improper influence, direct and indirect, from any source, whether within or outside the civil administration of East Timor” (Section 4.2 UNTAET Regulation 2000/16).

¹¹⁵⁶ Section 7.2 TRCP.

Tribunal to confer a large measure of discretion on the prosecution in terms of the assistance it is required to give the accused.”¹¹⁵⁷

It has been argued that an obligation of objectivity follows from human rights law. JACKSON argues that the ECtHR’s case law regarding the right to a fair trial, necessitates a “change in legal culture on the part of public authorities”, including police and prosecutors, calling for “a much more protective stance towards defendants.”¹¹⁵⁸ Among others, this would require prosecutors and police to search for evidence *à charge* and *à décharge* in the course of criminal investigations and to share the information gathered with the Defence.¹¹⁵⁹

However, it is not quite clear as to how much this finding derives from the ECtHR’s jurisprudence. The author identifies four ‘principles’ regarding the ECtHR’s vision of on Defence participation in the criminal process: to know (1) the principle that defendants cannot be required to take part in the criminal process, (2) the principle that any participation of the defendant in the criminal process must be informed, (3) that the Defence should be given the opportunity to challenge the evidence and finally, (4) that the national courts must clarify the grounds on which they base their decisions.¹¹⁶⁰ He adds that states enjoy considerable discretion on how to implement these principles in their domestic systems.¹¹⁶¹ Nevertheless, these principles seem to not require an ‘objective’ Prosecutor in the sense of a Prosecutor who equally investigates *à charge* and *à décharge*. Moreover, SUMMERS has argued that the ECommHR has consistently rejected any allegations of partiality of the investigative authorities. Also the ECtHR rejected allegations of violations of Article 6 based on the partiality of the investigative authorities. In this rejection, SUMMERS finds proof of the “Court’s construction of a criminal trial in which the investigators are automatically assumed to be partial”.¹¹⁶² Hence at present, an obligation of objectivity---in the sense of an obligation

¹¹⁵⁷ G. MCINTYRE, Equality of Arms – Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, in «Leiden Journal of International Law», Vol. 16, 2003, p. 282.

¹¹⁵⁸ J.D. JACKSON, The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?, in «Modern Law Review», Vol. 68, 2005, p. 759.

¹¹⁵⁹ *Ibid.*, pp. 759 - 760.

¹¹⁶⁰ *Ibid.*, pp. 758 – 759.

¹¹⁶¹ *Ibid.*, p. 759.

¹¹⁶² S.J. SUMMERS, Fair Trials: the European Criminal Procedural Tradition and the European Court of Human Rights, Oxford, Hart Publishing, 2007, p. 127 (however, whereas the author acknowledges that the Court has constructed the pre-trial phase in an adversarial manner, she adds that such was done in an “instinctive” rather than a “deliberate” manner).

incumbent on the Prosecutor to search for exculpatory evidence---, does not seem to derive from human rights law.

Nevertheless, an objective prosecutorial investigation may be required to fulfil the special goals that these tribunals were set up for. Besides, due consideration should be given to the post-conflict contexts in which these investigations are carried out. For example, the Defence's difficulties in accessing evidence, typically associated with these tribunals, favour imposing an obligation on the Prosecutor to search for exculpatory evidence. Notably, the 'Model Code of Criminal Procedure for Post-Conflict Criminal Justice' prefers a prosecutorial model whereby the Prosecutor gathers evidence both for and against the suspect.¹¹⁶³ This includes a positive obligation to take investigative measures which may reveal exonerating evidence.¹¹⁶⁴

IV. DUE PROCESS OBLIGATIONS

§ *The ad hoc tribunals and the SCSL*

Rules of professional ethics, though often disregarded, are incumbent on the different participants in the investigations. The benchmark cases regarding the *prosecutorial* duty of due diligence in conducting investigations are *Barayagwiza* and *Kajelijeli*. According to the ICTR Appeals Chamber, the duty of due diligence requires the Prosecution to ensure, once it initiates a case, that "the case proceeds to trial in a way that respects the rights of the accused."¹¹⁶⁵ This obligation attaches to the Prosecutor's authority to set the whole legal process in motion by starting an investigation and by submitting an indictment for confirmation.¹¹⁶⁶ Both the *Kajelijeli* and the *Barayagwiza* cases concerned the Prosecutors' responsibilities regarding the detention of a suspect in the custodial state and prior to their

¹¹⁶³ V. O'CONNOR and C. RAUSCH (eds.), *Model Codes for Post-Conflict Criminal Justice* (Vol. II), Washington D.C., United States Institute of Peace Press, 2008, pp. 89 – 90, 93.

¹¹⁶⁴ *Ibid.*, p. 93.

¹¹⁶⁵ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 91-92; ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 220. Both cases concerned the responsibilities of the Prosecutor regarding the detention of a suspect, prior to his or her transfer to the Tribunal.

¹¹⁶⁶ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 91. The Appeals Chamber emphasised that the ultimate responsibility to bring a defendant to trial rests with the Prosecutor. In that regard, the Prosecutor can be likened to the 'engine' driving the work of the tribunal.

transfer to the tribunal. The ordinary meaning of ‘due diligence’ connotes ‘appropriate, sufficient, or proper care and attention’.¹¹⁶⁷ Additionally, the notion (in the way it was referred to by the ICTR Appeals Chamber) denotes an element of ‘diligence’ in the sense of expeditiousness.¹¹⁶⁸

However, prosecutorial diligence is not limited to instances where liberty is deprived. Rather, due diligence is an overarching ethical obligation for the Prosecutor when conducting investigations. On several occasions, the Prosecution was reminded of its task to proceed diligently or expeditiously. While the Trial Chamber in *Furundžija* acknowledged “the constraints under which both parties operate”, it reminded the Prosecution that it should act “particularly diligent, for example, in searching its evidence, records and databases for information relevant to the case in hand and locating witnesses as a matter of urgency.”¹¹⁶⁹ The Trial Chamber “cannot condone inaction, inefficiency, shoddiness and incompetence of any sort.”¹¹⁷⁰ Besides, due diligence may lead the Prosecution to abstain from relying on certain information contained in witness statements where the Prosecution (based on documents in its possession) should have known that such information was incorrect.¹¹⁷¹

However, this is not to say that the prosecutorial requirement of due diligence is identical whether or not a suspect or accused has been deprived of liberty. Rather, it seems that the jurisprudence subscribes to a ‘strengthened’ due diligence notion in cases where a suspect or accused has been deprived of his or her liberty at the tribunal’s behest. As the Trial Chamber acknowledged in *Furundžija*, “it is reasonable for a Trial Chamber to expect a higher level of urgency and expediency” in such cases.¹¹⁷² This jurisprudence reflects the ‘special diligence’ requirement in the ECtHR’s case law in relation to proceedings regarding persons that have been ‘charged’ and are deprived of liberty. More precisely, in its assessment of the ‘reasonable time’ requirement under Article 5 (3) ECHR, the Court will consider (on a case

¹¹⁶⁷ Oxford English Dictionary (2nd ed., 1989); According to Black’s Law Dictionary, it refers to the “diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.” See Black’s Law Dictionary, 8th ed., St. Paul, Minnesota, West Group, 2004, p. 488.

¹¹⁶⁸ Compare F. MÉGRET, Accountability and Ethics, in L. REYDAMS, J. WOUTERS and C. RYNGAERT (eds.), International Prosecutors, Oxford, Oxford University Press, 2012, p. 449.

¹¹⁶⁹ ICTY, The Trial Chamber’s Formal Complaint to the Prosecutor Concerning the Conduct of the Prosecution, *Prosecutor v. Furundžija*, Case No. IT-95-17-PT, T. Ch., 5 June 1998, par. 6.

¹¹⁷⁰ *Ibid.*, par. 6.

¹¹⁷¹ ICTR, Decision on Callixte Nzabonimana’s Appeal against the Trial Chamber’s Decision on Motion for Rule 91 Proceedings against Prosecution Investigators, *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-AR91, A. Ch., 27 April 2012, par. 14.

¹¹⁷² *Ibid.*, par. 5.

by case basis), whether the national authorities displayed ‘special diligence’ in the conduct of proceedings.¹¹⁷³ It was this ‘special diligence’ requirement that led ICTR Trial Chamber III to observe in *Zigiranyirazo* that such a requirement may have been violated when the Prosecutor sought and obtained leave to amend the indictment on three occasions after Zigiranyirazo’s arrest and detention.¹¹⁷⁴ The issue of the length of pre-trial detention and the respective requirements under human rights law will be discussed in detail in Chapter 8.¹¹⁷⁵

These due diligence standards in the jurisprudence are reflected in prosecutorial, ethical ‘good conduct’ standards.¹¹⁷⁶ According to the ICTY and ICTR Standards of Professional Conduct [for] Prosecution Counsel (Regulation No. 2), counsel should always adopt the ‘highest standards of professional conduct’ in the course of investigations and ‘exercise the highest standards of integrity and care, including the obligation always to act expeditiously when required and in good faith’.¹¹⁷⁷ Besides, the ICTY ‘Code of Professional Conduct for Counsel Appearing Before the International Tribunal’ and the ICTR ‘Code of Professional Conduct for Defense Counsel’ contain due diligence obligations for counsel.¹¹⁷⁸ At the SCSL, the ‘Code of Professional Conduct for Counsel with the Right to Audience before the Special Court of Sierra Leone’ stipulates that counsel will act with ‘competence, honesty, skill and professionalism in the presentation and conduct of the case’.¹¹⁷⁹

Furthermore, a duty of due diligence is reflected in several provisions of the RPE, requiring the parties to conduct their respective investigations with proper care. It was previously illustrated how a due diligence standard is relevant for the late introduction of evidence. For example, when parties seek to present additional evidence before the Appeals Chamber or

¹¹⁷³ See *e.g.* ECtHR, *Kudła v. Poland*, Application No. 30210/96, Reports 2000-XI, Judgment (Grand Chamber) of 26 October 2000, par. 111; ECtHR, *Labita v. Italy*, Application No. 26772/95, Reports 2000-IV, Judgment (Grand Chamber) of 6 April 2000, par. 153; ECtHR, *Stögmüller v. Austria*, Application No. 1602/62, Series A, No. 9, Judgment of 10 November 1969, par. 5. Consider also ICTR, Decision on Protais Zigiranyirazo’s Motion for Damages, *Prosecutor v. Zigiranyirazo*, T. Ch. III, 18 June 2012, par. 34.

¹¹⁷⁴ ICTR, Decision on Protais Zigiranyirazo’s Motion for Damages, *Prosecutor v. Zigiranyirazo*, T. Ch. III, 18 June 2012, par. 39.

¹¹⁷⁵ See *infra*, Chapter 8, II.10.

¹¹⁷⁶ F. MÉGRET, *Accountability and Ethics*, in L. REYDAMS, J. WOUTERS and C. RYNGAERT (eds.), *International Prosecutors*, Oxford, Oxford University Press, 2012, pp. 451.

¹¹⁷⁷ Article 2 (d) of the Prosecutor’s Regulation No. 2 of 1999, Standards of Professional Conduct - Prosecution Counsel.

¹¹⁷⁸ Article 3 (iii) and 11 of the ICTY Code of Professional Conduct for Counsel Appearing Before the International Tribunal, (IT/125 REV. 3), 6 August 2009; Article 6 of the ICTR Code of Professional Conduct for Defense Counsel, 14 March 2008.

¹¹⁷⁹ Article 5 (i) of the Code of Professional Conduct for Counsel with the Right to Audience before the Special Court of Sierra Leone, as adopted on 14 May 2005 and amended on 13 May 2006.

when one of the parties seeks a review of the proceedings on the basis of new facts (not known to the moving party at the time of proceedings), it should be shown that the new evidence or the new facts could not have been discovered through the exercise of due diligence during trial.¹¹⁸⁰ The Appeals Chamber normally refuses to admit evidence that was available at an earlier stage but was not presented, due to a lack of due diligence of the party concerned.¹¹⁸¹ Besides, a duty of due diligence in the conduct of the investigations can be derived from the abovementioned jurisprudence on the re-opening of a party's case in exceptional circumstances.¹¹⁸² The primary consideration, when a party seeks to introduce 'fresh evidence', is whether "with *reasonable diligence*, the evidence could have been identified and presented in the case in chief of the party making the applications."¹¹⁸³ The Trial Chamber in *Milošević* noted that while "the Chamber is cognisant of the difficulties that parties before the Tribunal face in investigating and preparing cases of such scope and complexity, it considers that a party seeking evidence intended for use in its case in chief should not wait until several months after the commencement of its case to begin the process of obtaining it."¹¹⁸⁴ With the exception of situations where the Prosecutor is ignorant of the existence of an item of evidence, the reasonable diligence standard is not satisfied in cases where no attempt to locate or obtain the evidence in question was made until after the close of the party's case and no explanation for such delay is provided. In this sense, the duty of reasonable diligence requires the Prosecutor to secure evidence before it closes its case.¹¹⁸⁵

¹¹⁸⁰ Such an obligation of due diligence is explicitly provided for under Rule 119 (A) ICTY RPE and Rule 120 (A) ICTR RPE (on new facts) and not in Rule 120 SCSL RPE. Rule 115 ICTY, ICTR and SCSL RPE (on new evidence) does not explicitly call for a showing of *due* diligence. Nevertheless, it was already illustrated how the case law requires a showing of due diligence. See Chapter 3, I.3.1.

¹¹⁸¹ M. KARNAVAS, *Gathering Evidence in International Criminal Trials – The View of the Defence Lawyer*, in M. BOHLANDER (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, Cameron May, London, 2007, p. 126.

¹¹⁸² In addition to the references cited *supra*, Chapter 3, I.3, fn. 151, consider ICTY, Decision on Motion to Re-Open the Prosecution Case, *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.5, A. Ch., 9 May 2008, par. 23; ICTY, Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex, *Prosecutor v. Milošević*, Case No. IT-02-54-T, T. Ch., 13 December 2005, par. 25. On the Re-opening of the Defence case, see *e.g.* ICTY, Decision on the Praljak Defence Motion to Reopen its Case, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, T. Ch. III, 23 November 2010, par. 17; ICTY, Decision on the Petković Defence Motion to Reopen its Case, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, T. Ch. III, 23 November 2010, par. 12; ICTY, Decision on Jadranko Prlić's Defence Motion to Admit Evidence Rebutting Evidence Admitted by the Decision of 6 October 2010, Case No. IT-04-74-T, T. Ch. III, 24 November 2010, par. 15; ICTY, Decision on the Stojić Defence Request to Reopen its Case, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, T. Ch. III, 25 November 2010, par. 15.

¹¹⁸³ ICTY, Judgment, *Prosecutor v. Delalić et al. (Čelebići case)*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 283 (emphasis added).

¹¹⁸⁴ ICTY, Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex, *Prosecutor v. Milošević*, Case No. IT-02-54-T, T. Ch., 13 December 2005, par. 25.

¹¹⁸⁵ *Ibid.*, par. 25.

In a similar vein, parties in the proceedings before the ICC should exercise due diligence in conducting their respective investigations. It follows from Article 54 (1) (b) ICC Statute that the Prosecutor should ‘[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court’ and in doing so, respect the interests and personal circumstances of victims and witnesses’. Besides, several provisions hint to the existence of a duty of due diligence. For example, it follows from Article 84 (1) (a) ICC Statute that a conviction or sentence can be revised in the event that new evidence is discovered and where such evidence ‘was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making such application’. This latter part may be interpreted as requiring that the evidence would not have been available at trial through the exercise of due diligence by the party.¹¹⁸⁶

The Regulations of the Office of the Prosecutor do not include an explicit duty of diligence in the conduct of investigations. Nevertheless, such a duty may be read into the requirement that OTP staff should uphold the highest standards of efficiency, competence and integrity.¹¹⁸⁷ Besides, according to the Code of Conduct for the Office of the Prosecutor, staff should be guided by the principles of ‘fair, impartial, effective and expeditious investigation and prosecution’.¹¹⁸⁸ They should ‘act with competence and diligence’ and ‘fully respect the rights of persons under investigation and the accused’.¹¹⁸⁹ On several occasions, criticisms of the Court of the Prosecutor’s investigatory methods called the Prosecutor’s diligence in conducting investigations into doubt. It was discussed above how extensive post-confirmation investigations are a reason for concern.¹¹⁹⁰ Therefore, it is important to understand that the possibility for the Prosecutor to continue investigations post-confirmation is limited by the overarching obligations of diligence and expeditiousness.

¹¹⁸⁶ C. STAKER, Article 84, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1493.

¹¹⁸⁷ Regulation 17 ICC of the Regulations of the Prosecutor. Earlier drafts of the Regulations included an explicit duty to act diligently in the course of investigations, also with regard to the issue of pre-trial detention, but such duty does not appear in the final version of the Regulations.

¹¹⁸⁸ Article 8 (c) of the Code of Conduct for the Office of the Prosecutor.

¹¹⁸⁹ Article 51 of the Code of Conduct for the Office of the Prosecutor.

¹¹⁹⁰ See *supra*, Chapter 3, I.3.5. Additionally, consider the harsh criticism of Judge Van den Wyngaert with regard to the “negligent attitude” of the Prosecution in verifying the trustworthiness of evidence collected. See ICC, Decision on Defence Application pursuant to Article 64(4) and Related Requests, *Prosecutor v. Uhuru Muigai Kenyatta, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-728, T. Ch. V, 26 April 2013, Concurring Opinion of Judge Christine Van den Wyngaert, par. 4

§ ECCC

A duty of due diligence is incumbent on the Co-Investigating Judges.¹¹⁹¹ Besides, and in line with the previously discussed human rights law, the diligence displayed in the conduct of the investigation is a factor that the Co-Investigating Judges or the Pre-Trial Chamber should consider when assessing the continuation of detention or release of a person deprived of his or her liberty.¹¹⁹² In this regard, the Pre-Trial Chamber sought guidance in the ‘special diligence’ requirement found in the ECtHR’s practice.¹¹⁹³ A more general duty of due diligence, in the sense of expeditiousness, can be found in Rule 21 (4) ECCC IR.¹¹⁹⁴

The ECCC’s procedural framework does not explicitly provide for a prosecutorial duty of due diligence in the conduct of investigations. No such duty of (due) diligence seems to be explicitly provided for by the ECCC’s procedural framework. Again, however, different provisions reflect such a duty. For example, the revision of a final judgment is possible on the ground that new evidence has been discovered. One of the preconditions for such a revision is that the evidence ‘was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making the application’.¹¹⁹⁵ Such a requirement presupposes the existence of a duty of diligence in the conduct of investigations, incumbent on the parties.

¹¹⁹¹ Article 5 ECCC Code of Judicial Ethics. One example is the exercise by the Co-Investigating Judges of due diligence in keeping victims informed and ensuring that their rights are protected throughout the proceedings (pursuant to Rule 21 (1) (c) ECCC IR). See ECCC, Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, *Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 76, PTC 112, PTC 113, PTC 114, PTC 115, PTC 142, PTC 157, PTC 164, PTC 165, and PTC 172), PTC, 24 June 2011, par. 51 – 54.

¹¹⁹² Consider *e.g.* ECCC, Decision on IENG Sary’s Appeal against Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC32), PTC, 30 April 2010, par. 16, 57 – 61; ECCC, Decision on the Appeal against Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009, par. 44; ECCC, Decision on Appeal of Ieng Sary against OCIJ’s Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/19-19-2007-ECCC/OCIJ (PTC17), PTC, 26 June 2009, par. 38.

¹¹⁹³ ECCC, Decision on Appeal of Ieng Sary against OCIJ’s Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/19-19-2007-ECCC/OCIJ (PTC17), 26 June 2009, par. 41.

¹¹⁹⁴ Rule 21 (4) ECCC IR stipulates that “[p]roceedings before the ECCC shall be brought to a conclusion within a reasonable time.”

¹¹⁹⁵ Rule 112 (1) (a) ECCC IR.

§ *STL*

No explicit requirement for the parties to conduct their respective investigations with due diligence can be found in the procedural framework of the STL. However, such a requirement, incumbent on the parties, can indirectly be construed. Firstly, additional evidence may only be presented before the Appeals Chamber by a party when such evidence was not available at trial and could not have been discovered through the exercise of due diligence when conducting the investigation.¹¹⁹⁶ Secondly, a review of a final conviction is only possible when ‘material new evidence’ has been discovered that could not have been discovered by the parties through the exercise of due diligence.¹¹⁹⁷

Furthermore, a more general duty of due diligence is reflected in rules of professional ethics. In this regard, note the ‘Code of Professional Conduct for Counsel Appearing before the Tribunal’. It also applies to ‘Counsel whose work outside the courtroom directly supports their co-counsel’s in-court representation and whose conduct may impact the integrity and fairness of the Tribunal’s proceedings’.¹¹⁹⁸ Among others, it states that counsel shall ‘act with integrity’, shall ‘conduct himself or herself professionally’, in keeping with the fair trial rights of the accused and shall ‘diligently’, ‘expeditiously’ and to the best of his or her abilities represent the client’s interests.¹¹⁹⁹ However, this latter duty of diligence seems ‘partisan’ in the sense that it is limited to the representation of the interests of counsel’s own client.

§ *SPSC*

In line with what was said regarding other international criminal tribunals, a duty of due diligence in the conduct of the investigation was incumbent on the parties in the proceedings before the SPSC. In a similar vein, such a duty is not expressly provided for but this duty may be derived from limitations as to the introduction of new evidence on appeal. Here too, the introduction of new evidence was limited to instances where the evidence ‘was not known to

¹¹⁹⁶ Rule 186 (C) STL RPE.

¹¹⁹⁷ Rule 190 (A) STL RPE.

¹¹⁹⁸ STL, Code of Professional Conduct for Counsel Appearing before the Tribunal, STL-CC-2011-01, 28 February 2011, p. 1.

¹¹⁹⁹ *Ibid.*, pp. 1 - 2.

the moving party at the time of the prior proceedings and could not have been discovered through the exercise of due diligence'.¹²⁰⁰

PRELIMINARY FINDINGS

No uniform approach could be identified regarding a *minimum threshold* for the commencement of investigations. Such a threshold is provided for at some tribunals (the *ad hoc* tribunals ('sufficient basis to proceed'), the ICC ('reasonable basis to proceed') and the ECCC, regarding judicial investigations ('reason to believe')). In the absence of this minimum threshold at other tribunals under review, it appears that the Prosecutor's authority to rely on the investigative measures at his or her disposal is not limited by any requirement of initial suspicion.

From the existence of a minimum threshold follows the existence of what has been labelled a 'pre-investigation' phase. The purpose of this phase is to establish whether or not the minimum threshold for the commencement of a 'full investigation' has been reached. The procedural frameworks of only some of the tribunals explicitly provide for and regulate such a pre-investigation phase (ICC ('preliminary examinations') and the ECCC ('preliminary investigations')). In turn, the Statute and the RPE of the *ad hoc* tribunals do not regulate this preliminary phase of proceedings. Those tribunals that do envisage such a preliminary phase share the fact that the Prosecutor's powers at this stage are limited. Where these powers are normally 'passive' in nature, the Co-Prosecutors at the ECCC possess broader law enforcement powers, including limited search and seizure powers and the power to take suspects into police custody for up to 72 hours. These broader powers betray the more civil law nature of pre-trial proceedings at the ECCC. Only when a threshold has been met, the opening of a judicial investigation by the Co-Investigating Judges---thereby allowing for wider investigative powers---, is possible. In turn, the ECCC's procedural framework does not define a minimum threshold for the commencement of the preliminary investigation.

Besides, unlike the other tribunals scrutinised, at the ECCC, the preliminary investigation is the responsibility of another organ than conducts the investigation proper. Whereas the former is the joint responsibility of the Co-Prosecutors, the Co-Investigating Judges are in charge of

¹²⁰⁰ Section 41.2 TRCP.

the judicial investigation. It was shown how this set-up, while not unfamiliar to civil law criminal justice systems, is not found at any of the other international(ised) tribunals. It was illustrated how the unfamiliarity with this division of investigative responsibilities over different actors in practice prevents the system from being fully applied as it was intended. In turn, this results in a duplication of investigative efforts and a loss of efficiency. Notwithstanding these differences, the pre-investigation phase at the different tribunals was found to serve the same function; that is, to determine whether the minimum threshold is met for opening a full investigation. In that regard, this preliminary phase will protect the interests of the individuals targeted by the investigation. Besides, it protects against the spending of scarce resources on investigations that do not stand any chance of resulting in an actual prosecution. With the exception of when the ICC Prosecutor makes use of his or her *proprio motu* powers, there is no explicit judicial control over a positive determination that the minimum threshold for opening a full investigation is met.

With the exception of the ECCC, the Prosecutor is in charge of the investigation *sensu stricto*. Most courts and tribunals under review (the *ad hoc* tribunals, SCSL, SPSC, STL) define the investigation as ‘all investigative activities undertaken by the Prosecutor for the collection of information or evidence’. It was concluded that such a definition is faulty insofar that the more adversarial nature of proceedings before these tribunals requires the Defence to conduct its own investigations. In a similar vein, the statutory documents of these tribunals nowhere explicitly detail the Defence’s investigative powers. With the exception of the ECCC, it was found that no strict temporal limitation applies to the investigation insofar that it may, under certain conditions, continue after the commencement of the prosecution phase. It was argued that because any continuation of prosecutorial investigations after the confirmation of charges interferes with defence preparations, this should remain exceptional. Besides, they are limited by the Prosecutor’s obligations of due diligence and expeditiousness.

At the ECCC, the Defence is not allowed to undertake its own investigations (with the exception of ‘preliminary inquiries’). Rather, further reflecting the civil law style of proceedings at this stage of proceedings, the Defence can (as can the Co-Prosecutors or the civil parties) *request* the Co-Investigating Judges to undertake certain investigative acts. A similar possibility existed at the SPSC insofar that the Defence could request the Public Prosecutor or the Investigating Judge to order or conduct certain investigative acts. In practice, however, the Defence was not prohibited from conducting its own investigations.

It was concluded that, in the course of international criminal investigations, the judicial role is traditionally limited. Again, the exception are the ECCC, where the investigation is in the hands of the Co-Investigating Judges, and the SPSC, where a judicial authorisation was required to resort to the use of coercive measures during the investigation. Nevertheless, there is a notable trend towards a greater judicial role in the conduct of investigations. At the ICC and the STL, the Pre-Trial Chamber and the Pre-Trial Judge, respectively, possess limited but important powers during the investigation in order to assist the parties in the preparation of their respective cases. Besides, the ICC Pre-Trial Chamber confirmed its role in protecting the rights of suspects during the investigation.

Investigations before international criminal tribunals are normally *reactive* in nature. Although the same holds true for investigations into ‘situations’ by the ICC Prosecutor, it was shown how the Court’s jurisprudence may be interpreted as allowing for investigations into situations to become partly proactive in nature. Such interpretation is based on the understanding by several Pre-Trial Chambers that a situation ‘can include not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation of crisis referred to the Court as ongoing at the time of the referral’. If such an interpretation, allowing for investigations to become partly proactive, were to be upheld in the future, a number of requirements should apply to the proactive application of investigative measures. These include (i) the requirement of a judicial purpose, (ii) the need for a precise definition of proactive investigative powers, (iii) the related requirements of proportionality, subsidiarity and judicial approval, insofar that proactive investigative techniques interfere with the right to privacy as well as (iv) the requirement of independent and impartial supervision of proactive investigative efforts. It was shown how most of these requirements would be problematic if the ICC’s procedural framework were to be understood as allowing for proactive investigative efforts. Additionally, it was shown how there is no adequate legal basis for the storage of information gathered proactively. Among others, it would be unclear as to what information could be stored, to what use such information could be put or how long and under what conditions information gathered proactively could be stored. In that regard, human rights law may be instructive. For all of the above reasons, the ICC’s procedural framework should not be understood as allowing for proactive investigative efforts.

It was also concluded that the international Prosecutor enjoys considerable discretion in initiating investigations. Hence, it could be argued that the Prosecutor is guided by a ‘principle of opportunity’. Nevertheless, since this terminology originates from national criminal procedural law (where it is distinguished from the principle of legality), it was concluded that it does not translate well to investigations and prosecutions by the international tribunals under review. Therefore, it is preferable to refer to the international Prosecutor’s ‘considerable discretion’. No uniform approach could be discovered with regard to the decision to prosecute.

The statutory documents of several tribunals (SCSL, ECCC, ICTY) include limiting language, requiring the Prosecutor to focus on a specific group or category of persons. At all tribunals, such language offers ‘guidance’ to the Prosecutor on how to exercise his or her discretion. Regarding the SCSL and the ECCC, the Appeals Chamber and the Supreme Court Chamber’s positions, that such limiting language offers mere guidance and does not encompass a jurisdictional threshold, were criticised.

Discretion is further limited by the principles of equality and non-discrimination, both of which ultimately derive from human rights law. Closely related is the principle of impartiality in investigating and prosecuting crimes. It entails that prosecutorial discretion is applied evenhandedly to different groups or persons. The principle of prosecutorial independence is also important insofar that it entails that the Prosecutor does not seek or receive instructions from external sources.

None of the tribunals under review made prosecutorial guidelines on the exercise of prosecutorial discretion public. It was argued that it is preferable for tribunals to provide for public *ex ante* prosecutorial guidelines. Among others, such guidelines ensure transparency and coherence and ensure the protection of the aforementioned principles of equality and non-discrimination. Besides, they shield the international Prosecutor from outside political pressure. It would bring the prosecutorial practice in accordance with international and regional ‘guiding principles’ for Prosecutors. Nevertheless, one obstacle to the adoption of these guidelines is the need to first determine and rank the goals of international criminal prosecutions insofar that these influence any guidelines on the exercise of prosecutorial discretion.

No uniform approach regarding institutional and judicial restraints of prosecutorial discretion could be found. However, it was concluded that forms of judicial review over prosecutorial discretion are increasing.

The principle of objectivity is another principle that is not firmly established in international criminal procedural law. It requires the Prosecutor to investigate incriminating and exonerating evidence or information equally. Such a principle was found at the ICC and the SPSC. At the ECCC, such a principle is incumbent on the Co-Prosecutors during the preliminary investigation and on the Co-Investigating Judges during the judicial investigation. While the Prosecutors of the *ad hoc* tribunals, the SCSL and the STL have been described in the case law as an ‘organ of international criminal justice’ or a ‘minister of justice’, it was concluded that such language means little in the absence of any express obligation to gather exculpatory evidence. It was recommended that a principle of objectivity be adopted by all tribunals. In particular, to some extent it may offer a solution regarding the Defence’s difficulties in accessing evidence. Besides, it may better serve the idiosyncratic goals of international criminal proceedings.

Lastly, it was found that an ethical duty of due diligence is incumbent on the participants in the conduct of investigations.

SECTION II: THE COLLECTION OF EVIDENCE

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I. INTRODUCTION

Interrogating or questioning individuals is an important investigative measure in the evidence-gathering process. Statements that have been obtained from the suspect or the accused person can be particularly valuable for the Prosecutor. Statements resulting from suspect interviews, especially when they are confessional in nature, facilitate the Prosecution's burden to establish a *prima facie* case against the suspect. Since the interrogation of suspects or accused persons has been regulated in detail in international criminal procedure, statements that abide by the procedural rules carry strong *indicia* of reliability and authenticity.¹²⁰¹ In turn, the existence of sufficient procedural guarantees to prevent any form of undue pressure or oppressive questioning is necessary since the questioning of the suspect or accused person is "a key pressure point in criminal procedure."¹²⁰²

It is the aim of the present chapter to outline the legal requirements in the form of 'minimum rules' and procedural safeguards that the Prosecutor should respect when interrogating an accused person or a suspect. The use of the resulting statements as evidence at trial is not part of this discussion, but the issue will be touched upon when necessary.¹²⁰³ It goes without saying that these statements contain valuable information that the Prosecutor would often like to tender as evidence.

* This chapter is an expanded and updated version of this author's section 'Interrogation of Suspects and Accused Persons' in K. DE MEESTER, K. PITCHER, R. RASTAN and G. SLUITER, Investigation, Coercive Measures, Arrest and Surrender, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, pp. 214 – 254.

¹²⁰¹ ICTY, Prosecution Motion for Admission of Evidence from the Bar Table Pursuant to Rule 89(C), *Prosecutor v. Hartmann*, Case No. IT-02-54-R77.5, T. Ch., 17 February 2009, par. 18 ("it would be difficult to conceive of evidence that has stronger *indicia* of reliability and authenticity than a Suspect interview, conducted with the benefit of experienced counsel, which proceeded in accordance with the safeguards under Rules 42 and 43, and was then preserved for trial under Rule 41").

¹²⁰² A. ASHWORTH and M. REDMAYNE, *The Criminal Process*, Oxford, Oxford University Press, 2005, p. 81.

¹²⁰³ For a discussion of the case law of the international criminal courts on this particular issue, see, e.g., C. GOSNELL, Admissibility of Evidence, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), *Principles of Evidence in International Criminal Justice*, Oxford, Oxford University Press, 2010, pp. 415 – 418; V. TOCHILOVSKY, Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence, Leiden – Boston, Martinus Nijhoff Publishers, 2008, pp. 438-441; S. SWOBODA, Admitting Relevant and Reliable Evidence: The ICTY's Flexible Approach Towards the Admission of Evidence under Rule 89 (C) ICTY RPE, in T. KRUESMANN (ed.), *ICTY: Towards a Fair Trial?*, Antwerp, Intersentia, 2009, pp. 379 - 388; S. LUZZATI, On the Admissibility of Statements Made by the Defendant Prior to Trial: Remarks on the ICTY Appeals Chamber's Decisions in *Halilović* and *Prlić et al.*, in «Journal of International Criminal Justice», Vol. 8, 2010, pp. 221 – 236 (on the jurisprudence of the ICTY relevant to the admission of prior statements of the accused).

This chapter will start by comparing the different *procedural statuses* of persons being questioned (witness – suspect – accused person). It will highlight the importance of a clear delineation between them. Similar to national criminal justice systems, defining the status of the person being questioned is necessary for determining the precise procedural norms that apply to them and what rights they can avail themselves. It is important to recognize that this status is not static but may change over the course of the criminal investigation. The remainder of this chapter will only deal with the interrogation of suspects and accused persons, while the subject of questioning witnesses will be dealt with in the subsequent chapter (Chapter 5).

Secondly, it will be necessary to determine what the exact *scope* of these procedural rules on the conduct of an interrogation is. It was previously discussed how investigative actions will often be executed by national law enforcement officials.¹²⁰⁴ How far, then, should the procedural rules for questioning suspects and accused persons under international criminal procedural law be respected when the questioning is conducted by national law enforcement personnel or another international actor? The interplay between the international and national level needs to be scrutinised to determine the applicable procedural rules (international versus national rules of criminal procedure).

The core of this chapter consists of discussing the procedural powers (sword dimension) and safeguards (shield dimension) relevant to questioning suspects and accused persons. It will include a comparison of the procedural frameworks of the different international(ised) criminal courts and tribunals under review with special attention to the practices of these institutions. Notwithstanding the detailed regulation of this aspect of the investigation, the practice of the different tribunals reveals several problems that may arise when conducting an interrogation. Most litigation concerns such questions as the waiver of the right to counsel and the voluntariness or lack thereof in questioning. This chapter will ultimately result in the identification of some general procedural rules regarding the conduct of the interrogation of suspects and accused persons under international criminal procedural law.

¹²⁰⁴ See *supra*, Chapter 2, VII.1.

II. APPLICABLE PROCEDURAL REGIME

II.1. Status of the interviewee

II.1.1. Introduction

Different procedural rules regulate the interrogation or questioning of individuals, depending on the status of the person being questioned. More safeguards are in place when the person being questioned is a suspect or an accused person.¹²⁰⁵ Other circumstances may also have an influence on the procedural regime for conducting interrogations; firstly, whether or not the person being interrogated is detained or not.¹²⁰⁶ In this and the following chapter, a distinction will be drawn between the questioning of witnesses, suspects and accused persons. Further distinctions are possible, for example, based on the relationship of the person interrogated with the victim(s) of the crimes allegedly committed or with the suspect(s) or accused person(s).¹²⁰⁷ While such relationships may have an influence on the weight afforded to a given testimony, the same procedural rules apply to questioning these persons. Therefore, such a distinction is not useful for this study. In short, the following parameters will be taken into consideration in the present and following chapters as they potentially impact the rules governing the questioning of persons in international criminal procedure:

- The person who is conducting the interrogation or interview: is the questioning conducted by the Prosecutor, the Prosecutor's staff, by national authorities or by the defence counsel or his or her staff?
- The status of the interrogated person: suspect, accused person or witness (victim)?
- Is the person detained or not (custodial v. non-custodial interrogations)?

II.1.2. Suspects v. witnesses

The first important distinction for determining the applicable procedural regime is the distinction between suspects and witnesses. Whereas detailed provisions regulate the rights of suspects during an interrogation as well as the conduct of the interrogation, not many

¹²⁰⁵ See *infra*, Chapter 4, I.3.

¹²⁰⁶ Certain rights attach where the person is deprived of liberty, e.g. the right to be promptly informed of the reasons of the arrest. See in detail, *infra*, Chapter 7, V.

¹²⁰⁷ For this distinction, see C.J.M. SAFFERLING, *Towards an International Criminal Procedure*, Oxford, Oxford University Press, 2001, p. 131.

procedural norms detail the questioning of witnesses, irrespective of whether they are questioned by the Prosecution or by the Defence.¹²⁰⁸

The situation becomes more complicated when a witness later becomes a suspect or an accused. The ICTY Trial Chamber considered this situation in *Halilović*.¹²⁰⁹ The Prosecution sought to tender a statement by Halilović from the bar table, given some five years before the indictment against him was confirmed.¹²¹⁰ At the relevant time, the Prosecution did not consider him a suspect.¹²¹¹ Nevertheless, the Prosecution anticipated that Halilović could become a suspect and, on several occasions, informed him of his right to counsel and the right to remain silent. The question raises what safeguards should be applied for the admissibility of witness statements in the event that these witnesses later become suspects or accused persons.¹²¹² The underlying question is whether the statements taken when a person was still considered a witness, should respect the procedural safeguards for suspects and accused persons, as laid down in the procedural framework of the ICTY? In other words, should these procedural safeguards be applied *retroactively*? The Trial Chamber in *Halilović* stated that:

“The fundamental difference between an accused and a witness may result in an inadmissibility of a statement of an accused taken at the time when he was still considered a witness, insofar as the statement was not taken in accordance with Rules 42, 43 and 63 of the Rules. [...] [I]n order to protect the right of the Accused to a fair trial, in accordance with Article 21 of the Statute, it should be taken into account whether the safeguards of Rules 42, 43 and 63 of the Rules have been fully respected when deciding on the admission of *any* former statement of an accused irrespective of the status of the accused at the time of taking the statement.”¹²¹³

The Trial Chamber stated that the statement was only a summary of seven days of interviews, taken over a period of four months.¹²¹⁴ Because there was no recording pursuant to Rule 43

¹²⁰⁸ See *infra*, Chapter 5.

¹²⁰⁹ ICTY, Decision on Motion for Exclusion of Statement of Accused, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, T. Ch. I, Section A, 8 July 2005; ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, par. 19 *et seq.*

¹²¹⁰ This statement was the result of different interviews with *Halilović* in February and May 1996.

¹²¹¹ ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, par. 22.

¹²¹² *Ibid.*, par. 37.

¹²¹³ ICTY, Decision on Motion for Exclusion of Statement of Accused, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, T. Ch. I, Section A, 8 July 2005, par. 21.

¹²¹⁴ *Ibid.*, par. 25.

(which deals with the recording of the interrogation of *suspects*), the Chamber could not verify the accuracy of the statement. The Trial Chamber further held that *Halilović* had not chosen to waive his right to remain silent at trial (the only way he could challenge the contents of the statement if admitted into evidence).¹²¹⁵ Consequently, the Trial Chamber did not admit the statement pursuant to Rule 89 (D) of the ICTY RPE.¹²¹⁶ Nevertheless, the Chamber did not seem to find that the violation of Rule 43 meant having to automatically exclude the statement of the accused.¹²¹⁷

The issue was considered again by the Appeals Chamber in its final judgement. The Appeals Chamber found that the statement was correctly excluded by the Trial Chamber, but clarified that the statement's being inadmissible due to a retroactive reading of Rule 43 of the Rules was not decisive in the Trial Chamber's reasoning.¹²¹⁸ The Appeals Chamber excluded the statement pursuant to Rule 89 (D) of the Rules, because it did not consider the statement reliable enough and thus could have threatened the fairness of the proceedings.¹²¹⁹ Consequently, the Appeals Chamber did not address the question of whether the procedural safeguards for the interrogation of suspects or accused persons *should* be upheld when questioning a witness who later becomes a suspect or accused.

In the opinion of this author, the ICTY missed an important opportunity to clarify this issue. Interestingly though, two of the three separate opinions to the Appeals Chamber's decision, those of Judge Schomburg and Judge Meron, dealt with this particular question.¹²²⁰ Leaving the issue of the admissibility of prior statements aside, it is important to establish whether the procedural safeguards for questioning should be retroactively applied when a witness later becomes a suspect or an accused. A positive answer to this question would mean that the Prosecutor should always apply the procedural safeguards in Rule 42 and 43 if there is a chance that this witness may become a suspect or accused person. Judge Meron supported this

¹²¹⁵ For a discussion on the right to remain silent during interrogation, see *infra*, Chapter 5, III.3.

¹²¹⁶ ICTY, Decision on Motion for Exclusion of Statement of Accused, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, T. Ch. I, Section A, 8 July 2005, par. 27.

¹²¹⁷ As will be discussed, *infra*, Chapter 4, II.2.3.

¹²¹⁸ ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, par. 38.

¹²¹⁹ *Ibid.*, par. 38-39.

¹²²⁰ ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Separate Opinion of Judge Meron and ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Separate Opinion of Judge Schomburg.

retroactive application of the procedural safeguards.¹²²¹ Because of the underlying purposes of these procedural safeguards, namely voluntariness and reliability, they imply a value judgement that only those interviews that respect these safeguards can be admitted as evidence. Such a view offers a better protection of the rights of the accused person but places a heavy burden on the Prosecution by requiring that any interrogation be recorded from the moment there is even a possibility that the witness may become a suspect.

Judge Schomburg, on the other hand, argued that the procedural safeguards apply as soon as the witness becomes a suspect.¹²²² The Chamber should assess *ex post* whether or not the person qualified as a suspect or accused at the moment that their statement was taken. In other words, the Chamber should consider whether or not the objective requirements for a person to become a suspect or an accused person were fulfilled. Contrary to Meron, Schomburg's opinion does not require the Prosecutor to make audio recordings of all statements made by witnesses that may become a suspect.¹²²³ Judge Schomburg's reasoning on this point seems to be in line with the case law of the ICTR. In the *Zigiranyirazo* case, the Trial Chamber *ex post* examined whether the accused---who was treated as a witness during an interview with the Prosecution---, objectively qualified as a suspect at the relevant time. In that case, the Chamber found that, "while the evidence is not conclusive, there is evidence that the Prosecution possessed information that the accused had committed crimes over which the ICTR had jurisdiction and should, given this uncertainty, have been considered a suspect at the relevant time."¹²²⁴ It follows that the Prosecution has no obligation to retroactively apply prosecutorial safeguards from the interrogation of suspects and accused persons to the questioning of witnesses who later become suspects or accused persons.

The question remains, then, as to the what consequences and remedies there are for violating these procedural safeguards. This is the separate question of the admission of the prior statement into evidence. While the Trial Chamber in *Halilović* was ambiguous on this point,

¹²²¹ ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Separate Opinion of Judge Meron, par. 5-6.

¹²²² ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Separate Opinion of Judge Schomburg, par. 4-5.

¹²²³ *Ibid.*, par. 5 ("The difference between Judge Meron's opinion and mine is that under his approach the Prosecution would *de facto* feel obliged in its own interest to make audio or video recordings of all statements by all witnesses who could potentially become suspects. This would go beyond the ambit of Rule 43 and its clear wording").

¹²²⁴ ICTR, Decision on the *Voir Dire* Hearing of the Accused's *Curriculum Vitae*, *Prosecutor v. Zigiranyirazo*, T. Ch. III, 29 November 2006, par. 9.

the Appeals Chamber still assessed the reliability of the statements and did not uphold an automatic exclusion of the evidence. Later, it will be shown that the consequence of the violation of the procedural safeguards for the questioning of suspects or accused persons is the exclusion of the resulting statements.¹²²⁵ Hence, that the statement in the *Halilović* case was not automatically excluded can be interpreted as a further indication, besides the aforementioned case law of the ICTR, that *no* obligation exists for the Prosecutor to retroactively apply the procedural safeguards.¹²²⁶

Equally important is the question of whether the *definition* of ‘suspect’ is objective or subjective in nature. According to the ICTY, ICTR, SCSL and STL RPE, a suspect is ‘a person concerning whom the Prosecutor possesses reliable information which tends to show that the person may have committed a crime over which the Court has jurisdiction’.¹²²⁷ This definition seems to be objective in nature, insofar that it is based on objective criteria.¹²²⁸ Nevertheless, it has been argued that the Appeals Chamber in *Halilović* held the definition of ‘suspect’ to be *subjective* in nature.¹²²⁹ Under a *subjective* approach, determining the status of a suspect falls under the discretion of the Prosecutor. If such a view were to be upheld, however, it would be necessary to ensure that the person being questioned is given sufficient protection from arbitrarily being deprived of his or her procedural rights. This could be ensured through the possibility of allowing the Trial Chamber to retroactively apply the procedural rights of Rules 42 and 43. The view that the definition of ‘suspect’ is subjective in

¹²²⁵ See *infra*, Chapter 4, IV.

¹²²⁶ This being said, a wider application of the procedural safeguards for the questioning of suspects or accused may prove useful for the Prosecution, as respect for these safeguards will help the Prosecutor later to prove the reliability and voluntariness of the statements made.

¹²²⁷ Rule 2 ICTY, ICTR, SCSL and STL RPE.

¹²²⁸ Confirming, consider ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Separate Opinion of Judge Schomburg, par 4. Judge Schomburg makes an interesting comparison with national states and concludes that some states do rely on objective criteria to determine the point in time that a person becomes a suspect, whereas other states rely on a mixture between objective and subjective criteria, before concluding that such comparative exercise is not necessary given the statutory definition in the RPE; see also ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Declaration of Judge Shahabuddeen, par. 6 (“the test is whether the witness “was objectively a suspect, even though he may be called a witness””).

¹²²⁹ S. SWOBODA, Admitting Relevant and Reliable Evidence: The ICTY’s Flexible Approach Towards the Admission of Evidence under Rule 89 (C) ICTY RPE, in T. KRUESMANN (ed.), *ICTY: Towards a Fair Trial?*, Antwerp, Intersentia, 2009, p. 380 (the author argues that the majority of judges of the Appeals Chamber in *Halilović* refused to accept that the status of a suspect depends on objective criteria and held that the decision to grant the interviewee the status of a suspect falls under the discretion of the Prosecutor. However, it is the opinion of this author that no acceptance of a subjective approach can be read in the Appeals Chamber judgement as this was not a decisive consideration. The difference between the objective and subjective approach was only addressed by Judge Schomburg and Judge Shahabuddeen, respectively in their Separate Opinion and Declaration, see fn. 1228).

nature, however, is incorrect. Firstly, the ICTY Appeals Chamber in *Halilović* did not address whether the definition of ‘suspect’ was objective or subjective in nature and it did not reject the former.¹²³⁰ Secondly, a literal interpretation of the definition of ‘suspects’ in the ICTY RPE shows it to be objective in nature, particularly insofar that it treats the subjective belief of the Prosecutor as irrelevant.¹²³¹ It will be argued later on in this chapter how the procedural rights that apply to the interrogation of suspects embody basic and minimum rights of persons during the investigation that should always be respected when a suspect is being interrogated. Hence, the applicability of these procedural safeguards should not depend upon a *possible* later determination by a Chamber on the admissibility of the results of such interrogation. A further note of caution is warranted here. While it is argued that an objective approach should be upheld, such an approach does not entirely remove prosecutorial discretion. On the contrary, the Prosecutor exercises considerable discretion given the broad nature of the definition of suspects.¹²³² There are only a few cases (e.g. where the Prosecutor seeks to admit the prior statement of an accused at trial, as was the case in *Halilović*), when a Prosecutor’s decision to designate an individual as a suspect is subjected to judicial review.¹²³³ The example of *Sesay*, cited below, exemplifies the inherent risks of abusing discretion in the deliberate withholding of rights from persons being questioned.¹²³⁴ Therefore, it is important for the Prosecutor to treat a witness as a suspect from the moment any fact arises from which it follows that there are grounds to believe that the witness has committed a crime within the jurisdiction of the Court.¹²³⁵ Because of the risk of the abuse of discretion, the holding by the

¹²³⁰ It is the opinion of this author that no acceptance of a subjective approach can be read in the Appeals Chamber decision as this was not a decisive consideration. It is recalled that the difference between the objective and subjective approach was only addressed by Judge Schomburg and Judge Shahabuddeen, respectively in their Separate Opinion and Declaration, see fn. 1228).

¹²³¹ ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Separate Opinion of Judge Schomburg, par 4.

¹²³² S. ZAPPALÀ, *Human rights in International Criminal Proceedings*, Oxford, Oxford University Press, 2003, pp. 50-51; S. ZAPPALÀ, *Rights of Persons During an Investigation*, in A. CASSESE, P. GAETA and J. R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1191 (the author rightly argues that the determination of what is ‘reliable information’ which tends to show that the suspect may have committed a crime within the jurisdiction of the Tribunal does not offer any guidance as to what should exactly be considered ‘reliable information’. Consequently, such determination is subject to the discretion of the Prosecutor).

¹²³³ A. ALAMUDDIN, *Collection of Evidence*, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), *Principles of Evidence in International Criminal Justice*, Oxford, Oxford University Press, 2010, p. 271.

¹²³⁴ See *infra*, Chapter 4, IV.2.

¹²³⁵ See in that regard Regulation 28 of the ICC Draft Regulations of the Office of the Prosecution: “Witness as potential suspect - If during the interview facts are made known on the basis of which there are grounds to believe that the witness has committed a crime within the jurisdiction of the Court, he or she shall be immediately treated as a suspect for the purpose of these Regulations, in particular be informed of his or her rights under article 55 (2) of the Statute.” In a similar vein, see: ICTY Manual on Developed Practices, Turin, UNICRI Publisher, 2009, p. 26.

STL Pre-Trial Judge that only the Prosecutor is in a position to determine whether a person can be considered a suspect is to be criticised.¹²³⁶ Such reasoning blocks any judicial review of the determination by the Prosecutor.¹²³⁷

The ICC Statute avoids the term ‘suspect’, instead referring to a ‘person against whom there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court’. Disagreements on the definition of suspects as well as the wish “to avoid any kind of premature evaluation as to the guilt of the person under investigation” led to the deletion of this term.¹²³⁸ This definition is equally *objective* in nature.¹²³⁹ The Prosecutor has no discretion in deciding whether or not the person should be considered a suspect. It follows from Regulation 41 (2) of the Regulations of the OTP that if any information conveyed during a witness interview raises grounds to believe that the witness has committed a crime within the jurisdiction of the Court, the interviewee will immediately be informed of his or her rights under Article 55 (2) ICC Statute. The stated practice of the Prosecution is that interviews are preceded by a ‘screening interview’, one of the purposes of which is to determine whether the person interviewed qualifies as a suspect.¹²⁴⁰ Similar to the *ad hoc* tribunals, the designation of a person as a suspect is an internal process.

¹²³⁶ STL, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06, PTJ, 29 April 2009, par. 36. Confusingly, the Pre-Trial Judge consequently determined that “the persons detained cannot, at this stage in the investigation, be considered as either suspects or accused persons in the proceedings pending before the Tribunal”.

¹²³⁷ G. METTRAUX, The Internationalization of Domestic Jurisdictions by International Tribunals: The Special Tribunal for Lebanon Renders its First Decisions, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 922 (“If the Prosecutor were the sole arbiter of who can or should be regarded as a suspect for the purpose of these rules, the risk exists that individuals might be denied such status simply to avoid or circumvent the specific safeguards provided for in the Rules”).

¹²³⁸ S.A.F. DE GURMENDI, International Criminal Law Procedures, the Process of Negotiations, in S. LEE (ed.), The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results, The Hague, Kluwer Law International, 1999, p. 223, fn. 13; S. ZAPPALÀ, Rights of Persons During an Investigation, in A. CASSESE, P. GAETA and J. R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court, Oxford, Oxford University Press, 2002, p. 1196; H. FRIMAN, Rights of Persons Suspected or Accused of a Crime, in S. LEE (ed.), The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results, The Hague, Kluwer Law International, 1999, p. 248.

¹²³⁹ Article 55 (2) ICC Statute; in line with other authors, the term ‘suspect’ and a ‘person against whom there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court’ are used interchangeably, see e.g. C.K. HALL, Article 55, in O. TRIFFTERER, Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 1097; H. FRIMAN, The Rules of Procedure and Evidence in the Investigative Stage, in H. FISHER, C. KRESS and S.R. LÜDER (eds.), International and National Prosecution of Crimes under International Law: Current Developments, Berlin, Berlin Verlag Arno Spitz GmbH, 2001, p. 197.

¹²⁴⁰ ICC, Transcript, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009, p. 11 (the Prosecution investigator in charge of the investigations in the events that occurred in Bogoro testified with regard to screening interviews (or screening meetings) that “[w]e also try

In a similar vein, the TRCP objectively defined a suspect as “any person against whom there exists a reasonable suspicion of having committed a crime.”¹²⁴¹ The only exceptions are the ECCC Internal Rules, which define a suspect as “a person whom the Co-Prosecutors or the Co-Investigating Judges consider may have committed a crime within the jurisdiction of the ECCC, but has not yet been charged.”¹²⁴² In this definition, objective criteria have been mixed with subjective criteria, by including the personal convictions of the Co-Prosecutors or Co-Investigating Judges. In a similar vein, the term ‘charged person’, which will be explained further on, is subjective in nature.¹²⁴³ It is clear that the risk of postponing or deliberately withholding certain rights is inherent in such subjective definitions.

II.1.3. Suspects v. accused persons

Another important distinction to account for in determining the procedural regime for questioning is the difference between accused persons and mere suspects. A different procedural regime applies to all international(ised) criminal tribunals and courts under review. The ICTY, ICTR, SCSL and STL RPE define an accused as ‘a person against whom one or more counts in an indictment have been confirmed’.¹²⁴⁴ This distinction is relevant as only the accused person will enjoy the whole gamut of rights under Articles 21 ICTY Statute, 20 ICTR Statute, 17 SCSL Statute and 16 STL Statute. While the Statute and the RPE of the ICC do not define the term ‘accused’, these documents refer to a person as the ‘accused’ once charges have been confirmed.¹²⁴⁵ The accused is entitled to the rights enumerated in Article 67 ICC Statute. However, since, as previously discussed, the Prosecution’s investigation “should largely be completed at the stage of the confirmation of charges hearing,”¹²⁴⁶ the interrogation of accused persons by the ICC Prosecutor will be exceptional. In a similar vein, considering the ECCC, the interrogation of the accused will be less relevant to this study on the

and gauge whether the individual might have committed a crime under the Statute.” “This is because it also affects the preparation and the logistics required for a full interview”); *ibid.*, p. 12 (“If the assessment is that the person should be treated under Article 55 (2), these rights are given to the person in the very beginning. In this case the interview is also audio or video recorded, unless the person objects to the audio or video in which case we do a written statement”). See additionally: ICC, Judgement pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 149.

¹²⁴¹ Section 1 (w) TRCP.

¹²⁴² See Glossary annexed to the ECCC Internal Rules.

¹²⁴³ See *infra*, Chapter 4, IV.6.3.

¹²⁴⁴ Rule 2 and Rule 47 (H) (ii) ICTY, ICTR and SCSL RPE; Rule 2 and Rule 68 (J) (ii) STL RPE.

¹²⁴⁵ See e.g. Article 61 (6) and 63 ICC Statute.

¹²⁴⁶ ICC, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 Entitled “Decision on the Confirmation of Charges”, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. 01/04-01/10-514 (OA 4), A. Ch., 30 May 2012, par. 44. See *supra*, Chapter 3, I.3.

investigation phase, provided that a person only formally qualifies as an accused person after the Co-Investigating Judges or the Pre-Trial Chamber (in case of disagreement) indict(s) the person by sending him or her to trial.¹²⁴⁷ However, in relation to the ECCC, it will be important to distinguish between the interrogation of suspects and of charged persons, where, as will be discussed, different procedural norms apply.¹²⁴⁸

Confusion may be created on purpose as to the exact status of a person. In Chapter 1, reference was made to the *Sesay* case, where the interrogators referred to the accused as a suspect. In this case, the SCSL Trial Chamber suggested that the investigators did so on purpose, in order to confuse the accused and to ensure cooperation.¹²⁴⁹ According to the case law that is publicly available, such behaviour by prosecution investigators is exceptional. Nevertheless, such incidents underline the significance of a clear understanding and respect for the different statuses of suspects and accused persons and the applicable procedural regimes.

II.1.4. The autonomous interpretation of ‘charged’ under international human rights law

At the outset, it also needs to be reiterated how, under international human rights law, the enjoyment of the right to a fair trial in criminal proceedings depends upon the existence of a criminal ‘charge’. It was previously discussed that this term is to be given an autonomous interpretation.¹²⁵⁰ In the words of the Court: “The prominent place held in a democratic society by the right to a fair trial favours a “substantive”, rather than a “formal”, conception of

¹²⁴⁷ Rule 67 ECCC IR; glossary annexed to the Internal Rules. The Internal Rules define an accused as “any person who has been indicted by the Co-Investigating Judges or the Pre-Trial Chamber”. The procedure for the questioning of the accused person by the Trial Chamber is outlined in Rule 90 ECCC IR.

¹²⁴⁸ According to the glossary annexed to the Internal Rules, a ‘charged person’ refers to “any person who is subject to prosecution in a particular case, during the period between the Introductory Submission and Indictment or dismissal of the case.”

¹²⁴⁹ SCSL, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15, T. Ch. I, 30 June 2008, par. 47: “[w]e take cognisance of the fact that the investigators also repeatedly referred to the Accused throughout the interview as a suspect, rather than as an accused, although he had been charged and they were very much aware of it. This lends support to the interference that the Accused may have been further confused about his role during the first interview because up to that point, he had not yet been served with the Indictment.” See also accompanying footnote 63 citing the transcript of the interview with Sesay on 10 March 2003: “Q. “You are hereby advised that you are a suspected of [*sic*] being a participant being involved in International War Crimes and/or Crimes Against Humanity...” “So being a suspect, which is the reason why there was an arrest warrant issued for you, and that is why you are considered as a suspect, okay”. From the transcript of the interview on 14 March 2003: A. “Yeah, but according to you, I’m a suspect of – you know.” Q. “Yes, you’re a suspect and that’s why you’re being advised of your rights...”

¹²⁵⁰ See in more detail, *supra*, Chapter 2, III.4.

the "charge" referred to by Article 6 (art. 6); it impels the Court to look behind the appearances and examine the realities of the procedure in question in order to determine whether there has been a "charge" within the meaning of Article 6."¹²⁵¹ Hence, notwithstanding the requirement of a 'charge' for the enjoyment of the right to a fair trial in criminal matters under Article 14 ICCPR or Article 6 ECHR, the right to a fair trial may already apply before the official indictment. The ECtHR explained that "whilst 'charge', for the purposes of Article 6 (1), may in general be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise *substantially affect the situation of the suspect*."¹²⁵² Arguably, this is the case from the moment a person is considered to be a 'suspect' by the Prosecutor.¹²⁵³ In any case, according to the case law of the Court, a person will be 'charged' if he or she makes self-incriminating statements during questioning, leading the investigators to suspect the person's involvement in a crime.¹²⁵⁴ Such autonomous understanding is important to avoid any manipulation by the Prosecutor of the moment a person becomes 'charged'.

From this, it follows that the Co-Investigating Judges of the ECCC's interpretation of Article 14 ICCPR and Article 6 ECHR is faulty. The Co-Investigating Judges interpret the term

¹²⁵¹ ECtHR, *Adolf v. Austria*, Application No. 8269/78, Series A, No. 49, Judgment of 26 March 1982, par. 30; see also ECtHR, *Deweere v. Belgium*, Application No. 6903/75, Series A, No. 35, Judgment of 27 February 1980, par. 42, 44; the receiving of a 'notice of intended prosecution' in the UK was considered sufficient by the Court, see ECtHR, *O'Halloran and Francis v. The United Kingdom*, Application Nos. 15809/02 and 25624/02, Judgment (Grand Chamber) of 29 June 2007, par. 35.

¹²⁵² See e.g. ECtHR, *Corigliano v. Italy*, Application No. 8304/78, Judgment of 10 December 1982, par. 34; ECtHR, *Brozicek v. Italy*, Application No. 10964/84, Judgment of 19 December 1989, par. 38; ECtHR, *Deweere v. Belgium*, Application No. 6903/75, Series A, No. 35, Judgment of 27 February 1980, par. 46; ECtHR, *Mikolajová v. Slovakia*, Case No. 4479/03, Judgment of 18 January 2011, par. 40. Compare STL, Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr. El Sayed Dated 17 March 2010 and whether Mr. El Sayed has Standing before the Court, *El Sayed*, Case No. CH/PTJ/2010/005, PTJ, 17 September 2010, par. 50.

¹²⁵³ TRECHSEL argues that from the moment a person is confronted with questions or with a request for documents which could result in self-incrimination, that person is *de facto* 'charged', within the meaning of Article 6. In support, he refers to the *Serves* case, in which the ECtHR applied the right to a witness, after it found that he could be considered to be subject to a 'charge', in the meaning of Article 6 (1) (ECtHR, *Serves v. France*, Application No. 20225/92, Reports 1997-VI, Judgment of 20 October 1997, par. 42). See S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, p. 349.

¹²⁵⁴ ECtHR, *Shabelnik v. Ukraine*, Application No. 16404/03, Judgment of 19 February 2009, par. 57 (finding that Article 6 ECHR already applied prior to the moment the person was formally charged and from the moment he confessed the murder. "[F]rom the first interview of the applicant it became clear that he was not simply testifying about witnessing a crime but was actually confessing to committing one. From the moment the applicant first made his confession, it could not be said that the investigator did not suspect the applicant's involvement in the murder").

‘charge’ under these provisions in a formal sense so as to only apply from the moment the suspect is officially charged, thereby ignoring the autonomous interpretation given to the term.¹²⁵⁵ On one other occasion, however, they refer to the ‘substantially affected’ criterion under the ECtHR’s case law, but seem to wrongly interpret this criterion as presupposing the official notification of the charges.¹²⁵⁶

II.2. Status of the interviewer

II.2.1. Introduction

While the status of the interviewee may vary, the status of the interviewer may differ as well. Firstly, the interrogation can solely be conducted by national law enforcement officials. These national enforcement officials may act upon a request by the tribunal or not. Secondly, questioning can be conducted by the Prosecution staff, with national enforcement officials (or other non-tribunal investigators) being present. Thirdly, questioning can be conducted by the Prosecutor or Prosecution investigators, without other enforcement officials being present. What route will be followed depends upon different factors, including the location of the interviewee and the implementing legislation of the state where the questioning is taking place.

II.2.2. Uniformity of procedure?

As far as the *international* criminal courts and tribunals are concerned, neither the Statute nor the RPEs of the *ad hoc* tribunals and the SCSL provide any guidance as to whether or not the procedural safeguards for the interrogation of suspects and accused persons only apply to the interrogation of persons by the Prosecution or whether these procedural safeguards should

¹²⁵⁵ ECCC, Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel, Case No. 004/07-09-2009-ECCC-OCIJ, OCIJ, 17 May 2013, par. 52-54.

¹²⁵⁶ See ECCC, Decision on Request for Access to Case Files 003 and 004, Case File no. 004/29-07-2011-ECCC-OCIJ, 5 April 2011, par. 3, as referred to in ECCC, Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel, Case No. 004/07-09-2009-ECCC-OCIJ, OCIJ, 17 May 2013, par. 50, fn. 43 (“the Unnamed Suspects at this stage where they have not been officially informed of the criminal proceedings, have not been substantially affected by the investigations”).

also be upheld in cases where questioning is conducted by national law enforcement officials. No specific provisions regulate questioning conducted by state authorities.¹²⁵⁷

Conversely, the ICC Statute clearly stipulates (in Article 55 (2) ICC Statute) that the rights of suspects equally apply when such an interrogation is conducted by the national authorities *at the request* of the Prosecutor.¹²⁵⁸ This provision guarantees procedural uniformity. Arguably, the provision should be interpreted in a broad manner so as to also include interviewers that belong to, for instance, international governmental organisations or peacekeeping operations.¹²⁵⁹ Consequently, questioning by *any authority* should be in accordance with the procedural safeguards that are laid down in the Statute. While the questioning by national law enforcement officials will be conducted according to the provisions of national laws, these minimum procedural safeguards should always be respected.¹²⁶⁰

Nevertheless, it follows from the wording of Article 55 (1) ICC Statute that Article 55 concerns safeguards “[i]n respect of an investigation under this Statute.” Hence, Pre-Trial Chamber I held in the *Gbagbo* case that the procedural safeguards only apply to investigative acts that are “taken either by the Prosecutor or by national authorities *at his or her behest*.”¹²⁶¹ Thus, procedural safeguards on the questioning of suspects that are laid down in the ICC Statute (e.g. the right to the assistance of counsel) do not apply when the suspect is

¹²⁵⁷ A. CASSESE, *The Influence of the European Court of Human Rights on International Criminal Tribunals – Some Methodological Remarks*, in M. BERGSMO, *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide*, Leiden, Martinus Nijhoff Publishers, 2003, p. 40.

¹²⁵⁸ Article 55 (2) ICC Statute (‘Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, *or by national authorities pursuant to a request made under Part 9*, that person shall also have the following rights of which he or she shall be informed prior to being questioned’ (emphasis added)); Rule 111 (2) ICC RPE (‘When the Prosecutor *or national authorities* question a person, due regard shall be given to article 55’ (emphasis added)).

¹²⁵⁹ See C.K. HALL, Article 55, in O. TRIFFTERER, *Commentary on the Rome Statute of the International Criminal Court: Oberver’s Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1097.

¹²⁶⁰ According to W.A. SCHABAS, “the Statute almost seems to be saying that it cannot trust domestic justice systems to provide adequate respect for the rights of the individual.” See W.A. SCHABAS, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2007, p. 252.

¹²⁶¹ ICC, Decision on the ‘Corrigendum of the Challenge to the Jurisdiction of the International Criminal Court on the Basis of Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute Filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)’, *Prosecutor v. Gbagbo, Situation in Côte d’Ivoire*, Case No. ICC-02/11-01/11-212, PTC I, 15 August 2012, par. 96 (“Conversely, an investigation conducted by an entity other than the Prosecutor, and which is not related to proceedings before the Court, does not trigger the rights under Article 55 of the Statute”). Emphasis added.

interrogated in the context of national proceedings unrelated to the proceedings before the Court.¹²⁶²

However, as pointed out by Trial Chamber II in the *Katanga and Ngudjolo Chui* case, even when evidence has been gathered in national proceedings unrelated to the proceedings before the Court in non-compliance with the procedural safeguards under the ICC Statute (Article 55 ICC Statute), the resulting evidence may not be admissible in case it has been gathered in a manner that is in violation of internationally recognised human rights.¹²⁶³ In this manner, the Court further ensures the uniformity of procedural safeguards.

In the *Delalić* case, the ICTY Trial Chamber removed any doubt as to the applicability of international criminal procedure during questioning by national law enforcement officials. The Trial Chamber rejected the Prosecution's assertion that a distinction should be drawn between acts performed by tribunal investigators and acts by non-tribunal investigators.¹²⁶⁴ The Chamber confirmed that the rules on questioning suspects that are laid down in the Statute and RPE equally apply in both scenarios. This is important "as it protects the

¹²⁶² Where the accused is questioned during by the initial phases of the investigation by the national authorities, but not at the request of the ICC, the safeguards for the interrogations of suspects and accused persons do not apply. Consider e.g. ICC, Decision on the Confirmation of Charges, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-717, PTC I, 30 September 2008, par. 79 – 99 (where Katanga was interrogated by the Congolese authorities in the absence of counsel, and the Defence consequently objected to the admissibility of the resulting *procès-verbal* for the purposes of the confirmation hearing, the Pre-Trial Chamber considered this absence of counsel during the interrogation in light of the requirements of international human rights law, rather than to find a violation of Article 55 (2) (c) ICC Statute (right for suspects to the assistance of counsel during interrogation)); when the issue of the admissibility of the *procès-verbal* was raised again at trial, the Trial Chamber held that "evidence collected in non-compliance with the requirements of article 55(2) of the Statute, by a state not acting at the request of the Court, cannot be said to have been obtained "by means of a violation" of the Statute, as is required by article 69(7). As the Defence has rightly remarked, 'the drafters of the Rome Statute agreed to adopt a provision explicitly requiring that suspects be questioned in the presence of counsel *even though, domestically, this right is not always guaranteed.*' It cannot be concluded from this that the States Parties have agreed to comply with the procedural standards of the Statute in their domestic criminal proceedings. *Article 55(2) does not impose procedural obligations on states acting independently of the Court*" (first emphasis in original, second emphasis added). See ICC, Decision on the Prosecutor's Bar Table Motions, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-2635, T. Ch. II, 17 December 2010, par. 59.

¹²⁶³ *Ibid.*, par. 60-65.

¹²⁶⁴ ICTY, Decision on Zrdavko Mucić Motion for the Exclusion of Evidence, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, T. Ch., 2 September 1997, par. 43-44 and 48; see also ICTY, Judgement, *Prosecutor v. Delalić*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 530. A different view is apparently held by the ICTR Registrar, consider ICTR, Decision on Protais Zigiranyirazo's Motion for Damages, *Prosecutor v. Zigiranyirazo*, T. Ch. III, 18 June 2012, par. 24 ("the Registrar notes that Rules 42 and 55[sic] apply *when a suspect or accused is questioned by the Prosecutor of the ICTR*, and that Mr. Zigiranyirazo does not allege that he was questioned by the Prosecutor of the ICTR while he was detained in Belgium" (emphasis added).

uniformity of the criminal procedure, already at an early stage of proceedings.”¹²⁶⁵ This holding clarifies that the procedural guarantees during interrogations, as laid down in Rule 42 and 63 of the ICTY, ICTR and SCSL RPE are essential or minimum guarantees which should be respected in all cases.¹²⁶⁶ Legal assistance by states or other international organisations should thus be provided in accordance with the procedural safeguards for the interrogation of suspects and accused, otherwise risking the exclusion of the evidence.

However, later case law has limited the applicability of the rules of international criminal procedure to interrogations by non-tribunal investigators. In *Mrkšić*, the Trial Chamber differentiated between interrogations conducted by (1) the Prosecutor, prosecution staff and persons acting on the Prosecutor’s directions¹²⁶⁷ and (2) interrogations conducted by persons or authorities who have no relevant connection with the ICTY Prosecutor.¹²⁶⁸ Understanding the scope of this decision requires a brief explanation of its background. The Court had to consider whether statements made during questioning by all different accused persons to investigators of the military security organ in Belgrade and to a military investigating judge should uphold the procedural safeguards as laid down in the Statute and the RPE of the ICTY. The accused were questioned as suspects and during the proceedings before the Investigative Judge, two officers of the OTP were present, without participating.¹²⁶⁹ The Trial Chamber found that the investigators and the Investigative Judge were not acting under the ICTY Prosecutor’s direction.¹²⁷⁰ The Chamber stated that “it is not shown that the Serbian military questioning was other than for Serbian military purposes.” “In particular, it is not shown to

¹²⁶⁵ G. SLUITER, Commentary: *Prosecutor v. Mucić*, Exclusion of Evidence, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals, Vol. I, The Hague, Intersentia, 1999, p. 242; G. SLUITER, Recht op aanwezigheid van raadsman tijdens politieverhoor absoluut vereiste voor toelating bewijs, noot, in «NJCM-Bulletin», Vol. 23, 1998, pp. 86-87.

¹²⁶⁶ For a discussion of these procedural rights, see *infra*, Chapter 4, III. It is to be noted that the ICTR Prosecutor has occasionally argued that Rule 42 of the ICTR RPE, which elaborates the procedural rights of suspects during interrogation, does not apply when a suspect is provisionally arrested pursuant to Rule 40, before that person is transferred to Arusha. The Prosecutor found support for this reasoning in Rule 40 (C) of the ICTR RPE. This reasoning has not been endorsed by the Tribunal, see *e.g.* ICTR, Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44-I, T. Ch. II, 8 May 2000, par. 24.

¹²⁶⁷ Cf. Rule 37 (B) ICTR, ICTY and SCSL RPE.

¹²⁶⁸ ICTY, Decision Concerning the Use of Statements given by the Accused, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, T. Ch. II, 9 October 2006, par. 21; see also the reference in ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Separate Opinion of Judge Schomburg, fn. 1.

¹²⁶⁹ ICTY, Decision Concerning the Use of Statements given by the Accused, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, T. Ch. II, 9 October 2006, par. 15-16.

¹²⁷⁰ *Ibid.*, par. 15.

have been, in any way, at the direction of, or request of, or even to assist, the ICTY Prosecutor.”¹²⁷¹ The Chamber further argued that:

“there is no express provision of the Statute or the Rules which regulates the questioning or taking of statements from persons who are then accused in an indictment filed in the Tribunal, or are suspects, by persons or authorities who have no relevant connection to the ICTY Prosecutor.” Nor is there, subject to provisions [...], any provision regulating the use, or the admission into evidence, in a trial in this Tribunal, of statements obtained in such circumstances.”¹²⁷²

The Trial Chamber observed that the rights of the accused persons during interrogation (as laid down in Rules 63, 42 and 43 ICTY RPE) were not upheld at the time that the statements were made, but also that there were no indications as to any infringement of Serbian laws.¹²⁷³ It follows from the Prosecutor’s reasoning that the context in which the statements were taken was different from the context in which the statements were taken from Mucić in the *Delalić (Čelebići)* case. There, the accused was interrogated by the Austrian authorities “in respect of proceedings which had been instituted at the instigation of the ICTY Prosecutor to secure the transfer of an accused to the Tribunal.”¹²⁷⁴ Therefore, there was a relevant connection with the ICTY Prosecutor. Moreover, the situation was also different from other case law where questioning was conducted by OTP investigators.¹²⁷⁵ Importantly, the Trial Chamber subsequently allowed the use of the resulting statements at trial. The Prosecution requested the use of these statements for the specific and limited purpose of cross-examining the defence witnesses and accused persons who gave evidence in their own defence. The Chamber clearly stated that it would not have allowed the admission of these statements as substantial evidence.¹²⁷⁶

¹²⁷¹ *Ibid.*, par. 15.

¹²⁷² *Ibid.*, par. 21; consider also par. 17.

¹²⁷³ *Ibid.*, par. 22, 27. Among others, the accused persons, while questioned, were obliged to answer the questions of the investigators of the military security organ (while before the military judge they had and were informed of the possibility to refuse to answer incriminating questions). Besides, the accused persons did at no time during the questioning have the assistance of counsel and there is no proof of a voluntary and express waiver.

¹²⁷⁴ *Ibid.*, par. 27.

¹²⁷⁵ *Ibid.*, par. 27. Consider e.g. ICTR, Decision on Kanyabashi’s Oral Motion to Cross-Examine Ntahobali Using Ntahobali’s Statements to Prosecution Investigators in July 1997, *Prosecutor v. Ndayambaje et al.*, T. Ch. II, 15 May 2006, par. 67.

¹²⁷⁶ ICTY, Decision Concerning the Use of Statements given by the Accused, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, T. Ch. II, 9 October 2006, par. 29.

One can conclude that this decision draws a distinction between questioning by the Prosecutor, prosecution staff or persons/authorities mandated by the Prosecution and authorities without any relevant connection to the Prosecutor. In the latter case, there are no rules as to the conduct of questioning suspects or accused persons under international criminal procedural law that should be respected. Only national law should be respected. Nevertheless, the *consequence* of not upholding the procedural safeguards for questioning suspects or accused persons under international criminal procedure may be the non-admission of the evidence at trial. Exceptionally, however, statements from the questioning can be used during cross-examination.

In the end, both decisions favour respecting the procedural safeguards under international criminal procedural law during interrogations by states or other international organisations regardless of whether such interrogation followed a request by the tribunal. Otherwise, the result may be the non-admission of the statements at trial.

II.2.3. Minimum guarantees v. modalities for the conduct of questioning

If the procedural safeguards for the interrogation of suspects and accused persons should be respected, irrespective of whether the interrogation is conducted by tribunal investigators or by the national authorities, the follow-up question is whether the modalities for the conduct of such interrogation should be exactly the same as the modalities provided for in international criminal procedure as laid down in Rule 43 of the ICTY, ICTR and SCSL RPE or as outlined in Rule 112 of the ICC RPE.¹²⁷⁷

As far as the *ad hoc* tribunals are concerned, Judge Schomburg held that the *rationale* of Rule 43---which contains the recording procedure---, is to translate the procedural guarantees for suspects and accused persons during questioning “into reality using contemporary technical standards and at the same time to assure the precision and reliability of a suspect’s statement in the language he used when answering questions put to him by an interrogator.”¹²⁷⁸ Two Judges of the ICTY Appeals Chamber argued in *Halilović* that Rule 43 reflects a substantive judgment that unrecorded statements are, by definition, insufficiently reliable and that such

¹²⁷⁷ For a discussion of the recording requirements, *infra*, Chapter 4, IV.6.

¹²⁷⁸ ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Separate Opinion of Judge Schomburg, par 2.

unrecorded statements should always be excluded.¹²⁷⁹ However, such was not the majority view. The majority held that, in the absence of a recording of the interview in accordance with Rule 43, the Prosecutor is still able to prove its reliability. This will be assessed by the Chamber in accordance with Rule 89 (C) and (D) of the RPE.¹²⁸⁰ This argumentation is persuasive. Rule 43 provides a mechanism to ensure the reliability of an accused or a suspect's statement, but such reliability can also be proven by other means.¹²⁸¹ In this regard, Judge Shahabuddeen referred to Rule 92 of the RPE on confessions. According to this Rule, a confession will "be presumed to have been free and voluntary", if the requirements of Rule 63 (which provides for audio or video recording in accordance with Rule 43) are strictly complied with, unless the contrary is proven.¹²⁸² Consequently, even if the recording procedure of Rule 43 is not respected, the confession can be admitted as evidence.

Rule 43 provides no indication that non-tribunal investigators should conduct interrogations according to it. However, it seems advisable to ensure that this recording procedure is respected, insofar that it helps to prove the reliability and voluntariness of the statement. Hence, it is advisable to include a reference to this recording procedure within any request for legal assistance. Regarding the *ad hoc* tribunals, given the broad cooperation obligations, national states would be required to honour such a request.

The procedural framework of the ICC seems clearer in this regard. Although it follows from Article 55 (2) ICC Statute that the rights of suspects also apply in interrogations conducted by national authorities, Rule 112 of the ICC RPE, which pertains to the recording procedure for interrogations of suspects and accused persons, only refers to the Prosecutor. Consequently, one can infer that the modalities of Rule 112 of the ICC RPE should not be upheld in case the

¹²⁷⁹ ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Separate Opinion of Judge Meron, par. 6; ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Separate Opinion of Judge Schomburg, par 7.

¹²⁸⁰ ICTY, Decision on Motion for Exclusion of Statement of Accused, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, T. Ch. I, Section A, 8 July 2005, par. 24-25; ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, par. 38-40.

¹²⁸¹ S. SWOBODA, Admitting Relevant and Reliable Evidence: The ICTY's Flexible Approach Towards the Admission of Evidence under Rule 89 (C) ICTY RPE, in T. KRUESMANN (ed.), *ICTY: Towards a Fair Trial?*, Antwerp, Intersentia, 2009, p. 380; ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Separate Opinion of Judge Meron, par. 6; ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Declaration of Judge Shahabuddeen, par. 7-10 (Judge Shahabuddeen argues that if the sanction of the violation of Rule 43 were the automatic exclusion of the statement, it would have been explicitly stated in the provision).

¹²⁸² Rule 92 ICTY, ICTR and SCSL RPE; ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Declaration of Judge Shahabuddeen, par 8.

questioning is conducted by non-tribunal investigators. However, where the modalities provided for under Rule 112 may be beneficial in establishing the reliability and voluntariness of the interrogation, the ICC Prosecutor may be well advised to request the national authorities to conduct a suspect interview in accordance with these modalities. It follows from Article 99 (1) of the ICC Statute that states should execute a request for assistance in accordance with the relevant procedure under their national law in the manner specified in the request, *unless prohibited by such law*.¹²⁸³

III. PROSECUTORIAL POWER TO INTERROGATE SUSPECTS AND ACCUSED PERSONS

III.1. The *ad hoc* tribunals and the SCSL

The Statutes of the different *ad hoc* tribunals and the SCSL allow the Prosecutor to question suspects, victims and witnesses during the investigation.¹²⁸⁴ The Prosecutor is equally authorised to question accused persons.¹²⁸⁵

The RPE of the *ad hoc* tribunals and the SCSL provide a detailed regulation of the conduct of the interrogation of suspects and accused persons.¹²⁸⁶ Several rights of the *suspect* during interrogation are outlined in their respective RPEs and Statutes: (i) the right to be assisted by counsel, (ii) the right to the free assistance of an interpreter and (iii) the right to remain silent and to be cautioned. The suspect should be informed about these rights prior to questioning, in a language spoken and understood by the suspect.¹²⁸⁷ It will be illustrated in the next subsection how these procedural safeguards reflect international human rights norms. Hence, these rights reflect *minimum rights* that should be respected in all instances. The violation of one of these fundamental rights should lead to the exclusion of such evidence at trial. In

¹²⁸³ This article should be read together with Article 88 of the ICC which obliges states to ensure that procedures are available under their national law for all forms of cooperation specified. On this issue, see G. SLUITER, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, Antwerp, Intersentia, 2002, p. 207 and following. See also *infra*, fn. 1591.

¹²⁸⁴ Article 18 (2) ICTY Statute; Article 17 (2) ICTR Statute and Article 15 (2) SCSL Statute.

¹²⁸⁵ Rule 63 ICTY, ICTR and SCSL RPE.

¹²⁸⁶ See in particular Rules 42, 43 and 63 of the ICTY, ICTR and SCSL RPE.

¹²⁸⁷ Rule 42 ICTY RPE, ICTR RPE and SCSL RPE; Article 18 (3) ICTY Statute and Article 17 (3) ICTR Statute.

addition to these rights, *accused* persons enjoy all rights laid down in article 21 of the ICTY Statute, Article 20 ICTR Statute and Article 17 of the SCSL Statute.

Most litigation before the *ad hoc* tribunals concerns the waiver of the right to counsel as well as the voluntariness of the statement given (absence of coercive circumstances). While the procedural safeguards seem to be respected in most interrogations, case law provides us with examples of transgressions, where the questioning results in inducements or threats. Prosecution staff should strictly respect the rights of suspects and accused persons and also be well trained in order to distinguish acceptable and unacceptable interrogation methods.

III.2. The International Criminal Court

The ICC Prosecutor's power to question persons being investigated, victims and witnesses, derives from Article 54 (3) (b) of the ICC Statute. A detailed regulation on the recording of suspect interviews is laid down in Rule 112 of the ICC RPE. Pursuant to Article 93 (1) (c) of the ICC Statute, States Parties are under an obligation to comply with requests from the ICC to provide assistance to the questioning of persons investigated or prosecuted. In such a case, Article 99 (1) ICC Statute leaves broad discretion for the Prosecution to participate in the questioning of the suspect or accused person by the requested state. Moreover, in case this is necessary for the successful execution of the request and where the suspect participates in the interview on a voluntary basis, the Prosecutor may him or herself interview a suspect on the territory of a state party without further state assistance.¹²⁸⁸

III.3. Internationalised criminal courts and tribunals

Article 23 new, paragraph 8 of the ECCC Law authorises the Co-Investigating Judges to question suspects. According to the Internal Rules, the Co-Investigating Judges may summon and question suspects and charged persons.¹²⁸⁹ The judicial police and investigators cannot question charged persons.¹²⁹⁰ In turn, the Co-Prosecutors have the power to question any person that may provide relevant information for the case under investigation during their

¹²⁸⁸ Consider Article 99 (4) ICC Statute.

¹²⁸⁹ Rule 55 (5) (a) ECCC IR.

¹²⁹⁰ Rule 62 (3) (b) ECCC IR.

preliminary investigation.¹²⁹¹ At the SPSC, the power of the Public Prosecutor to question suspects and accused persons was outlined in general terms in Section 7.4 (b) of the TRCP. Finally, the power of the STL Prosecutor to question suspects is outlined in Article 11 (5) of the STL Statute as well as Rule 61(i) of the STL RPE. The powers to question suspects and accused persons are regulated in detail in the RPE.¹²⁹²

IV. PROCEDURAL SAFEGUARDS AND MODALITIES

IV.1. Right to the assistance by counsel during interrogation

IV.1.1. The *ad hoc* tribunals and the SCSL

According to Article 18 (3) ICTY Statute and Article 17 (3) ICTR Statute as well as Rules 42 (A) (i) and 42 (B) of the ICTY, ICTR and SCSL RPE, every suspect has a right to the assistance of counsel in the course of an interrogation. This right can be waived by the suspect, on the condition that such a waiver is given voluntarily. In addition, it can be revoked by the suspect at any time. A similar right to assistance by counsel during questioning is guaranteed for accused persons.¹²⁹³ ICTR Trial Chamber I underlined the importance of the right to counsel by stressing that it “is rooted in the concern that an individual, when detained by officials for interrogation is often fearful, ignorant and vulnerable; that fear and ignorance can lead to false confessions by the innocent; and that vulnerability can lead to abuse of the innocent and guilty alike, particularly when a suspect is held incommunicado and in isolation.”¹²⁹⁴ Such a guarantee ensures the proper conduct of the questioning and ensures that the person is aware of his rights.¹²⁹⁵ Arguably, it even surpasses the requirements under international human rights law.

¹²⁹¹ Rule 50 (4) ECCC IR.

¹²⁹² Rules 65, 66 and 85 STL RPE.

¹²⁹³ Rule 63 (A) ICTY, ICTR and SCSL RPE.

¹²⁹⁴ ICTR, Decision on the Prosecutor’s Motion for the Admission of Certain Materials, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. I, 14 October 2004, par. 16 (The Trial Chamber added that the right to legal assistance is also important as it ensures the respect of other rights of the suspect or accused person (*ibid.*, par. 23)).

¹²⁹⁵ ICTY, Reasons for the Decision on the Admission of two Statements and Related Exhibits of Witness Zdravko Janić into Evidence Pursuant to Rule 92ter, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, T. Ch. I, 24 July 2008, par. 4; ICTY, Trial Judgement, *Prosecutor v. Gotovina et al.*, Case No. IT-05-87/1-T, T. Ch. I, 15 April 2011, par. 18.

International human rights law recognizes the defendant's right to have the assistance of a counsel during interrogation. The case law of the European Court of Human Rights ('ECtHR') has long been vague, emphasising the need to look at the criminal proceedings as a whole in order to determine whether Article 6 (3) (c) has been violated. The Court stated that while the right to benefit from the assistance of a lawyer in the early stages of an investigation can be derived from Article 6, such a right can be restricted for good cause.¹²⁹⁶ This implied that it was 'virtually impossible' to derive a full-fledged right to the assistance of a defence counsel in the course of the investigation, from the case law of the ECtHR.¹²⁹⁷ Moreover, the Court relied on a retrospective determination to establish whether the restriction of counsel, in light of the entirety of the proceedings, had deprived the accused of a fair hearing.¹²⁹⁸ The Court underscored that it depended on the special features and the circumstances of the case whether the presence of a counsel during interrogations was necessary.¹²⁹⁹

The ECtHR altered its case law in its judgement in the *Salduz* case.¹³⁰⁰ The court reiterated that "article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation."¹³⁰¹ Next, and after referring to the particularly vulnerable position of the suspect during interrogations (especially in light of the growing complexity of the legislation on criminal procedure), the Court found that "in order for the right to fair trial to remain sufficiently 'practical and effective', article 6 (1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of

¹²⁹⁶ ECtHR, *Murray v. the United Kingdom*, Application No. 18731/91, Reports 1996-I, Judgement (Grand Chamber) of 8 February 1996, par. 63.

¹²⁹⁷ S.J. SUMMERS, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights*, Oxford, Hart Publishing, 2007, p. 181. However, in *Delalić*, the ICTY seems to read such right to counsel during interrogations in the case law of the ECtHR: see ICTY, *Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, Prosecutor v. Delalić et al.*, Case No. IT-96-21, T. Ch, 2 September 1997, par. 50 *et seq.*

¹²⁹⁸ ECtHR, *Murray v. the United Kingdom*, Application No. 18731/91, Reports 1996-I, Judgment (Grand Chamber) of 8 February 1996. Summers identifies two reasons why such test is inadequate: (1) every determination requires a hypothetical assessment of the effect on future fairness or through retrospective examination of the influence of the pre-trial factors on the fairness of the trial, consequently such test is of little use for criminal justice authorities seeking guidance; and (2) it disregards the importance of the fairness of the investigation for the fairness of the trial: S.J. SUMMERS, *Fair trials: the European Criminal Procedural Tradition and the European Court of Human Rights*, Oxford, Hart Publishing, 2007, p. 182.

¹²⁹⁹ ECtHR, *Murray v. the United Kingdom*, Application No. 18731/91, Reports 1996-I, Judgement of 28 October 1994, par. 62 ; ECtHR, *Imbrioscia v. Switzerland*, Application No. 13972/88, Series A, No. 275, 24 November 1993, par. 38.

¹³⁰⁰ ECtHR, *Salduz v. Turkey*, Application No. 36391/02, Judgment (Grand Chamber) of 27 November 2008; see also ECtHR, *Panovits v. Cyprus*, Application No. 4268/04, Judgment of 11 December 2008.

¹³⁰¹ ECtHR, *Salduz v. Turkey*, Application No. 36391/02, Judgment (Grand Chamber) of 27 November 2008, par. 52 (emphasis added).

each case that there are compelling reasons to restrict this right.”¹³⁰² Such restriction must not unduly prejudice the rights of the accused under Article 6. The Court concluded that “[t]he rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for conviction.”¹³⁰³ Exceptions to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time.¹³⁰⁴ The fact that denial of access to a lawyer is provided for on a systematic basis by the relevant legal provisions does not satisfy this test.¹³⁰⁵

While the *Salduz* judgement left some doubt as to whether access to a lawyer also encompasses assistance by a lawyer during the interrogation, the subsequent case law removed that doubt.¹³⁰⁶ It follows that the ICC Trial Chamber II’s holding that the ECtHR only requires *access* to a lawyer and does not necessarily require that a lawyer be physically present during every interrogation should be held at fault.¹³⁰⁷ Besides, the ECtHR clarified that persons ‘charged’ not only have the right to be assisted by a lawyer from the moment that they are in police custody or pre-trial detention, but also in case they are questioned by the police or the investigating judge outside of detention.¹³⁰⁸ In *Zaichenko v. Russia*, the Court held that the right of access to counsel first arises when there is a “significant curtailment of the applicant’s freedom of action.”¹³⁰⁹ The right to the assistance of counsel involves the whole range of services specifically associated with it. This implies that counsel should be able “to secure without restriction the fundamental aspects of that person’s defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and a check of the conditions of detention.”¹³¹⁰

¹³⁰² *Ibid.*, par. 55.

¹³⁰³ *Ibid.*, par. 55. (emphasis added).

¹³⁰⁴ *Ibid.*, par. 54.

¹³⁰⁵ *Ibid.*, par. 55.

¹³⁰⁶ ECtHR, *Panovits v. Cyprus*, Application No. 4268/04, Judgment of 11 December 2008, par. 66; ECtHR, *Brusco v. France*, Application No. 1466/07, Judgment of 14 October 2010, par. 54 (“L’avocat n’a donc été en mesure ni de l’informer sur son droit à garder le silence et de ne pas s’auto-incriminer avant son premier interrogatoire ni de l’assister lors de cette déposition et lors de celles qui suivirent, comme l’exige l’article 6 de la Convention”).

¹³⁰⁷ ICC, Decision on the Prosecutor’s Bar Table Motions, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-2635, T. Ch. II, 17 December 2010, par. 60-61.

¹³⁰⁸ ECtHR, *Simons v. Belgium*, Application No. 71407/10, Decision of 28 August 2012, par. 31.

¹³⁰⁹ ECtHR, *Zaichenko v. Russia*, Application No. 39660/02, Judgment of 18 February 2010, par. 48.

¹³¹⁰ ECtHR, *Dayanan v. Turkey*, Application No. 7377/03, Judgment of 31 October 2009, par. 32.

Also the HRC underlined the importance of the presence of counsel during interrogations and held that the right to counsel under Article 14 (3) (d) applies to the investigation phase.¹³¹¹

The case law of the *ad hoc* tribunals emphasised that Rule 42, which outlines the right to counsel for suspects, reflects (and is an adaptation *mutatis mutandis* of) Article 6 (3) (c) ECHR and Article 14 (3) ICCPR.¹³¹² Consequently, the case law of the ECHR and the HRC are of primary importance for understanding the content and scope of the right to the assistance of counsel during interrogations. However, the case law further clarified that even in a case where the non-provision of the right to legal assistance in a certain national criminal justice system would not be found to be in violation of Article 6 (3) (c) of the ECHR by the ECtHR, a national provision restricting the right to counsel during interrogations would still not be acceptable under Article 18 (3) of the ICTY Statute and Rule 42 (A) (ii).¹³¹³ The *ad hoc* tribunals thus seem to offer a stronger protection of the right to legal assistance during interrogations than international human rights law currently does. This is only logical given the specificity of the right under Rule 42 compared to the human rights provisions, which leaves no room for interpretation and restriction of the guarantee.¹³¹⁴

Remarkably, it follows from the ICTY RPE, that counsel can be assigned to a suspect “whenever the interests of justice so demand.”¹³¹⁵ Does this Rule qualify the right to assistance by counsel during interrogations such that no assistance by counsel can be provided

¹³¹¹ HRC, *Aliev v. Ukraine*, Communication No. 781/1997, U.N. Doc. CCPR/C/78/D/781/1997, 7 August 2003, par. 6.6; HRC, *Saidova v. Tajikistan*, Communication No. 964/2001, U.N. Doc. CCPR/C/81/D/964/2001, 20 August 2004, par. 6.8; Concluding Observations of the Human Rights Committee: South Korea, U.N. Doc. CCPR/C/KOR/CO/3, 28 November 2006, par. 14 (“The Committee is concerned by the State party’s interference with the right to counsel during pre-trial criminal detention, in particular, that consultation with counsel is permitted only during interrogation, and that even during interrogation, police officials can deny access to counsel on grounds that it will purportedly interfere with the investigation, aid a fugitive defendant, or endanger the acquisition of evidence”). Also the UN Basic Principles on the Role of Lawyers make clear that the right of access to counsel extends to all stages of criminal proceedings, including interrogations, presumably even before formal arrest. See the UN Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990.

¹³¹² Consider ICTY, Decision on Zrdavko Mucić’s Motion for the Exclusion of Evidence, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, T. Ch., 2 September 1997, par. 60.

¹³¹³ *Ibid.*, par 61.

¹³¹⁴ In a similar vein, these provisions surpass the requirement of counsel during interrogation as recognised by the U.S Supreme Court in *Miranda v. Arizona* (*Miranda v. Arizona*, 384 U.S. 436 (1966), pp. 478-79). It limits this right to custodial interrogation. In addition, the right has been limited considerably in consequent jurisprudence. See further, e.g. S. SLOBOGIN, An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation, in «Michigan Journal of International Law», Vol. 22, 2001, pp. 439 – 442.

¹³¹⁵ Rule 45 (A) ICTY RPE. However, Rule 45 ICTR and SCSL RPE does not include such ‘interests of justice’ requirement.

if the interests of justice do not so require? Such reading seems at odds with Article 18 (3) of the ICTY Statute which does not include such qualification of the right to assistance by counsel.¹³¹⁶ Therefore, this interpretation would violate the hierarchy of norms.

§ *The right to be informed about such right*

In order to be in a position to exercise or waive the right to be assisted by counsel, the suspect or accused should first be cautioned about the existence of the right to counsel during interrogation.¹³¹⁷ The ICTY RPE require that the suspect be informed prior to the questioning, in a language that the suspect ‘understands’.¹³¹⁸ Conversely, the RPE of the ICTR and SCSL require that the person be informed about this right in a language that the person ‘speaks and understands’.¹³¹⁹ All that is required is that this right be read out to the person. No obligation exists for the Prosecutor to explain the consequences of exercising or waiving the right in greater depth.¹³²⁰ There is no requirement incumbent on the Prosecutor to clarify the status of the person and to clarify to the person his or her status as a suspect (or accused).¹³²¹ However, as will be explained in the next section, the suspect or accused should be informed about the exact nature of the right to legal assistance during questioning, as otherwise he or she is not in an informed position to waive the right.

In the *Delalić* case, the Defence relied on the suspect’s cultural background to contend that the person was unable to understand and appreciate the scope and meaning of his right to counsel when the right was read to him. The Trial Chamber rejected this argument on the basis that the suspect was entitled to have his rights read to him in a language that he

¹³¹⁶ M. BOHLANDER, *The Defence*, in G. BOAS and W.A. SCHABAS (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Leiden-Boston, Martinus Nijhoff Publishers, 2003, p. 39. While Bohlander leaves aside whether this apparent inconsistency reveals a breach of the hierarchy of norms, is an acceptable interpretation under Article 15 of the Statute, or is the result of a mere oversight, he clarifies that the phrase ‘interests of justice’ was taken of Article 14 of the ICCPR and, while it could have a meaning in domestic prosecutions, it is meaningless in international criminal law.

¹³¹⁷ Rule 42 (A) ICTY, ICTR and SCSL RPE; Rule 63 (B) ICTY, ICTR and SCSL RPE.

¹³¹⁸ Rule 42 (A) ICTY RPE.

¹³¹⁹ Rule 42 (A) ICTR and SCSL RPE. The text of Rule 42 of the ICTY also required the suspect to be informed in a language he or she “speaks and understands” but this provision was amended in 2005 (U.N. Doc. IT/32/Rev. 36, 21 July 2005).

¹³²⁰ ICTY, Judgement, *Prosecutor v. Delalić et al.*, Case no. IT-96-21-A, A. Ch., 20 February 2001, par. 552.

¹³²¹ ICTY, Decision on Motion on the Exclusion and Restitution of Evidence and Other Material Seized from the Accused Zejnil Delalić, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, T. Ch., 9 October 1996, par. 9-10; ICTR, Decision on Prosper Mugiraneza’s Renewed Motion to Exclude his Custodial Statements from Evidence, *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, T. Ch. II, 4 December 2003, par. 17-19.

understood. “If we were to accept the cultural argument, it would be tantamount to every person interpreting the rights read to him subject to his personal or contemporary cultural environment. The provision should be *objectively construed*.”¹³²² There is no room for a ‘subjective standard of informed consent’.¹³²³

§ Requirements for waiver of the right

The right to counsel can be waived by the suspect or the accused person if such a waiver is made ‘voluntarily’. However, one wonders whether it would ever be in the person’s best interests to refuse the assistance of counsel, considering the seriousness of the crimes alleged.¹³²⁴ According to the case law of the tribunals, the burden of proof of voluntariness and the absence of oppressive conduct in waiving the right to counsel falls on the Prosecution.¹³²⁵ The standard of proof was defined as “convincingly and beyond reasonable doubt.”¹³²⁶ If the person already has the status of being ‘accused’, the rules seem more stringent in that they not only require the waiver to be ‘voluntary’ but also to be ‘express’.¹³²⁷ However, the requirement of an ‘express’ waiver was also read into Rule 42. The ICTR Trial Chamber held in *Bagosora et al.* that the waiver must be “express and unequivocal” and clearly relate to the interview in which the statement is taken.¹³²⁸ The *ad hoc* tribunals derived

¹³²² ICTY, Decision on Zdravko Mucić’s Motion for the Exclusion of Evidence, *Prosecutor v. Delalić*, T. Ch., 2 September 1997, par. 59; ICTY, Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65ter Exhibit List, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. Ch. II, 25 October 2007, par. 32, as later confirmed by the Appeals Chamber. See ICTY, Decision on Appeals against Decision Admitting Material Related to Borovčanin’s Questioning, *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.10, A. Ch., 14 December 2007, par. 34 (“the Appeals Chamber is not convinced that the Trial Chamber abused its discretion or otherwise erred in concluding that the Prosecution unambiguously advised Borovčanin about his right to counsel”).

¹³²³ ICTY, Judgement, *Prosecutor v. Delalić et al.*, Case no. IT-96-21-A, A. Ch., 20 February 2001, par. 553.

¹³²⁴ J.D. JACKSON and S.J. SUMMERS, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*, Cambridge, Cambridge University Press, 2012, pp. 102 – 103.

¹³²⁵ ICTY, Decision on Zdravko Mucić Motion for the Exclusion of Evidence, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, T. Ch., 2 September 1997, par. 42.

¹³²⁶ *Ibid.*, par. 42, par. 48; ICTR, Decision on the Prosecutor’s Motion for the Admission of Certain Materials, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. I, 14 October 2004, par. 18; ICTY, Astrit Haraqija’s Defence Motion to Join Bajrush Morina’s Request for a Declaration of Inadmissibility and Exclusion of Evidence and to Seek the Exclusion of Same Against Astrit Haraqija, *Prosecutor v. Haraqija et al.*, Case No. IT-04-84-R77.4, T. Ch. I, 4 August 2008, par. 3. The SCSL in this regard referred to it as an ‘established principle of law’, see SCSL, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15, T. Ch. I, 30 June 2008, par. 36.

¹³²⁷ Rule 63 (A) ICTY, ICTR and SCSL RPE.

¹³²⁸ ICTR, Decision on the Prosecutor’s Motion for the Admission of Certain Materials, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. I, 14 October 2004, par. 18.

this requirement from human rights law¹³²⁹ and common law case law.¹³³⁰ The term ‘equivocal’ has been interpreted by a Trial Chamber of the ICTY as meaning “unclear in meaning or intention; ambiguous.”¹³³¹

The term voluntary has been interpreted as including the requirements of being *informed* as well as *knowing and intelligent*.¹³³² The information required for a suspect or accused to make an informed decision depends on the stage of the proceedings.¹³³³ The requirement for a waiver to be knowing and intelligent implies that the accused is able “to make a rational appreciation of the effects of proceeding without a lawyer.”¹³³⁴ A suspect may be taken to comprehend what a reasonable person would understand. However, when there are indications that a person is confused, steps must be taken in order to ensure that the suspect actually does understand the nature of his or her rights.¹³³⁵ According to Judge Itoe in the *Sesay* case, it is not sufficient to “rattle through the textual reading of the waiver”; rather, a “comprehensive explanation of its contents and implications” is required.¹³³⁶ In the *Bagosora et al.* case, the ICTR found that the Prosecution did not discharge its burden of showing that the accused, *Kabiligi*, had voluntarily waived his right to counsel. The waiver by the accused was based on the misconception that his right to counsel depended on being informed of the

¹³²⁹ ECtHR, *Pishalnikov v. Russia*, Case No. 7025/04, Judgment of 24 September 2009, par. 77 (holding that a waiver “must not only be *voluntary*, but must also constitute a *knowing and intelligent* relinquishment of a right”). See also ECtHR, *Håkansson and Sturesson v. Sweden*, Series A, No. 171, Application No. 11855/85, Judgment of 21 February 1990, par. 66 and ECtHR, *Pfeifer and Plankl v. Austria*, Series A, No. 227, Application No. 10802/84, Judgment of 25 February 1992.

¹³³⁰ *Miranda v. Arizona*, 384 U.S. 436 (1966), p. 444 (“The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently”); *R. v. Bartle* [1994] 3 S.C.R. 173, par. 39 (“clear and unequivocal”).

¹³³¹ ICTY, Reasons for Oral Decision Denying Mr. Krajišnik’s Request to Proceed Unrepresented by Counsel, *Prosecutor v. Krajišnik*, T. Ch., Case No. IT-00-39-T, 18 August 2005, par. 6. This decision relates to the waiver of the right to counsel *at trial*. However, the interpretation of the requirements for a valid waiver of counsel may also be relevant for our analysis.

¹³³² *Ibid.*, par. 5; see also ECCC, Decision on Appeal against Provisional Detention Order of Nuon Chea, *The case of Nuon Chea et al.*, Case No. 002/19-09-2007, PTC, 20 March 2008, par. 26.

¹³³³ In this sense, one may compare both the *Bagosora et al.* and *Krajišnik* decisions. Whereas, in the *Bagosora et al.* Decision, the Trial Chamber considered it sufficient that a suspect is informed about the right to a lawyer, in *Krajišnik*, which concerned the right to self-representation and waiver *at trial*, the Chamber required information on the financial and practical consequences of proceeding without a lawyer.

¹³³⁴ ICTY, Reasons for Oral Decision Denying Mr. Krajišnik’s Request to Proceed Unrepresented by Counsel, *Prosecutor v. Krajišnik*, T. Ch., Case No. IT-00-39-T, 18 August 2005, par. 8.

¹³³⁵ ICTR, Decision on the Prosecutor’s Motion for the Admission of Certain Materials, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. I, 14 October 2004, par. 17.

¹³³⁶ SCSL, Separate Concurring and Partially Dissenting Opinion of Hon. Justice Benjamin Mutanga Itoe on the Decision on the Admissibility of Certain prior Statements of the Accused given to the Prosecution, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15, T. Ch. I, 30 June 2008, par. 43. Judge Itoe dissents from the majority in that he does not agree that the waiver of counsel by Sesay was voluntary made and subscribed to.

case against him.¹³³⁷ The investigators did not correct this misconception.¹³³⁸ Consequently, the Trial Chamber concluded that there was a violation of the right to counsel and the interview was to be excluded from the evidence, according to Rule 95 ICTR RPE.¹³³⁹

Waiving the right to counsel can only be voluntary when the suspect knows the right he or she is entitled to in the first place.¹³⁴⁰ To be so informed, “the suspect must be informed that the right includes the right to the prompt assistance of counsel, prior to and during any questioning.” “Any implication that the right is conditional, or that the presence of counsel may be delayed until after the questioning, renders any waiver defective.”¹³⁴¹ In the *Nchamihigo* case, the suspect was interviewed in the absence of counsel and the Prosecution claimed that he had waived his right voluntarily.¹³⁴² Although the suspect requested the assistance of two attorneys that had previously assisted him, the Prosecution investigator told him the attorneys could only come to assist him if he had sufficient means to pay them. They failed to inform him, however, that a duty counsel had been appointed to represent him and would be available during questioning.¹³⁴³ Hence, the Trial Chamber concluded that *Nchamihigo* had not voluntarily waived his right to assistance by counsel.¹³⁴⁴

¹³³⁷ ICTR, Decision on the Prosecutor’s Motion for the Admission of Certain Materials, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. I, 14 October 2004, par. 19 (“The accused told the investigators that as soon as he is informed about the case against him, he would then ‘exercise’ his right to counsel or ‘be entitled’ to have the assistance of counsel”).

¹³³⁸ *Ibid.*, par. 20 (the Trial Chamber stated that “[i]t was improper for the investigators to have explained that “standard procedure” was that disclosure occurred at a later time. The Accused was under the impression that the interview was “preliminary, but the investigators proceeded to ask important questions of substance”).

¹³³⁹ *Ibid.*, par. 21; ICTR, Decision on Kabiligi Motion for the Exclusion of Portions of Testimony of Prosecution Witness Alison des Forges, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. I, 4 September 2006, par. 2 (the Trial Chamber held that expert witness testimony on the conduct of the interview of the accused should likewise be excluded).

¹³⁴⁰ ICTR, Decision on the Prosecutor’s Application to Admit into Evidence the Transcript of the Accused’s Interview as a Suspect and the Defense Request to Hold a *Voir Dire*, *Prosecutor v. Nchamihigo*, Case No. ICTR-01-63-T, T. Ch. III, 5 February 2007, par. 24; ICTR, Decision on the Prosecutor’s Motion for the Admission of Certain Materials, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. I, 14 October 2004, par. 17.

¹³⁴¹ ICTR, Decision on the Prosecutor’s Motion for the Admission of Certain Materials, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. I, 14 October 2004, par. 17.

¹³⁴² ICTR, Decision on the Prosecutor’s Application to Admit into Evidence the Transcript of the Accused’s Interview as a Suspect and the Defense Request to Hold a *Voir Dire*, *Prosecutor v. Nchamihigo*, Case No. ICTR-01-63-T, T. Ch. III, 5 February 2007.

¹³⁴³ *Ibid.*, par. 17-18.

¹³⁴⁴ *Ibid.*, par. 24.

§ Revocation of waiver

In case the waiver is revoked by the suspect or accused person, the interrogation should immediately cease and only be resumed when the suspect or accused person has obtained or has been assigned counsel.¹³⁴⁵

§ Right to adequate assistance by counsel

In *Popović*, Borovčanin's Defence argued that he had not been adequately represented during the interview as his counsel stood mute during the majority of the interviews. However, the Trial Chamber did not feel that this suggested that the representation was defective in any way.¹³⁴⁶ However, it did hold that if *substantive evidence* was adduced, questioning the counsel's competence to adequately represent the accused's or suspect's interests, the Trial Chamber should examine such evidence.¹³⁴⁷ In the *Halilović* case, the Appeals Chamber found that the Trial Chamber had not given sufficient weight to evidence that the representation was inadequate. *In casu*, there was an Order by the Registry which explicitly stated that the withdrawal of Baliljagić's counsel was based on "available information which seems to put into doubt the quality of the representation of the accused" and added that "it does not appear that the accused is adequately represented."¹³⁴⁸ There seems to be a high threshold for deeming a suspect's or accused's representation incompetent. In *Orić*, ICTY Trial Chamber II held that the counsel's conduct must have been "so deficient that he didn't act as 'counsel', or that he provided 'flagrant incompetent advocacy'".¹³⁴⁹

¹³⁴⁵ Rule 42 (B) ICTY, ICTR and SCSL RPE. Rule 63 (A) ICTY, ICTR and SCSL RPE.

¹³⁴⁶ ICTY, Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65ter Exhibit List, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, 25 October 2007, par. 33.

¹³⁴⁷ *Ibid.*, par. 31. Consider additionally ICTY, Decision on Appeals against Decision Admitting Material Related to Borovčanin's Questioning, *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.10, A. Ch., 14 December 2007, par. 32-36 (the Appeals Chamber finds that the Trial Chamber did not abuse its discretion in finding that there was no violation of the right of the accused to effective representation).

¹³⁴⁸ ICTY, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 19 August 2005, par. 61-62 ("On the evidence placed before the Trial Chamber, the Appeals Chamber is not satisfied that the Trial Chamber gave sufficient weight to the evidence showing Mr. B to be incompetent to represent the interests of the Appellant. Both the statements of the Prosecution and the decision of the Registrar to withdraw Mr. B as assigned counsel to the Appellant clearly indicate that Mr. B was incompetent to provide effective representation to the Appellant").

¹³⁴⁹ ICTY, Decision on Defence Motion to Exclude Interview of the Accused Pursuant to Rule 89 (D) and 95, *Prosecutor v. Orić*, Case No. IT-03-68-T, T. Ch. II, 7 February 2006, par. 26 (footnotes omitted).

In the *Blagojević and Jokić* case, Jokić and Obrenović (a former co-accused who pleaded guilty) requested the same counsel (Simić) as their counsel of choice.¹³⁵⁰ The Defence argued that this created a conflict of interests and that the interview transcripts should not be admitted as evidence.¹³⁵¹ It held that the Prosecution should have informed Mr. Jokić of “an apparent conflict of interest” and should have informed him about “the issue of waiver of conflict-free counsel.”¹³⁵² However, the Trial Chamber found that the Prosecution had respected all procedural requirements. “As a matter of principle [...], once a suspect or an accused waives his or her right to remain silent, the result of any questioning by members of the Prosecution [...] can be used in proceedings involving that suspect or accused.”¹³⁵³ It further held that it was not up to the Prosecutor to question---or interfere with---Jokić’s choice of counsel.¹³⁵⁴ Rather it is the counsel’s as well as the person retaining the counsel’s responsibility to ensure that there is no conflict of interest.¹³⁵⁵ Finally, in *Prlić et al.*, the Appeals Chamber held that the accused failed to substantiate how the counsel’s allegedly opposing interests could be expected to adversely affect the counsel’s assistance during the suspect interviews.¹³⁵⁶ A divergence of personal or political views would not suffice.¹³⁵⁷

IV.1.2. The International Criminal Court

Article 55 (2) (c) of the ICC Statute outlines a *suspect’s* right to have the assistance of a counsel of his or her choice or to have legal assistance assigned during interrogation. The suspect has to be informed about this right prior to being questioned.¹³⁵⁸ Such information should be conveyed by the Prosecution in “the most unequivocal language”.¹³⁵⁹ Article 67 (1) (d) ICC Statute provides a similar right for accused persons.¹³⁶⁰ This includes the right to have

¹³⁵⁰ ICTY, Decision on Prosecution’s Motion for Clarification of Oral Decision Regarding Admissibility of Accused’s Statement, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, T. Ch. I, Section A, 18 September 2003, par. 10.

¹³⁵¹ *Ibid.*, par. 10.

¹³⁵² *Ibid.*, par. 20.

¹³⁵³ *Ibid.*, par. 19.

¹³⁵⁴ *Ibid.*, par. 20.

¹³⁵⁵ *Ibid.*, par. 20.

¹³⁵⁶ ICTY, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.6, A. Ch., 23 November 2007, par. 18 – 26.

¹³⁵⁷ *Ibid.*, par. 24-25.

¹³⁵⁸ Article 55 (2) ICC Statute.

¹³⁵⁹ See ICC, Decision on the Defences’ Applications for Leave to Appeal the “Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased witness 12”, *Prosecution v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07,-496, PTC I, 22 May 2008, p. 10.

¹³⁶⁰ A provision which closely resembles Article 14 (3) (d) ICCPR.

legal assistance assigned in any case where the interests of justice require so and without payment if the person does not have sufficient means to pay for it.¹³⁶¹ The suspect can freely choose from a list of counsel or choose another counsel that meets the requirements and is willing to represent.¹³⁶² As such, suspects and accused persons are given a considerable degree of choice to agree to or refuse counsel that was assigned to them.¹³⁶³ In *Katanga and Ngudjolo Chui*, Trial Chamber II held that “the main importance of the right to counsel in the context of pre-trial interrogations is to protect the essence of the accused’s right, which is to be presumed innocent, to remain silent and not to be forced to self-incriminate”.¹³⁶⁴ It held that if a suspect is interrogated without counsel by national authorities in proceedings unrelated to the Court, the resulting statement may still be admissible as evidence. This is allowed in cases where the absence of a counsel’s assistance *during* the interrogation is not in itself a breach of ‘internationally recognized human rights’ (and the ECHR more precisely), as referred to in Article 69 (7) ICC Statute.¹³⁶⁵ However, it was explained above how the jurisprudence of the ECtHR in principle requires the assistance of counsel *during* the interrogation. Still, the Trial Chamber held that the resulting statement was to be excluded since there were “serious concerns that those statements were obtained in violation of his right to remain silent and the privilege against self-incrimination.”¹³⁶⁶

¹³⁶¹ Controversy has risen on the interpretation of the ‘interests of justice’ reference. Whereas ZAPPALÀ argues that such qualifier is unwelcome as it puts a limitation on this right, HALL has argued that this does not limit but instead enhances the possibilities to have assistance by legal counsel. According to HALL, the choice to include this language was made because delegates at the Rome Conference wanted certainty that persons suspected of the heinous crimes falling within the jurisdiction of the court would be able to obtain assistance by counsel. HALL argues that it will always be in the interests of justice for a suspect to be represented by counsel, unless a person is willing and able to represent himself or herself. See: C.K. HALL, Article 55 in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, München, Verlag C.H. Beck, 2008*, p. 1100; S. ZAPPALÀ, *Human rights in International Criminal Proceedings*, Oxford, Oxford University Press, 2003, p. 60. On the ‘interests of justice’ requirement in Article 67 (1) (d), SCHABAS clarifies that this wording had been removed by the ILC and reinstated by the Preparatory Committee. He acknowledges that it is difficult to imagine a case before the ICC where the interests of justice would not require an indigent defendant to have legal assistance assigned, see W.A. SCHABAS, Article 67, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, München, Verlag C.H. Beck, 2008*, pp. 1263-1264.

¹³⁶² Rule 21 (2) of the ICC RPE *juncto* Regulation 75 of the Regulations of the Court.

¹³⁶³ However, no unfettered right for suspects and accused persons to counsel of their own choosing currently exists.

¹³⁶⁴ ICC, Decision on the Prosecutor’s Bar Table Motions, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-2635, T. Ch. II, 17 December 2010, par. 62.

¹³⁶⁵ *Ibid.*, par. 60-61.

¹³⁶⁶ *Ibid.*, par. 63.

§ Waiver

After the suspect has been informed about his or her right to assistance by counsel, he or she can *voluntarily* choose to waive this right.¹³⁶⁷ Unfortunately, unlike the statutory documents of the *ad hoc* tribunals and the SCSL, there is no explicit requirement to immediately cease questioning when a suspect, who previously waived his or her right to counsel, changes his or her mind.¹³⁶⁸

IV.1.3. Internationalised criminal courts and tribunals

Article 24 new ECCC Law includes an *unconditional* right for suspects to legal assistance of their own choosing and to have counsel assigned if they cannot afford it.¹³⁶⁹ Contrary to other tribunals, the right to legal assistance for suspects herein is not limited to interrogation. Moreover, the free choice of counsel is explicitly guaranteed, which is not always true of other tribunals that sometimes present unfortunate restrictions.¹³⁷⁰ A charged person's right to have the assistance of counsel during questioning is provided for in Rule 58 (2) of the Internal Rules.¹³⁷¹ The charged person can waive the right to a lawyer during questioning, on the condition that a separate written and signed record is completed by the charged person and included in the case file. Apart from these formal elements, the ECCC Pre-Trial Chamber confirmed the jurisprudence of the *ad hoc* tribunals and held that such a waiver should be *unequivocal* and *voluntary*, the latter term meaning that the waiver should be *informed, knowing and intelligent*.¹³⁷² As far as the interrogation of suspects is concerned, the possibility

¹³⁶⁷ Article 55 (2) (d) ICC Statute.

¹³⁶⁸ Compare Article 55 (2) (d) ICC Statute with Rule 42 (B) ICTR, ICTY and SCSL RPE and Rule 63 (A) ICTR, ICTY and SCSL RPE.

¹³⁶⁹ A similar right is provided for accused persons in Article 35 new (d) ECCC Law; see also Rule 21 (1) (d) ECCC IR.

¹³⁷⁰ In particular, the ICTR has imposed restrictions on the choice of counsel, based on "the resources of the Tribunal, competence and recognized experience of counsel, geographical distribution, a balance of the principal legal systems of the world, irrespective of age, gender, race or nationality of the candidates." See: ICTR, Decision on the Motions of the Accused for Replacement of Assigned Counsel, *Prosecutor v. Ntakirutimana*, Case Nos. ICTR-96-10-T and ICTR-96-17-T, 11 June 1997, par. 6 as mentioned in M. BOHLANDER, The Defence, in G. BOAS and W.A. SCHABAS (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Leiden-Boston, Martinus Nijhoff Publishers, 2003, pp. 50-52; C.K. HALL, Article 55, in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1097, fn. 42; J.T. TUINSTRAN, *Defence Counsel in International Criminal Law*, The Hague, T.M.C. Asser Press, 2009, p. 53.

¹³⁷¹ Consider also Rule 21 (1) (d) ECCC IR.

¹³⁷² ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, *The case of Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC/OICJ (PTC01), PTC, 20 March 2008, par. 17-39. While this decision deals

of waiving the right to counsel is not explicitly provided for, but can be indirectly construed.¹³⁷³ Notwithstanding the plain wording of Article 24 new ECCC Law and Rule 21 (1) (d) ECCC IR, International Co-Investigating Judge Harmon confusingly held that a right to assistance by counsel should only be provided to ‘charged persons’.¹³⁷⁴ In light of the clear wording of these provisions, this interpretation should be rejected.¹³⁷⁵ Conversely, if such a limitation were to imply that a suspect---unlike a ‘charged person’---did not have the right to assistance by counsel during an interrogation, it would be in violation of international human rights norms, as was set out above.¹³⁷⁶

At the SPSC, suspects and accused persons also had the right to legal assistance.¹³⁷⁷ Unfortunately, the right to have the assistance of counsel during an interrogation as well as the possibility to waive such a right was only mentioned specifically in the TRCP in relation to custodial interrogations.¹³⁷⁸ The case law of the SPSC reveals that the minimum rights of suspects and accused were not always respected.¹³⁷⁹ Several defendants made statements to investigators without counsel being present.¹³⁸⁰ For example, in the case of *Joni Marques et al.*, the accused was questioned without the presence of his lawyer. The lawyer sent a standardised letter stating that due to time constraints, the questioning could take place

with the adversarial hearing prior to the ordering of pre-trial detention (Rule 63 ECCC IR), and while the Pre-Trial Chamber held that the rules on the interview of the charged person do not apply to this adversarial hearing (*ibid.*, par. 17), there is no reason why the same material conditions should not apply to the interview of the charged person by the Co-Investigating Judges. See the discussion of this decision, *infra*, Chapter 8, II.4.1.

¹³⁷³ Rule 25 (1) (b) ECCC IR (detailing that in case the Co-Prosecutors or Co-Investigating Judges interrogate a suspect, the waiver of the right to assistance by counsel should be recorded).

¹³⁷⁴ ECCC, Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel, Case No. 004/07-09-2009-ECCC-OCIJ, OCIJ, 17 May 2013, par. 50 (“in recognising the Suspect’s right to be defended by a lawyer of his/her choice the Notification of Suspect Rights decision overruled a series of previous decisions by the CIJ’s refusing to grant defence rights to the persons named in the Introductory Submission, without providing any reasons beyond citing Internal Rule 21, and giving this provision a particularly broad interpretation”). It is difficult to understand how granting a right to the assistance of counsel to suspects gives a ‘particularly broad interpretation’ to Rule 21 ECCC IR. It is recalled that Rule 21 (1) (d) affords “[e]very person *suspected* or prosecuted” the right “to be defended by a lawyer of his/her choice” (emphasis added). However, in paragraphs 57 – 59 of the same decision the International Co-Investigating Judge rather (and correctly) argued that the rights of ‘suspects’ are more limited in nature than those of ‘charged persons’ and only encompass the rights expressly set forth in Rule 21 (1) (d), including the right to be assisted by counsel. Hence, suspects do not enjoy the full gamut of defence rights (e.g. access to the case file).

¹³⁷⁵ More specifically, the right to assistance of counsel during suspect interviews derives from Rule 25 (1) (b) ECCC IR. Besides, it follows from Rule 28 (9) ECCC IR that from the moment an issue of self-incrimination arises during a witness interview, the questioning should stop and counsel should be provided.

¹³⁷⁶ See *supra*, Chapter 4, IV.1.1.

¹³⁷⁷ Section 6.3 (a) TRCP.

¹³⁷⁸ Section 6.2 (f) TRCP.

¹³⁷⁹ K. KERR, Fair Trials at International Tribunals, Examining the Parameters of the International Right to Counsel, in «Georgetown Journal of International Law», Vol. 36, 2005, pp. 1248 – 1249.

¹³⁸⁰ JSMP Trial Report, The General Prosecutor v. Joni Marques and nine others (The Los Palos Case), March 2002, p. 17.

without his presence. The letter also included a list of rights to be read to the accused before questioning.¹³⁸¹ Consequently, the statement was allowed at the trial during the cross-examination of the accused. The court found that the accused had waived his right to counsel by being interviewed.

Finally, the STL Statute and RPE provide suspects and accused persons with the right to be questioned only in the presence of counsel.¹³⁸² However, while Rule 65 STL RPE provides that the suspect has the right to be assigned legal assistance without payment if he or she does not have sufficient means to pay for it, the Statute adds that legal assistance will only be provided ‘where the interests of justice require so’.¹³⁸³ Such a requirement does not add anything regarding crimes within the jurisdiction of these international criminal tribunals, as it will always be in the interest of justice to have counsel assigned if the suspect does not have the means to pay for it. Prior to the actual questioning, the suspect should be informed, in a language that he or she speaks and understands, that he or she has the right to legal assistance during the questioning itself.¹³⁸⁴ This right to assistance by counsel can be waived. The provision takes into consideration the case law of the *ad hoc* tribunals by not only requiring that the waiver be ‘voluntary’ but also ‘express’.¹³⁸⁵ However, the Statute seems to offer lesser protection to the suspect than the RPE in that it only requires that the waiver be *voluntary*.¹³⁸⁶ In the case of a waiver, if the suspect subsequently expresses a desire to have counsel, questioning should immediately cease and resume only when the suspect’s counsel is present.¹³⁸⁷

¹³⁸¹ JSMP Trial Report, 16 March 2002, as reprinted in M. BOHLANDER, R. BOED and R.J. WILSON (eds.), *Defense in International Criminal Proceedings: Cases, Materials and Commentary*, Ardsley, Transnational Publishers, 2006, p. 719.

¹³⁸² Article 15 (e) STL Statute; Rule 65 (A) (ii) STL RPE and Rule 85 (A) STL RPE.

¹³⁸³ Compare Rule 65 (A) (ii) STL RPE and Article 15 (c) STL Statute.

¹³⁸⁴ Article 15 STL Statute. However, Rule 65 (A) STL RPE only requires that the suspect is informed ‘in a manner and language the suspect understands’.

¹³⁸⁵ Rule 65 (B) STL RPE, compare with Rule 42 (B) of the ICTR, ICTY and SCSL RPE, *supra*, Chapter 4, IV.1.1.

¹³⁸⁶ Article 15 (e) STL Statute.

¹³⁸⁷ Rule 65 (B) STL RPE.

IV.2. Right to remain silent

IV.2.1. The *ad hoc* tribunals and the SCSL

Suspects¹³⁸⁸ and accused persons¹³⁸⁹ right to remain silent during questioning, as well as accused persons' right to not be compelled to testify against themselves or confess guilt¹³⁹⁰, are laid down in the Statute and the Rules. Originally, the ICTY RPE only provided that the accused should not be compelled to testify against him or herself or to confess guilt. The RPE were later amended to explicitly include a suspect's and accused person's right to remain silent during questioning.¹³⁹¹ An accused person's right to not be compelled to testify against him or herself or to confess guilt does not only apply to the proceedings of the court, but also to any further interrogation of the accused outside the courtroom.¹³⁹²

This right to remain silent and the privilege against self-incrimination (or the *nemo tenetur* principle) reflect international human rights law.¹³⁹³ Although this right and privilege are not provided for under the ECHR, they have been recognised in the case law of the ECtHR.¹³⁹⁴ The right to remain silent and the privilege against self-incrimination were first recognised in *Funke* and in *Murray*.¹³⁹⁵ They are closely connected to the presumption of innocence.

¹³⁸⁸ Rule 42 (A) (iii) ICTY, ICTR and SCSL RPE. The right is not mentioned in the Statute.

¹³⁸⁹ Rule 63 (B) ICTY, ICTR and SCSL RPE.

¹³⁹⁰ Article 20 (4) (g) ICTR Statute, Article 21 (4) (g) ICTY Statute and Article 17 (4) (g) SCSL Statute.

¹³⁹¹ Rule 42 of the ICTY RPE was amended at the fifth Plenary Session (16 January – 3 February 1995): Rule 42 (A) (iii), ICTY RPE, U.N. Doc. IT/32/Rev. 3, 30 January 1995; Rule 63 was amended at the twelfth Plenary Session (2 – 3 December 1996) to make it consistent with Rule 42 (A) (iii): Rule 63, ICTY RPE, U.N. Doc. IT/32/Rev. 10, 3 December 1996. The right to remain silent for suspects was mentioned from the beginning in the ICTR and SCSL RPE (Rule 42 (A) (iii)), the right to remain silent for accused was made explicit in the ICTR RPE after the amendment of Rule 63 at the fifth Plenary Session (1 – 8 June 1998): Rule 63 (B), 8 June 1998.

¹³⁹² *Contra*, consider M. BERGER, *The Right To Silence in The Hague International Criminal Courts*, in «University of San Francisco School of Law Review», Vol. 47, 2012, pp. 38-39. The author argues that “[b]oth the language of the self-incrimination contained in Article 21, as well as the context of the entire article, suggests that its focus is the adjudicatory process before the Court. [...] It does not necessarily mean that the Prosecutor may subject the accused to further questioning outside of the courtroom. Nor does any other provision of the ICTY Statute suggest that there is any such right.” However, it seems that the author is mixing up a *procedural safeguard* (privilege against self-incrimination) and a *power-conferring rule* (power to question accused persons). Additionally, it emerges from this argumentation that the author holds that the Prosecutor's investigative powers are governed by a prohibiting rule. On this issue, see *supra*, Chapter 2, VI.

¹³⁹³ Article 14 (3) (g) ICCPR and Article 8 (2) (g) and 8 (3) ACHR.

¹³⁹⁴ The non-exhaustive character of the rights enumerated in Article 6 (2) and 6 (3), them being specific aspects of the general right to a fair trial, allows for the reading of such right and privilege into Article 6. See ECtHR, *Deweert v. Belgium*, Application No. 6903/75, Series A, No. 35, Judgment of 27 February 1980, par. 56.

¹³⁹⁵ ECtHR, *Funke v. France*, Application No. 10828/84, Judgement of 25 February 1993, par. 44; ECtHR, *Murray v. the United Kingdom*, Application No. 18731/91, Reports 1996-I, Judgement (Grand Chamber) of 8 February 1996, par. 45. In *Saunders*, the ECtHR stated that “although not specifically mentioned in Article 6 of the Convention (art. 6), the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (art. 6).” See

Additionally, there is a link with the right not to be subjected to torture or to inhuman or degrading treatment, since torture and inhuman or degrading treatment constitute methods that are often used in order to compel individuals to confess or to testify against themselves.¹³⁹⁶ The right to remain silent can be considered more limited in scope than the privilege against self-incrimination, which is not limited to verbal expressions. On the other hand, the right to silence goes beyond this as it not only protects the individual from making incriminating statements, but any declaration at all.¹³⁹⁷ These terms are equated by the ECtHR. Some form of compulsion must take place in order for these right and privilege to apply.¹³⁹⁸ The right to remain silent and the privilege against self-incrimination protect the individual against, what the Court labels, ‘improper compulsion’ by the authorities.¹³⁹⁹ Besides, the privilege against self-incrimination protects the accused’s will to remain silent against the ‘defiance of the will of the accused through coercion or oppression’.¹⁴⁰⁰ Neither the right to remain silent nor the privilege against self-incrimination are considered absolute by the Court.¹⁴⁰¹ The Court must take different factors into consideration, including (i) the nature and degree of compulsion used to obtain the evidence, (ii) the weight of the public

ECtHR, *Saunders v. The United Kingdom*, Application No. 19187/91, Reports 1996-VI, Judgment of 17 December 1996, par. 68.

¹³⁹⁶ HRC, General Comment 13, Article 14 (Twenty-first session, 1984), par. 14, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1, p. 14. See *infra*, Chapter 4, IV.5.

¹³⁹⁷ S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, p. 342.

¹³⁹⁸ See ECtHR, *Saunders v. The United Kingdom*, Application No. 19187/91, Reports 1996-VI, Judgment of 17 December 1996, par. 69 (“The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing”). See the discussion, *infra*, Chapter 4, IV.2; Chapter 6, II.5.1.

¹³⁹⁹ See e.g. ECtHR, *Murray v. the United Kingdom*, Application No. 18731/91, Reports 1996-I, Judgment (Grand Chamber) of 8 February 1996, par. 48-50; ECtHR, *Bykov v. Russia*, Application No. 4378/02, Judgment (Grand chamber) of 10 March 2009, par. 92. Consider. J.D. JACKSON and S.J. SUMMERS, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*, Cambridge, Cambridge University Press, 2012, p. 283 (the authors propose a different rationale for these rights and argue that where the defendant is asked to account and thus to participate already at the pre-trial stage of proceedings, these two rights should rather function as a procedural right to ensure that there can be no participation at the pre-trial stage until the accused is given access to all defence rights which apply to that stage of proceedings).

¹⁴⁰⁰ ECtHR, *Allan v. United Kingdom*, Application No. 48539/99, Reports 2002-IX, Judgment of 5 November 2001, par. 44, 50; ECtHR, *Jalloh v. Germany*, Application No. 54810/00, Judgment (Grand Chamber) of 11 July 2006, par. 100; ECtHR, *Saunders v. The United Kingdom*, Application No. 19187/91, Reports 1996-VI, Judgment of 17 December 1996, par. 68; ECtHR, *J.B. v. Switzerland*, Application No. 31827/96, Reports 2001-III, Judgment of 3 May 2001, par. 64; ECtHR, *Bykov v. Russia*, Application No. 4378/02, Judgment (Grand chamber) of 10 March 2009, par. 92.

¹⁴⁰¹ ECtHR, *O’Halloran and Francis v. The United Kingdom*, Application Nos. 15809/02 and 25624/02, Judgment (Grand Chamber) of 29 June 2007, par. 53; ECtHR, *Bykov v. Russia*, Application No. 4378/02, Judgment (Grand chamber) of 10 March 2009, Partly Dissenting Opinion of Judge Costa, par. 7.

interest in the investigation and punishment of the offence in issue, (iii) the existence of any relevant safeguards in the procedure, and (iv) the use that any obtained material is put to.¹⁴⁰²

There is a link between the above-mentioned right and privilege and the procedural safeguards outlined in Rule 43. Rule 43 of the RPE encompasses technical rules that are not only aimed at ensuring the reliability and precision of an individual's statement, but which aim at safeguarding the guarantees of Rule 42 and protect the individual against involuntary self-incrimination in particular.¹⁴⁰³ These technical rules will be discussed in a later section.¹⁴⁰⁴

§ *Right to be informed about this right*

As with the other rights afforded to a suspect or an accused person, the individual should be informed about the existence of the right prior to the start of the interrogation and in a language that he or she (speaks and) understands.¹⁴⁰⁵ The suspect or the accused person should also be cautioned that any statement he or she makes will be recorded and can be used as evidence.¹⁴⁰⁶ However, there is no requirement that the suspect be explicitly informed that his or her statement may be used as evidence *against him or herself*.¹⁴⁰⁷ The ICTY Appeals Chamber accepted a presumption and held that the accused is presumed to know of the right to remain silent if he or she is assisted by counsel.¹⁴⁰⁸ This underlines the important

¹⁴⁰² ECtHR, *Jalloh v. Germany*, Application No. 54810/00, Judgment (Grand Chamber) of 11 July 2006, par. 117.

¹⁴⁰³ ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Separate Opinion of Judge Schomburg, par. 2.

¹⁴⁰⁴ See *infra*, Chapter 4, IV.6.

¹⁴⁰⁵ Rules 42 (A) ICTY, ICTR and SCSL RPE. Compare with the *Miranda* case in the US and the need for a formal warning, *Miranda v. Arizona*, 384 U.S. 436 (1966). Note that the 'Miranda warnings' are more restrictive where these only apply to the situation where a person has been taken into custody.

¹⁴⁰⁶ Rule 42 (A) (iii) and 63 (B) ICTY, ICTR and SCSL RPE.

¹⁴⁰⁷ ICTY, Decision on Motion for Exclusion of Statement of Accused, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, T. Ch. I, Section A, 8 July 2005, par. 23. Although, occasionally, the Prosecution has gone further than this obligation requires. For example, in the *Popović* case, the suspect Borovčanin was cautioned that any statement he made could be used against him and the words "against you" were added. However, these words were subsequently not translated in BCS. The Trial Chamber noted that the investigator was under no obligation to do so and that this omission in the translation is immaterial for the application of the objective test which is set out in Rule 42. See: ICTY, Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65ter Exhibit List, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. Ch. II, 25 October 2007, par. 35.

¹⁴⁰⁸ ICTY, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 19 August 2005, par. 15. In *Bagosora et al.*, the Trial Chamber underscored the importance of legal representation to have an explanation on other rights at the preliminary stage, see ICTR, Decision on the Prosecutor's Motion for the Admission of

connection between these two rights. Also, the ECtHR held that the right to assistance by counsel during interrogation is all the more important when the person has not been informed of his or her right to remain silent, prior to the commencement of the interview.¹⁴⁰⁹

Could an accused person be ‘encouraged’ to speak rather than remain silent? This situation arose in the *Delalić* case. The Trial Chamber ruled that “telling a suspect that a confession would on conviction assist in mitigation of punishment is not so strong as to induce confession.”¹⁴¹⁰ According to the Trial Chamber, offering an alternative to remaining silent is ‘undesirable’ and at odds with the right to remain silent. However, it does not render the interrogation involuntary.¹⁴¹¹

§ Waiver of right to remain silent

Similar to waiving the right for the assistance of counsel, any waiver of the right to remain silent, and thus the choice to respond to any question, should be voluntary, express and unequivocal.¹⁴¹² Likewise, the suspect or accused should be aware that the right exists as well as of the consequences that arise should they choose to waive this right.¹⁴¹³ In the *Delalić* case, Mucić claimed that a subjective test should be applied to assess the voluntariness of the waiver. He claimed that his cultural background and the fact that he was under arrest in a foreign country should be taken into consideration.¹⁴¹⁴ The Trial Chamber did not accept this cultural argument and stated that the suspect had the facility of interpretation at his disposal.¹⁴¹⁵

Certain Materials, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. I, 14 October 2004, par. 21. Consider also ICTY, Prosecution Motion for Admission of Evidence from the Bar Table Pursuant to Rule 89(C), *Prosecutor v. Hartmann*, Case No. IT-02-54-R77.5, T. Ch., 17 February 2009, par. 13.

¹⁴⁰⁹ ECtHR, *Brusco v. France*, Application No. 1466/07, Judgment of 14 October 2010, par. 45, 54.

¹⁴¹⁰ ICTY, Decision on Zrdavko Mucić Motion for the Exclusion of Evidence, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, T. Ch., 2 September 1997, par. 54.

¹⁴¹¹ *Ibid.*, par. 54-55.

¹⁴¹² See *supra*, Chapter 4, IV.1.1.

¹⁴¹³ ICTY, Decision on the Admission into Evidence of Slobodan Praljak’s Evidence in the case of Naletelić and Martinović, *Prosecutor v. Prilć et al.*, Case No. IT-04-74-T, T. Ch. III, 5 September 2007, par. 19. However, this case concerned the statement of the interrogation of a witness.

¹⁴¹⁴ ICTY, Judgement, *Prosecutor v. Delalić*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 549-550.

¹⁴¹⁵ *Ibid.*, par. 551.

§ *No retroactive invocation of the right*

If the accused has freely and voluntarily made statements prior to trial, he cannot retroactively choose to invoke his right against self-incrimination to try and prevent those statements from being introduced. That is, of course, provided that he was informed about his right to remain silent before having given the statement. Once a suspect or accused has waived his or her right to remain silent, the results from any questioning can be used in proceedings that involve that suspect or accused.¹⁴¹⁶

§ *Drawing adverse inferences from the silence of the accused*

The question also arises as to whether and to what extent it is possible to hold a suspect's or an accused's silence against him or her. Arguably, warning a suspect that his or her silence during the interrogation can be used against him or her can be considered a form of *indirect compulsion*. In the *Delalić et al.* case, the Trial Chamber had to consider the possibility of drawing inferences from the accused's silence. The Prosecution requested an order from the Chamber that Mucić provide a handwriting sample to prove his authorship of a letter. The Defence opposed this request as being in violation of the protection against self-incrimination. The Prosecutor relied on the *Murray* case of the ECtHR.¹⁴¹⁷ However, the Trial Chamber argued that, unlike in the *Murray* case, the ICTY Statute does not provide for the power to draw adverse inferences.¹⁴¹⁸ Article 21 (4) (g), Rule 42 (A) (iii) and Rule 63 are unambiguous.¹⁴¹⁹ The Trial Chamber ruled that compelling the accused to provide a sample would infringe upon Article 21 (4) (g) ICTY Statute.¹⁴²⁰ It argued that “[i]f the handwriting

¹⁴¹⁶ ICTY, Decision on Prosecution's Motion for Clarification of Oral Decision Regarding Admissibility of Accused's Statement, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, T. Ch. I (Section A), 18 September 2003, par. 19; ICTY, Decision on the Admission of the Record of the Interview of the Accused Kvočka, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, T. Ch., 16 March 2001; ICTY, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 19 August 2005, par. 15; ICTY, Prosecution Motion for Admission of Evidence from the Bar Table Pursuant to Rule 89(C), *Prosecutor v. Hartmann*, Case No. IT-02-54-R77.5, T. Ch., 17 February 2009, par. 13.

¹⁴¹⁷ ECtHR, *Murray v. the United Kingdom*, Application No. 18731/91, Reports 1996-I, Judgement (Grand Chamber) of 8 February 1996.

¹⁴¹⁸ ICTY, Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucić, to Provide a Handwriting Sample, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, T. Ch., 19 January 1998, par. 46.

¹⁴¹⁹ The Chamber also rejected the argumentation by the Prosecution, based on American jurisprudence, that the privilege from self-incrimination should be qualified or restricted to testimonial evidence. There was no such condition contemplated by the law maker. See *ibid.*, par. 51-58.

¹⁴²⁰ *Ibid.*, par. 47.

sample taken together with other evidence will constitute material evidence to prove the charge against the accused, then the order of the Trial Chamber would have compelled the production of self-incriminating evidence.”¹⁴²¹ “There is no duty in law or morals for the accused to fill a vacuum created by the investigative procedural gap of the Prosecution.”¹⁴²² According to the Chamber, the precise meaning of the right to silence is that the accused person can stay mute without reacting to the allegation.¹⁴²³ Later case law of the *ad hoc* tribunals confirmed that in the absence of an express statutory provision, drawing adverse inferences is absolutely prohibited.¹⁴²⁴

Consequently, the procedural safeguards offered by the *ad hoc* tribunals go beyond the requirements of the ECtHR.¹⁴²⁵ As explained above, according to the ECtHR, the right to remain silent is not absolute. A conviction cannot solely or mainly be based on an accused’s silence. Nevertheless, in case the silence ‘calls’ for an explanation which the accused ought to be in a position to provide, the failure to provide such an explanation “may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty.”¹⁴²⁶ Close attention should be paid to all circumstances: the situations in which an inference can be drawn, the weight that can be attached to an inference in assessing the evidence, the degree of compulsion inherent in the situation, etc.¹⁴²⁷ However, a state cannot impose sanctions compelling an accused person to provide information. This would destroy the very essence of one’s privilege against self-incrimination and the right to remain silent.¹⁴²⁸ In this manner, the ECtHR tries to resolve the tension between affording the right to

¹⁴²¹ *Ibid.*, par. 48.

¹⁴²² *Ibid.*, par. 49.

¹⁴²³ *Ibid.*, par. 50.

¹⁴²⁴ ICTY, Judgement, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 783; ICTY, Judgement, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, T. Ch. I, 31 March 2003, par. 9; ICTY, Judgement, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. Ch. II, 10 June 2010, par. 17; ICTR, Judgement and Sentence, *Prosecutor v. Gatete*, Case No. ICTR-2000-61-T, T. Ch. III, 31 March 2011, par. 78; ICTR, Judgement and Sentence, *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, T. Ch. I, 16 May 2003, par. 46.

¹⁴²⁵ Disregarding the fact that, as rightly stressed by the Trial Chamber in the *Delalić* case, there is no legal basis for the drawing of adverse inferences provided for in neither the Statute nor the RPE.

¹⁴²⁶ ECtHR, *Murray v. The United Kingdom*, Application No. 18731/91, Reports 1996-I, Judgement (Grand Chamber) of 8 February 1996, par. 51; ECtHR, *Adetoro v. The United Kingdom*, Application No. 46834/06, Judgment of 20 April 2010, par. 48; ECtHR, *Al-Khawaja and Tahery v. The United Kingdom*, Application Nos. 26766/05 and 22228/06, Reports 2011, Judgment (Grand Chamber) of 15 December 2011, par. 138.

¹⁴²⁷ *Ibid.*, par. 49; ECtHR, *Murray v. the United Kingdom*, Application No. 18731/91, Reports 1996-I, Judgment (Grand Chamber) of 8 February 1996, par. 47; ECtHR, *Averill v. The United Kingdom*, Application No. 36408/97, Reports 2000-VI, Judgment of 6 June 2000, par. 44.

¹⁴²⁸ ECtHR, *Heaney and McGuinness v. Ireland*, Application No. 34720/97, Reports 2000-XII, 21 December 2000, par. 55.

remain silent to the defendant and the requirement of defence participation, which is a prerequisite for the trier of fact to have all relevant information at his or her disposal.¹⁴²⁹ Unlike the ECtHR, the HRC seems to hold that drawing adverse inferences violates the right to a fair trial.¹⁴³⁰

SLUITER and ZAHAR provide a possible explanation as to why the law of international criminal procedure surpasses the requirements outlined in the case law of the ECtHR. They argue that “[a]ssistance from the accused, generally in the form of a confession, is at the present stage of international criminal law not as important as in domestic jurisdictions. There is not the situation of immediate arrest followed by interrogation, offering a conducive environment for a confession. The general practice is for an accused person to determine their defence strategy and adequately prepare for a trial beforehand.”¹⁴³¹ From the perspective of efficiency, one could argue that preventing the tribunals from drawing adverse inferences makes the suspect’s or the accused’s decision to remain silent or not testify “more costly than would otherwise be the case.”¹⁴³² However---notwithstanding the prohibition of drawing adverse inferences in the procedures of *ad hoc* tribunals---, this does not prevent the triers of fact from taking the accused’s silence into consideration, even if they do not openly admit it. Additionally, the decision to remain silent is sometimes considered by the *ad hoc* tribunals in relation to applications for provisional release, which seems to be odds with the right to remain silent and the privilege against self-incrimination.¹⁴³³

§ *The right not to be compelled to incriminate oneself and oppressiveness of the interrogation*

A substantial amount of litigation before the *ad hoc* tribunals focuses on the alleged involuntariness of interrogations. Oppressive conduct renders an interrogation involuntary. Arguably, the right to remain silent and the privilege against self-incrimination serve to

¹⁴²⁹ J.D. JACKSON and S.J. SUMMERS, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*, Cambridge, Cambridge University Press, 2012, p. 103.

¹⁴³⁰ HRC, Concluding Observations: United Kingdom of Great-Britain and Northern Ireland, U.N. Doc. CCPR/CO/73/UKOT, 6 December 2001, par. 17 (“the Committee remains troubled by the principle that juries may draw negative inferences from the silence of accused persons. The State party should reconsider, with a view to repealing it, this aspect of criminal procedure, in order to ensure compliance with the rights guaranteed under article 14 of the Covenant”).

¹⁴³¹ A. ZAHAR and G. SLUITER, *International Criminal Law: a Critical Introduction*, Oxford, Oxford University Press, 2008, p. 307.

¹⁴³² M. BERGER, *The Right To Silence in The Hague International Criminal Courts*, in «University of San Francisco School of Law Review», Vol. 47, 2012, p. 21.

¹⁴³³ See *infra*, Chapter 8, II.2.6.1.

ensure that the participation of the suspect or the accused is ‘voluntary’ and respects his or her will.¹⁴³⁴ Below, two kinds of oppressive conduct will be distinguished: (i) statements that ‘excite hope’ and thereby coerce the suspect or defendant into cooperating involuntarily and (ii) conduct that ‘raises fears’ and, thus, also coerces the suspect or defendant into cooperating.

§ *Inducements and incentives*

In the case law of *ad hoc* tribunals, a distinction can be drawn between ‘inducements that render cooperation involuntary’ and ‘inducements that are mere incentives to cooperate’. In *Halilović*, the Appeals Chamber stated that the fact that the interviewer offered an incentive during an interrogation which the accused subsequently took into account, does not mean that the accused acted involuntarily.¹⁴³⁵ It follows from the Appeals Chamber’s reasoning that only more powerful inducements that “coerce the Appellant into cooperating with the Prosecutor” render the cooperation involuntary.¹⁴³⁶ Such a test, however, is not always easy to apply in practice, given its subjective nature. It is not always clear to what extent an inducement coerces an accused person into cooperating. For example, it is difficult to measure the effect of a Prosecutor’s statement that it would not oppose an application for provisional release if the person cooperates during the interrogation. A confession given by an accused person must be the product of his or her free will. In *Halilović*, the Appeals Chamber agreed with the Trial Chamber that a statement by the Prosecution that the accused’s cooperation “could have a positive influence on the Prosecution’s position in respect of an application for provisional release”, is distinct from a promise of provisional release and did not render the interview involuntary. However, the Appeals Chamber did find that the Trial Chamber erred by not classifying such a statement as an inducement. While the statement did not *coerce* the accused into cooperating, it should still be treated as an ‘inducement understood as an incentive to cooperate’.¹⁴³⁷

¹⁴³⁴ J.D. JACKSON and S.J. SUMMERS, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*, Cambridge, Cambridge University Press, 2012, p. 267.

¹⁴³⁵ ICTY, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 19 August 2005, par. 38.

¹⁴³⁶ Compare ICTY, Decision on Hazim Delić’s Motion Pursuant to Rule 73, *Prosecutor v. Delalić et al.*, Case No. ICTY-96-21-T, T. Ch. I, 1 September 1997, par. 15.

¹⁴³⁷ ICTY, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 19 August 2005, par. 38-39; ICTY,

In *Sesay*, the SCSL Trial Chamber relied heavily on common law case-law to derive certain ‘principles of law’ regarding the voluntariness of interrogations. It follows from these principles that a promise made by the Prosecution will only render a statement involuntary if the *quid pro quo* offered provides a strong enough inducement “to raise a reasonable doubt about whether the will of the suspect was overborne.”¹⁴³⁸ *In casu*, the Prosecution investigators told the accused that they had the authority to ask the Judges for leniency if the accused would cooperate. They also said that the Judges would accept whatever they, as investigators, would tell the Judges.¹⁴³⁹ Moreover, they told the accused that cooperation would enable the investigators to ask the Court for a reduced sentence. The accused was also told that the Prosecution would take care of his family for the duration of the interrogation and that they would be placed into protective custody, given financial benefits as well as the possibility of relocating to another country.¹⁴⁴⁰ Finally, they indicated to the accused that he would be called as a witness for the Prosecution if he would cooperate. According to the Chamber, the accused could have understood this to mean that he could avoid prosecution.¹⁴⁴¹ In addition to other irregularities, this led the Court to conclude that the Prosecution had not discharged its burden to prove beyond reasonable doubt that the statements were given voluntarily. The Court explained that the statements were the result of a “fear of prejudice and hope of advantage”. The Court referred to the role of the Prosecution investigators in this case as one which “borders on a semblance of arm twisting and holding out promises and inducements to the Accused in the course of the interrogation and particularly during the unrecorded conversations in the course of the break in order to sustain the accused’s cooperation with the Prosecution.”¹⁴⁴²

Decision on Admission into Evidence of Interview of the Accused, *Prosecutor v. Halilović*, Case No. IT-01-48-T, T. Ch. I, Section A, 20 June 2005, par. 13-14.

¹⁴³⁸ SCSL, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15, T. Ch. I, 30 June 2008, par. 43, citing the case of *R. v. Spencer*, before the Supreme Court of Canada: *R. v. Spencer*, [2007] 1 S.C.R. 500, 2007 SCC 11.

¹⁴³⁹ SCSL, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15, T. Ch. I, 30 June 2008, par. 45.

¹⁴⁴⁰ *Ibid.*, par. 45.

¹⁴⁴¹ *Ibid.*, par. 46.

¹⁴⁴² *Ibid.*, par. 51.

§ *Circumstances surrounding the interrogation: coercion, duress, threats*

The ICC Statute explicitly prohibits any form of coercion, duress or threat during questioning.¹⁴⁴³ No similar provision can be found in the Statute or RPE of the *ad hoc* tribunals or the SCSL. Nevertheless, the jurisprudence provides some guidance as to what conduct is prohibited.

Cases where statements are induced by oppressive conduct (coercion, force or fraud) that sapped the accused's concentration and free will through various acts, weakened resistance and rendered it impossible for the suspect to think clearly, constitute oppressive conduct.¹⁴⁴⁴ Oppressiveness hinges upon many factors that cannot all be catalogued. First, the characteristics of the suspect or accused person should be taken into consideration. What may be oppressive to a child, old man or an invalid person or someone inexperienced in the administration of justice may not be oppressive to a mature person who is familiar with the judicial process.¹⁴⁴⁵ The duration and manner of questions as well as material considerations are equally important.¹⁴⁴⁶

The Trial Chamber in the *Sesay* case refused to take the cultural background of the accused into consideration when looking into the oppressiveness of the questioning.¹⁴⁴⁷ The Chamber held that the test is to be construed objectively. It rejected the Defence's argument that "the Accused had spent the previous ten years fighting in a war in the bush and did not have direct experience of a judicial system or of a system or a state authority based on the rule of law and the protection of human rights relevant to its analysis of the circumstances in which the questioning occurred."¹⁴⁴⁸

The ICTY Trial Chamber in *Delalić et al.* drew from the English law of evidence, which defines oppressive questioning as:

¹⁴⁴³ Article 55 (1) (b) ICC Statute.

¹⁴⁴⁴ ICTY, Decision on Zrdavko Mucić Motion for the Exclusion of Evidence, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, T. Ch., 2 September 1997, par. 66.

¹⁴⁴⁵ *Ibid.*, par. 67.

¹⁴⁴⁶ Examples are the facilities provided such as refreshments as well as the rest between different periods of questioning.

¹⁴⁴⁷ SCSL, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15, T. Ch. I, 30 June 2008, par. 57.

¹⁴⁴⁸ *Ibid.*, par. 56.

“Questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hope (such as hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have remained silent.”¹⁴⁴⁹

This test led the Trial Chamber to conclude that an interview that lasted four and three quarter hours and in which five different officers participated did not constitute oppressive questioning.¹⁴⁵⁰ In *Orić*, the Defence complained that the defendant had been questioned aggressively. The Trial Chamber concluded that the questioning was not aggressive and held that where the style of interrogation was “somewhat ‘aggressive’”, “this was within the limits of normality and in no way affects the integrity of the interview rendering it unreliable.”¹⁴⁵¹

§ Other forms of improper compulsion; prohibition of deceptive methods

The case law of the *ad hoc* tribunals also clarified that the interviewer should not mislead the suspect or accused in regard to his or her affiliation with the OTP.¹⁴⁵² It may be asked what other forms of compulsion or deception should be considered unacceptable given that they can render the questioning involuntary. However, further relevant case law on this issue is lacking.¹⁴⁵³

There is not a great deal of guidance as to what forms of compulsion and deception are acceptable under human rights law either. While the case law of the ECtHR clarified that the right to remain silent offers protection against improper compulsion, it is less clear what types

¹⁴⁴⁹ ICTY, Decision on Zrdavko Mucić Motion for the Exclusion of Evidence, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, T. Ch., 2 September 1997, par. 68 (referring to *R v. Prager* (1972) 56 Cr. App. R. 151 (English Court of Appeal)).

¹⁴⁵⁰ *Ibid.*, par. 69.

¹⁴⁵¹ ICTY, Decision on Defence Motion to Exclude Interview of the Accused Pursuant to Rules 89 (D) and 95, *Prosecutor v. Orić*, Case No. IT-03-68-T, T. Ch. II, 7 February 2006, par. 28; ICTY, Judgement, *Prosecutor v. Orić*, Case No. IT-03-68-T, T. Ch. II, 30 June 2006, par. 55.

¹⁴⁵² ICTR, Decision on Kanyabashi’s Oral Motion to Cross-Examine Ntahobali Using Ntahobali’s Statements to Prosecution Investigators in July 1997, *Prosecutor v. Ndayambaje et al.*, Case No. ICTR-98-42-T T. Ch. II, 15 May 2006, par. 76.

¹⁴⁵³ Note that all national criminal justice systems allow for some forms of pressure in the course of the interrogation. See P. ROBERTS, *Comparative Criminal Justice Goes Global*, in «Oxford Journal of Legal Studies», Vol. 28, 2008, p. 380 (“Today, every police force in every jurisdiction in the world uses lawful psychological pressure to extract confessions from suspects during interrogation, and this undoubtedly frequently produces ‘testimony’ (or evidence presented to the court in the form of a confession) which would not have been forthcoming in the absence of such pressures”).

of compulsion should be labelled ‘improper’.¹⁴⁵⁴ The Court seeks to distinguish between (i) direct compulsion (e.g. bringing criminal proceedings against a person to compel him or her to provide evidence (*Funke*)), which *may* result in the violation of the right to remain silent and the privilege against self-incrimination and (ii) certain amounts of indirect compulsion (e.g. warning a suspect that adverse inferences may be drawn (*Murray*)), which do not violate the privilege against self-incrimination or the right to remain silent.¹⁴⁵⁵ Admittedly, such criteria are rather vague. The question is whether “the very essence” of the privilege against self-incrimination is destroyed.¹⁴⁵⁶

As previously indicated, the privilege against self-incrimination and the right to remain silent also imply that, in a criminal case, the prosecution does not seek to prove its case against the accused by resorting to evidence obtained *through methods of coercion or oppression in defiance of the will of the accused*.¹⁴⁵⁷ This may be the case when an accused is questioned in custody using an informant placed in his cell, even if no direct compulsion is exercised in such a situation. In *Allan v. UK*, the ECtHR held that:

“While the right to silence and the privilege against self-incrimination are primarily designed to protect against improper compulsion by the authorities and the obtaining of evidence through methods of coercion or oppression in defiance of the will of the accused, the scope of the right is not confined to cases where duress has been brought to bear on the accused or where the will of the accused has been directly overborne in some way. The right, which the Court has previously observed is at the heart of the notion of a fair procedure, serves in principle to protect the freedom of a suspected person to choose whether to speak or to remain silent when questioned by the police. Such freedom of choice is effectively undermined in a case in which, the suspect having elected to remain silent during questioning, the authorities use subterfuge to

¹⁴⁵⁴ ECtHR, *Murray v. the United Kingdom*, Application No. 18731/91, Reports 1996-I, Judgment (Grand Chamber) of 8 February 1996, par. 46 (“The Court does not consider that it is called upon to give an abstract analysis of the scope of these immunities and, in particular, of what constitutes in this context “improper compulsion”).

¹⁴⁵⁵ ECtHR, *Murray v. the United Kingdom*, Application No. 18731/91, Reports 1996-I, Judgment (Grand Chamber) of 8 February 1996, par. 48-50; ECtHR, *O’Halloran and Francis v. The United Kingdom*, Application Nos. 15809/02 and 25624/02, Judgment (Grand Chamber) of 29 June 2007, par. 53 (noting that not every form of direct compulsion automatically results in a violation of these rights, considering that they are not absolute).

¹⁴⁵⁶ *Ibid.*, par. 49.

¹⁴⁵⁷ ECtHR, *Allan v. United Kingdom*, App. No. 48539/99, Reports 2002-IX, Judgment of 5 November 2001, par. 44, 50; ECtHR, *Jalloh v. Germany*, Application No. 54810/00, Judgment (Grand Chamber) of 11 July 2006, par. 100; ECtHR, *Saunders v. The United Kingdom*, Application No. 19187/91, Reports 1996-VI, Judgment of 17 December 1996, par. 68; ECtHR, *J.B. v. Switzerland*, Application No. 31827/96, Reports 2001-III, Judgment of 3 May 2001, par. 64; ECtHR, *Gäfgen v. Germany*, Application No. 22978/05, Reports 2010, Judgment (Grand Chamber) of 1 June 2010, par. 168.

elicit, from the suspect, confessions or other statements of an incriminatory nature, which they were unable to obtain during such questioning and where the confessions or statements thereby obtained are adduced in evidence at trial.”¹⁴⁵⁸

It is important to consider the particularities of the case, in that the accused was in pre-trial detention and “consistently availed himself of the right to silence”.¹⁴⁵⁹ Furthermore, *in casu*, the police took advantage of the accused’s vulnerable and susceptible state, the result of lengthy periods of interrogation. However, this judgment should not lead us to conclude that the use of trickery, subterfuge or other forms of deception, automatically violates the accused’s right to remain silent and privilege against self-incrimination. This is evidenced by the Court’s judgment in *Bykov* that a statement was not considered to be obtained by coercion, oppression or in defiance of the will of the accused (and thus in breach of the privilege against self-incrimination), where an informant was used outside of custody and where the accused was “willing to continue the conversation” started by the informant.¹⁴⁶⁰

IV.2.2. The International Criminal Court

According to Article 55 (2) (b) ICC Statute, a suspect who is questioned, either by the Prosecutor or by national authorities, has the right to remain silent during the questioning.¹⁴⁶¹ This provision does not apply in cases where a suspect was interrogated by national authorities in proceedings unrelated to the Court. However, Trial Chamber II in the *Katanga and Ngudjolo Chui* case still decided to exclude self-incriminating statements made by the accused in Congolese proceedings unrelated to the Court, since they could have been obtained in violation of ‘internationally recognized human rights’. More precisely, there were “serious concerns that those statements were obtained from him in violation of his right to remain silent and of the privilege against self-incrimination.”¹⁴⁶² It based this conclusion on the fact

¹⁴⁵⁸ ECtHR, *Allan v. United Kingdom*, Application. No. 48539/99, Reports 2002-IX, Judgment of 5 November 2001, par. 50 – 51.

¹⁴⁵⁹ *Ibid.*, par. 52.

¹⁴⁶⁰ ECtHR, *Bykov v. Russia*, Application No. 4378/02, Judgment (Grand chamber) of 10 March 2009, par. 99-105. Consider also the dissent by Judge Costa, who argued that “[t]he right to remain silent would be truly “theoretical and illusory” if it were accepted that the police had the right to “make a suspect talk” by using a covert recording of a conversation with an informer assigned the task of entrapping the suspect”). See *ibid.*, Partly Dissenting Opinion of Judge Costa, par. 8.

¹⁴⁶¹ Article 55 (2) (b) ICC Statute.

¹⁴⁶² ICC, Decision on the Prosecutor’s Bar Table Motions, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-2635, T. Ch. II, 17 December 2010, par. 63-65. However, the Trial Chamber omitted to explain whether the two-prong test for the exclusion of evidence under Article 69 (7) ICC

that it was the accused's first interview in detention and that, at the time, he was unaware of the reasons for his detention.¹⁴⁶³ The Chamber underlined the link between the right to remain silent and to not be compelled to incriminate oneself and the right to counsel. Even if the accused would have had access to his counsel shortly before the interrogation, the counsel's advice would not have been adequate given that it necessarily would have been based on incomplete information.¹⁴⁶⁴

Accused persons enjoy the right to not be compelled to testify or confess guilt in addition to the right to remain silent during interrogation.¹⁴⁶⁵ The practice of the *ad hoc* tribunals and the SCSL may offer guidance as to how this right should be interpreted. It follows from Regulation 43 (1) of the ICC OTP Regulations that: '[n]o inducement whatsoever shall be offered to a person in exchange for questioning or statement'.

§ *Right to be informed about such right*

Similar to the *ad hoc* tribunals and the SCSL, the right to remain silent can be waived and the accused or suspect should be cautioned. Regrettably, unlike the procedural framework of the *ad hoc* tribunals and the SCSL, no express requirement is to be found in the Statute or the Rules stating that the suspect or accused should be cautioned about the possibility that his or her statement could be used as evidence at trial.¹⁴⁶⁶ However, the Prosecution has stated that it has "adopted, and consistently applied, a policy of informing all persons questioned – including under Article 55 (2) – that their evidence may be used in subsequent proceedings."¹⁴⁶⁷

Statute was fulfilled. It is to be recalled that the ICC Statute provides for the mandatory exclusion of evidence if such evidence is obtained by means of a violation of internationally recognised human rights only if (a) the violation casts serious doubt on the reliability of the evidence; or (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

¹⁴⁶³ *Ibid.*, par. 63.

¹⁴⁶⁴ *Ibid.*, par. 63.

¹⁴⁶⁵ Article 67 (1) (g) ICC Statute.

¹⁴⁶⁶ Compare with Rule 42 (A) (iii) ICTY, ICTR and SCSL RPE. While Regulation 40 (f) of the Regulations of the Office of the Prosecutor states that the person questioned should be informed of the 'procedures which may follow', including those of 'being requested to appear before the Court', this falls short of a clear-cut obligation to inform the person questioned that *any statement made* may be used in evidence.

¹⁴⁶⁷ ICC, Prosecution's Observations Regarding Admission for the Confirmation Hearing of the Transcripts of Interview of Deceased Witness 12 pursuant to Articles 61 and 69 of the Statute, *Prosecutor v. Katanga and Njudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-336, PTC I, 20 March 2008, par. 21.

§ Drawing inferences from silence

Unlike the *ad hoc* tribunals and the SCSL, the ICC Statute explicitly states that silence cannot be taken into consideration when determining the guilt or innocence of an accused.¹⁴⁶⁸ In this sense, the ICC Statute offers greater protection. Such protection may go further than what is required under international human rights law.¹⁴⁶⁹

IV.2.3. Internationalised criminal courts and tribunals

The ECCC Law includes the right for *accused persons* to not be compelled to testify against themselves or confess guilt.¹⁴⁷⁰ Despite the fact that the ECCC Law does not include the right to remain silent for suspects or charged persons, the Internal Rules provide that every suspect or charged person should be presumed innocent and therefore informed at every stage of the proceedings about their *right to remain silent*.¹⁴⁷¹ It follows from the case law of the Pre-Trial Chamber that a charged person's or a lawyer's request to postpone an interview cannot be understood as invoking the right to remain silent.¹⁴⁷² The case law further clarified that the right to remain silent does not apply to an adversarial hearing on provisional detention (Rule 63 of the IR) because the charged person is *not questioned* at this occasion and is only given the opportunity to respond to the request of the Co-Prosecutors.¹⁴⁷³ In this way, the Pre-Trial Chamber seems to place an unfortunate restriction on a charged person's right to remain silent. This seems to be at odds with labelling this right as a 'fundamental principle', which implies that it should apply at every stage of the proceedings.¹⁴⁷⁴

Also at the STL, the suspect and the accused person enjoy the right to not be compelled to incriminate him or herself, or confess guilt as well as the right to remain silent. He or she should be informed of these rights prior to the start of any interrogation.¹⁴⁷⁵ The suspect or accused should be cautioned that any statement will be recorded and can be used as evidence

¹⁴⁶⁸ Article 55 (2) (b) ICC Statute.

¹⁴⁶⁹ See *supra*, Chapter 4, IV.2.1.

¹⁴⁷⁰ Article 35 new (g) ECCC Law.

¹⁴⁷¹ Rule 21 (1) (d) ECCC IR.

¹⁴⁷² ECCC, Decision on Nuon Chea's Appeal against Order Refusing Request for Annulment, *The case of Nuon Chea et al.*, Case No. 002/19-09-2007, PTC, 26 August 2008, par. 54

¹⁴⁷³ ECCC, Decision on Appeal Against Provisional Detention Order of Nuon Chea, *The case of Nuon Chea et al.*, Case No. 002/19-09-2007, PTC, 20 March 2008, par. 40.

¹⁴⁷⁴ The right to remain silent is included in the list of 'fundamental principles' in Rule 21 of the ECCC IR.

¹⁴⁷⁵ Article 15 (b) STL Statute, Rule 65 (A) (iv) STL RPE, Rule 85 (B) STL RPE.

at trial. In line with the ICC RPE, such silence cannot be considered in the determination of guilt or innocence.¹⁴⁷⁶

Finally, the TRCP also recognized that a suspect or an accused is entitled to the right to remain silent as well as the protection from his or her silence being used in the determination of guilt or innocence.¹⁴⁷⁷ The jurisprudence confirmed that the right to remain silent can be waived provided that such a waiver is made voluntarily and knowingly.¹⁴⁷⁸ The issue of retroactively applying the right to remain silent to statements made by the defendant in the course of the investigation (to an SCU investigator, Investigating Judge or a police officer) has arisen on several occasions. For example, in the judgment in the *Prosecutor v. Anigio de Oliveira* case, the panel held that a statement made by the defendant during the investigation to the Investigating Judge could not be admitted as evidence at trial, in case the defendant decided to remain silent at trial.¹⁴⁷⁹ Such statements could only be used on the condition that the defendant waived his or her right to remain silent *at trial*. While Section 33.4 TRCP allowed for the admission of a statement made by an accused to the Investigating Judge as evidence, the panel held that such a provision is limited to situations where the defendant chose to waive the right to remain silent at trial.¹⁴⁸⁰ In the *Francisco Pereira* case, the panel had to decide whether a statement made by the defendant to an investigator, rather than to the Investigating Judge, could be admitted as evidence.¹⁴⁸¹ The majority held that a defendant's prior statement made to an investigator could not be admitted into evidence at trial insofar that this would violate his right to remain silent *at trial*.¹⁴⁸² However, unlike the panel in *Prosecutor v. Anigio de Oliveira*, the majority concluded that statements made before an Investigating Judge could be admitted as evidence. They did not limit this possibility to instances where the defendant waived the right to remain silent at trial.¹⁴⁸³ Judge Rapoza dissented and held that, notwithstanding the defendant's choice to remain silent at trial, the

¹⁴⁷⁶ Article 15 (b) STL Statute.

¹⁴⁷⁷ Section 6.3 (h) TRCP; see also 6.2 (a) TRCP (custodial interrogation).

¹⁴⁷⁸ SPSC, Dissenting Opinion on the Defendant's Oral Motion to Exclude Statement of the Accused, *Prosecutor v. Francisco Pereira*, Case No. 34/2003, SPSC, 17 September 2004, par. 4.

¹⁴⁷⁹ SPSC, Sentence, *Prosecutor v. Anigio de Oliveira*, Case No. 07/2001, SPSC, 27 March 2007, p. 9 (only available in Portuguese).

¹⁴⁸⁰ *Ibid.*, pp. 8 - 9.

¹⁴⁸¹ SPSC, Dissenting Opinion on the Defendant's Oral Motion to Exclude Statement of the Accused, *Prosecutor v. Francisco Pereira*, Case No. 34/2003, SPSC, 17 September 2004.

¹⁴⁸² The right to remain silent at trial is provided for in Section 30.4 TRCP.

¹⁴⁸³ See JSMP, Admissibility Of Prior Statements As Evidence Before The Special Panels, 29 October 2004 (available at: <http://jsmp.tl/wp-content/uploads/2012/06/Justice-Update-Admissibility-of-prior-statements-as-evidence-before-the-SPSC-October-2004.pdf>, last visited: 15 October 2013).

defendant's statement made to an investigator could be admitted, provided that he voluntarily and knowingly waived his right to remain silent during the interrogation.¹⁴⁸⁴ Judge Rapoza argued that where the right to remain silent serves to protect a person from being compelled to make a statement when interrogated by an investigator, Investigating Judge or police officer, the element of compulsion disappears when the suspect knowingly and voluntarily waives this right.¹⁴⁸⁵ The retroactive application of the right to remain silent to statements that were made voluntarily during the investigation, does not advance the rationale of the right to remain silent, to know the protection against compulsion.¹⁴⁸⁶ Other case law confirmed Judge Rapoza's dissent. For example, in *Prosecutor v. Alarico Mesquita et al.*, the panel unanimously allowed an accused's prior statement made before an investigator as evidence.¹⁴⁸⁷

IV.3. Right to be informed of the charges or allegations

IV.3.1. The *ad hoc* tribunals and the SCSL

§ *Accused persons*

Accused persons enjoy the right to be informed promptly and in detail in a language which they understand about the nature and cause of the charges against them prior to being questioned.¹⁴⁸⁸ This information duty helps to ensure that the privilege against self-incrimination is exercised effectively. There have been occasions, however, when the Prosecutor has violated this right. In the *Simić et al.* case, a telephone interview was conducted with the accused, Miroslav Tadić, without properly having served him the indictment.¹⁴⁸⁹ As of the first interview, the indictment still had not been served on the accused. In spite of this, the Prosecution proceeded with the interrogation after reading out

¹⁴⁸⁴ SPSC, Dissenting Opinion on the Defendant's Oral Motion to Exclude Statement of the Accused, *Prosecutor v. Francisco Pereira*, Case No.34/2003, SPSC, 17 September 2004, p. 4 (in other words, "[t]he defendant's right to maintain his silence at trial is not so broad as to require the exclusion from evidence of a previous statement knowingly and voluntarily given to an investigator").

¹⁴⁸⁵ *Ibid.*, p. 5.

¹⁴⁸⁶ *Ibid.*, p. 6.

¹⁴⁸⁷ See JSMP, Admissibility Of Prior Statements As Evidence Before The Special Panels, 29 October 2004 (available at: <http://jsmp.tl/wp-content/uploads/2012/06/Justice-Update-Admissibility-of-prior-statements-as-evidence-before-the-SPSC-October-2004.pdf>, last visited: 15 October 2013).

¹⁴⁸⁸ Article 21 (4) (a) ICTY Statute, Article 20 (4) (a) ICTR Statute and Article 17 (4) (a) SCSL Statute.

¹⁴⁸⁹ ICTY, Decision on Prosecutor's Request to Add Further Exhibits to the Confidential Prosecution Exhibit List Filed on the 9th of April 2001, *Prosecutor v. Simić et al.*, Case No. IT-95-9-T, T. Ch. II, Section B, 11 September 2001.

sections of the indictment to Tadić over the phone.¹⁴⁹⁰ At the time of a second telephone interview, the first six pages of the indictment had been served on the accused.¹⁴⁹¹ While the Prosecution was aware that the accused had an incomplete copy, they nevertheless proceeded with the interview on the facts of the indictment.¹⁴⁹² The Chamber held that effective service of the indictment was not satisfactorily made prior to any of the telephone interviews. For this reason, it found that the accused did not fully appreciate the seriousness of the indictment at the time nor did he fully understand the nature of the indictment and the proceedings.¹⁴⁹³ The obligation of the valid service of the indictment cannot be derogated from.¹⁴⁹⁴

§ *Mere suspects*

A more complicated question arises as to whether this right also applies when a suspect is being questioned. Neither the Statute nor the Rules of the *ad hoc* tribunals include an explicit obligation to inform the suspect about the allegations against him or her. Of course, the suspect cannot yet be informed about the precise *charges* against him or her at such a time, insofar that the suspect interview forms part of the fact-finding process used to determine whether charges *should* be brought against the suspect.¹⁴⁹⁵

Is there an obligation to inform a suspect about the *allegations* against him or her before questioning? Some decisions of the *ad hoc* tribunals seem to place such an obligation on the Prosecution. In the *Karemera et al.* case, the ICTR Trial Chamber did not admit the interviews of Nzirorera and Ngirumpatse, who had been interviewed after being provisionally arrested pursuant to Article 40 of the Rules, into evidence.¹⁴⁹⁶ The Chamber decided to exclude the evidence pursuant to Rule 95 as the suspects were not informed promptly and in

¹⁴⁹⁰ *Ibid.*, p. 2.

¹⁴⁹¹ The indictment was faxed to the accused but only the first six pages were received by the accused.

¹⁴⁹² *Ibid.*, p. 2.

¹⁴⁹³ *Ibid.*, p. 2; ICTY, Reasons for Decision on Prosecution's Motion to Use Telephone Interviews, *Prosecutor v. Simić et al.*, Case No. IT-95-9-T, T. Ch. II, 11 March 2003, par. 3.

¹⁴⁹⁴ *Ibid.*, par. 5; par. 6 (the right to be informed promptly and in detail not only includes the legal qualification of the charges against the accused but also the facts that are underlying the charge).

¹⁴⁹⁵ As acknowledged for example in: ICTY, Decision on Bajrush Morina's Request for a Declaration of Inadmissibility and Exclusion of Evidence, *Prosecutor v. Haraqiija et al.*, Case No. IT-04-84-R77.4, T. Ch. I, 28 August 2008, par. 30.

¹⁴⁹⁶ ICTR, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 2 November 2007.

detail of the charge against him or her in accordance with Article 20 (4) (a) ICTR Statute.¹⁴⁹⁷ This decision is confusing, as the Chamber failed to explain why Article 20, which outlines the rights of the *accused*, should be applied to the (custodial) questioning of a *suspect*.¹⁴⁹⁸ While the Chamber accepted that Ngirumpatse was informed about his rights to be assisted by counsel, to have the free assistance of an interpreter and to remain silent, likewise, “[t]he Chamber finds no indication that he was informed about the *charges* against him or the nature and cause thereof”.¹⁴⁹⁹ In the Court’s reasoning, it is unclear whether such a requirement constitutes a separate right for the suspect during questioning or whether the requirement follows from a retrospective application of the rights of accused persons.

Undoubtedly, in cases where a suspect is subjected to *custodial* interrogation, the suspect has the right to be informed about the reasons for his or her arrest. This right follows from the arrest of the suspect.¹⁵⁰⁰ Consequently, provisionally detained suspects should be informed about the reasons for their arrest and any charge against them, as in the *Karemera* case. As such, however, there seems to be no explicit right in the Statute or the Rules for all suspects (detained or not) to be informed about the allegations against them when questioned.

Several authors subscribe to a suspect’s right to being promptly informed about the nature and cause of the allegations in case of questioning.¹⁵⁰¹ SAFFERLING presumes the applicability of Article 21 (4) (a) ICTY Statute and Article 20 (4) (a) ICTR Statute to suspects, insofar that

¹⁴⁹⁷ *Ibid.*, par. 9; par. 40-41. Rule 95 states that no evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

¹⁴⁹⁸ At several times, the Trial Chamber seems to imply that there is an obligation to inform the suspect about “the charges or provisional charges.” Such wording is confusing, as information on the *allegations* seems to be referred to. Moreover, the Trial Chamber could be clearer that such right to be informed about the allegations attaches to the arrest of the suspect and is not a requirement for the questioning of suspects. Additionally, the Trial Chamber holds that there is such right to be informed about the allegations because otherwise, a suspect is not in a position to waive his or her right to counsel in an informed way.

¹⁴⁹⁹ *Ibid.*, par. 41.

¹⁵⁰⁰ International human rights norms require that upon arrest, a person should be informed about the reasons for this arrest and should be promptly informed of any charge against him. Consequently, the suspect that has provisionally been arrested will have to be informed about the allegations, see Article 5 (2) ECHR, Article 9 (2) ICCPR, Article 7 (4) ACHR. Such requirement cannot be found in the African Charter. See, in detail, *infra*, Chapter 7, V.2.

¹⁵⁰¹ C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, p. 291; C.J.M. SAFFERLING, *Towards an International Criminal Procedure*, Oxford, Oxford University Press, 2001, pp. 115, 120-121; ZAPPALÀ argues, on Article 21 of the ICTY Statute in general, that “whether the same protection must be afforded to a person before he or she assumes the status of accused cannot really be discussed. It is logical to assume, as explained above, that in general, protection for those who are not yet accused may be wider but certainly not narrower.” He argues that persons under investigation must benefit from all those rights established for the accused which may be applicable to their situation, see S. ZAPPALÀ, *Human rights in International Criminal Proceedings*, Oxford, Oxford University Press, 2003, pp. 48-50.

such an extension “seems logical and indeed necessary.”¹⁵⁰² Such argumentation seems to be more of a *de lege ferenda*.

As the Trial Chamber acknowledged in *Karemera et al.*, there is a close link between the right to be assisted by counsel and the right to be informed about the allegations.¹⁵⁰³ Indeed, it is difficult for a suspect to decide whether to waive or exercise the right to counsel if the suspect is not generally made aware of the allegations against him or her.¹⁵⁰⁴ *In casu*, the Chamber expressed its doubt about whether a suspect, who had no knowledge about the charges or provisional charges against him, was in an *informed* position to waive his right to counsel or to answer questions put to him during his interview.¹⁵⁰⁵ In *Haraqija and Morina*, the Chamber took into consideration that the suspect “was informed of the factual basis for the allegations against him,” when assessing the decision of the suspect Morina to proceed with the questioning while unrepresented.¹⁵⁰⁶ In a similar vein, the Appeals Chamber held that a suspect should be informed of the ‘nature of the investigation’ prior to an interview in order to make an informed decision about the waiver of his rights.¹⁵⁰⁷

Other case law does not seem to put such a duty on the Prosecutor. In these instances, the reasoning suggests that an individual is in an informed position to waive the right to counsel so long as he or she is informed that he or she is a suspect, responsible for committing acts

¹⁵⁰² C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, p. 291.

¹⁵⁰³ ICTR, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ndirumpatse, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 2 November 2007, par. 30.

¹⁵⁰⁴ For example, when questioned, Morina complained that he was unaware about any allegations and stated that it would be difficult for him to decide to exercise or waive his right to counsel: “*I don’t know what the indictment is. I don’t know why I am here so at the moment it is difficult for me to say whether I should have a legal representative here. Maybe, maybe.*” See ICTY, Astrit Haraqija’s Defence Motion to Join Bajrush Morina’s Request for a Declaration of Inadmissibility and Exclusion of Evidence and to Seek the Exclusion of Same Against Astrit Haraqija, *Prosecutor v. Haraqija et al.*, Case No. IT-04-84-R77.4, T. Ch. I, 4 August 2008, par. 3.

¹⁵⁰⁵ ICTR, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ndirumpatse, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 2 November 2007, par. 30 and accompanying footnote.

¹⁵⁰⁶ ICTY, Decision on Bajrush Morina’s Request for a Declaration of Inadmissibility and Exclusion of Evidence, *Prosecutor v. Haraqija and Morina*, Case No. IT-04-84-R77.4, T. Ch. I, 28 August 2008, par. 29-30; ICTY, Decision on Astrit Haraqija and Bajrush Morina’s Joint Request for Reconsideration of the Trial Chamber’s Decision of 28 August 2008, *Prosecutor v. Haraqija et al.*, Case No. IT-04-84-R77.4, T. Ch. I, 14 October 2008, par. 14.

¹⁵⁰⁷ ICTY, Judgement, *Prosecutor v. Haraqija and Morina*, Case No. IT-04-84-R77.4-A, A. Ch., 23 July 2009, par. 37.

which are chargeable under the tribunal Statute.¹⁵⁰⁸ In *Delalić*, the Trial Chamber stated that it was not necessary for the Prosecution to inform a suspect of the “[f]acts on which [their] suspicions were based.”¹⁵⁰⁹ While the aforementioned case law may be welcomed as broadening suspects’ rights, the basis and source of such a right remains unclear. In *Haraqija and Morina*, the Trial Chamber first took the fact that Morina was informed about the factual allegations against him into consideration and subsequently rejected the Defence’s argument that the obligation to inform the suspect of the nature and cause of the charge against him under Article 14 (3) (a) could be applied to the questioning of suspects.¹⁵¹⁰ The question remains as to where the Chamber derived such a right to be informed from.

Perhaps, this right for *suspects* to be informed of the charges or allegations derives from international human rights norms. Human rights law embodies the right that everyone ‘charged with’ or ‘accused of’ a criminal offence must be informed promptly, in a language which he or she understands and in detail, of the nature and cause of the accusation or charge.¹⁵¹¹ As explained above, however, it remains unresolved what the precise boundaries of this right are.¹⁵¹² Whether it follows from human rights law that a suspect should be informed about the allegations against him or her depends on the moment when a person is ‘charged’. The right to be informed could be interpreted as applying only when a person is *formally* charged. Such an interpretation would mean that the Prosecution would be able to question a suspect as long as they wanted without informing him or her about the allegations, so long as no confirmation of the charges is sought.¹⁵¹³ However, it was discussed how the ECtHR has preferred a substantial interpretation of the term ‘charge’. Hence “whilst “charge”,

¹⁵⁰⁸ See *supra*, Chapter 4, IV.1.1.1; see for example, ICTY, Decision on the Motion on the Exclusion and Restitution of Evidence and Other Material Seized from the Accused Zejnil Delalić, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, T. Ch., 9 October 1996, par. 12; ICTY, Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65ter Exhibit List, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. Ch. II, 25 October 2007, par. 32.

¹⁵⁰⁹ ICTY, Decision on the Motion on the Exclusion and Restitution of Evidence and Other Material Seized from the Accused Zejnil Delalić, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, T. Ch., 9 October 1996, par. 11 (the Chamber adds that “[t]here is nothing in Rule 42 or in any other Rule which requires such disclosure at that stage of the investigation. All that is necessary under Rule 42 is that the suspect be informed of his rights as set out in that Rule”).

¹⁵¹⁰ ICTY, Decision on Bajrush Morina’s Request for a Declaration of Inadmissibility and Exclusion of Evidence, *Prosecutor v. Haraqija and Morina*, Case No. IT-04-84-R77.4, T. Ch. I, 28 August 2008, par. 29-30.

¹⁵¹¹ See in particular Art. 14 (3) (a) ICCPR, Art. 6 (3) (a) ECHR and Art. 8 (2) (b) ACHR. While the ICCPR and the ACHR speak of a right of the accused to know the charges against him, the ECHR speaks of a right for the accused to be informed about the nature and cause of the *accusation* against him.

¹⁵¹² See *supra*, Chapter 4, II.1.4.

¹⁵¹³ C.J.M. SAFFERLING, *Towards an International Criminal Procedure*, Oxford, Oxford University Press, 2001, p. 121.

for the purposes of Article 6, may in general be defined as ‘the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence’, it may in some instances take the form of other measures which carry the implication of such an allegation and which, likewise, *substantially affect the situation of the suspect*.¹⁵¹⁴ It was discussed how a person may already be ‘charged’ when an individual makes self-incriminating statements during questioning leading the investigators to suspect the person’s involvement in a crime.¹⁵¹⁵ With regard to the comparable right under Article 14 (3) (a) ICCPR, the General Comment on Article 14 notes that “information must be provided with the lodging of the charge or directly thereafter, with the opening of the preliminary investigation or with the setting of some other hearing that gives rise to official suspicion against a specific person.”¹⁵¹⁶ According to NOWAK, “charge” does not merely refer to the formal act of lodging a complaint but rather to “the date on which state activities substantially affect the situation of the person concerned. This is usually the first official notification of a specific accusation, but in certain cases, this may also be as early as arrest.”¹⁵¹⁷

The ECtHR has underlined the close link between the right to be informed about the charge or accusation and the right to prepare a defence.¹⁵¹⁸ The latter right serves as a yardstick to interpret the right to be informed about the accusation under Article 6 (3) (a). The fact that an accused has already been questioned at length will, according to the ECtHR, have an influence on the level of information that is required.¹⁵¹⁹

It appears that it is difficult to abstractly determine the precise moment when a person becomes ‘charged’ and should be informed about the nature and cause of the accusations. However, since the ECtHR links this right with the right to prepare a defence, it is clear that

¹⁵¹⁴ ECtHR, *Corigliano v. Italy*, Application No. 8304/78, Judgement of 10 December 1982, par. 34.

¹⁵¹⁵ See *supra*, Chapter 4, II.1.4.

¹⁵¹⁶ HRC, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, p. 14.

¹⁵¹⁷ M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR commentary (2nd edition), Kehl am Rein, Engel, 2005, pp. 318-319.

¹⁵¹⁸ See, for example, ECtHR, *Mattei v. France*, Application No. 34043/02, Judgment of 19 December 2006, par. 36; ECtHR, *Pélissier et Sassi v. France*, Application No. 25444/94, Judgment of 25 March 1999, par. 52-54.

¹⁵¹⁹ ECtHR, *Kamasinski v. Austria*, Application No. 9783/82, Series A, No. 168, Judgment of 19 December 1989, par. 80 (“Previously Mr Kamasinski had been questioned at length and in the presence of interpreters about the suspected offences, firstly by the police and then by the investigating judges. On this basis alone he must have been made aware in sufficient detail of the accusations leveled against him”).

this right may only have a limited meaning during the evidence gathering process.¹⁵²⁰ TRECHSEL convincingly reasons that, since the obligation is to inform the accused *in detail* about the allegation, such information cannot be given at the beginning of an investigation as the very purpose of the investigation is to gather evidence.¹⁵²¹ Such argumentation is confirmed in *Kamasinski*, where the Court seems to have interpreted the term ‘accusation’ under Article 6 (3) (a) as referring to the indictment.¹⁵²²

IV.3.2. The International Criminal Court

Every *accused* should be promptly informed in detail about the nature, cause and content of the charge, in a language which the accused fully understands and speaks.¹⁵²³ Unlike the *ad hoc* tribunals and the SCSL, the accused should not only be informed about the nature and cause, but also about the ‘content’ of the charge.¹⁵²⁴ Some have argued that while no meaningful difference seems to exist between the ‘cause’, which refers to the material facts, and the ‘content’ of the charge, the latter may include a “message of exhaustivity.”¹⁵²⁵

For *suspects*, no explicit right to be informed about the allegations against him or her has been included in the Statute or the Rules. Under Article 55 (2) (a), there is only an obligation for the Prosecutor to inform the suspect that there are reasonable grounds to believe that he or she has committed a crime within the jurisdiction of the Court. It is doubtful as to whether such an obligation also includes a duty to inform the suspect about the nature and cause of the allegations against him or her.¹⁵²⁶ Nevertheless, when the suspect has been arrested prior to

¹⁵²⁰ Although it can be argued that the information of the allegations at that early stage provide the suspect with a possibility to influence the decision whether or not charges will be laid.

¹⁵²¹ S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, pp. 199-200.

¹⁵²² ECtHR, *Kamasinski v. Austria*, Application No. 9783/82, Series A, No. 168, Judgment of 19 December 1989, par. 79.

¹⁵²³ Article 67 (1) (a) ICC Statute.

¹⁵²⁴ See ICTY, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, *Prosecutor v. Simić*, Case No. IT-95-9-T, T. Ch. II, 11 March 2003, par. 6.

¹⁵²⁵ W.A. SCHABAS, Article 67, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes*, München, Verlag C.H. Beck, 2008, p. 1257.

¹⁵²⁶ Some authors seem to interpret this provision as to also include a duty to inform the suspect about the nature and cause of the allegations against him or her. For example, SAFFERLING argues that Article 55 (2) (a) includes information as to the crime(s) the person is believed to have committed as well as its (their) legal classification. Hence, the suspect has a right to be at least informed about the nature of the charges. See C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, p. 291. *Contra*, consider the following statement of Judge Fulford in the *Lubanga* case: “Isn’t the essence of the point you’re making that under 55(2)(a) all it says is that the individual has a right to be informed that there are grounds to

the first interrogation, he or she will already have been informed of any allegations through the warrant of arrest.¹⁵²⁷ Alternatively, the suspect will already have been informed about the allegations when the interrogation takes place after the suspect's initial appearance following either a summons to appear or a voluntary appearance. As noted by ALAMUDDIN, the suspect's right to be informed about their status may hamper investigative efforts where these suspects are senior government officials. Hence, a careful planning may be required of the timing of the interrogation of these suspects.¹⁵²⁸

IV.3.3. Internationalised criminal courts and tribunals

Also all internationalised criminal tribunals under review provide for certain information duties *vis-à-vis* the suspect or accused person on the (provisional) charges. First, according to the ECCC Internal Rules, the suspect and the charged person enjoy the right to be informed about charges brought against him or her.¹⁵²⁹ At the SPSC, the suspect and the accused person had to be informed in detail, in a language he or she understands, of the nature and cause of the charges.¹⁵³⁰ However, there was no indication that the persons should be 'promptly'" so informed.

Finally, at the STL, the suspect should be informed, prior to the interrogation, that there are grounds to believe that he or she has committed a crime within the STL's jurisdiction.¹⁵³¹ The same right applies when an accused is questioned.¹⁵³² However, the amount of information required before any questioning can take place differs. It follows from Article 16 (4) (a) STL Statute that the accused should be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her.

believe? There is nothing within the article that indicates that, as well as being informed of there being grounds, that the evidence backing up the grounds has to be provided to the person in question. Now I think that is, as it were, fairly clear from the article." See ICC, Transcript, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-T-303, T. Ch. I, 17 June 2010, p. 21.

¹⁵²⁷ Articles 58 and 59 ICC Statute, Rule 117 ICC RPE.

¹⁵²⁸ A. ALAMUDDIN, Collection of Evidence, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), *Principles of Evidence in International Criminal Justice*, Oxford, Oxford University Press, 2010, p. 272.

¹⁵²⁹ Rule 21 (1) (d) ECCC IR, compare with Article 35 new (a) ECCC Law for accused persons.

¹⁵³⁰ Section 6.3 (b) TRCP.

¹⁵³¹ Article 15 (a) STL Statute, Rule 65 (A) (i) STL RPE (as amended November 2010).

¹⁵³² Rule 85 STL RPE.

IV.4. Right to the free assistance of an interpreter

IV.4.1. The *ad hoc* tribunals and SCSL

The Statutes of the *ad hoc* tribunals guarantee that every suspect has the right to necessary translation into and from a language he can speak or understand.¹⁵³³ Rule 42 (A) (ii) ICTY, ICTR and SCSL RPE encompasses a suspect's right to have the free assistance of an interpreter when he or she cannot speak or understand the language that is used during the questioning. Similar safeguards apply when an accused is questioned.¹⁵³⁴ Such a right is in line with obligations in international human rights law. There is no case law by the *ad hoc* tribunals or the SCSL directly concerned with the specific issue of assistance by an interpreter during questioning. Therefore, one can assume that this minimum guarantee during questioning has been a less problematic or less contested issue. This does not mean that language problems as such have not been a subject of litigation before these tribunals. It suffices to look at the extensive case law to understand its importance.¹⁵³⁵

The ICTY jurisprudence provides us with some guidance as to the proper understanding of the interpreter's role during questioning.¹⁵³⁶ The Trial Chamber reiterated that the interpreter acts as an officer of the Tribunal and that his or her role during questioning is that of "a third party in the furtherance of the administration of justice."¹⁵³⁷ His or her function is merely to pass information to one party what the other party has said in the proceedings. An interpreter is in no way obligated to keep a record of what either party says.¹⁵³⁸

¹⁵³³ Article 18 (3) ICTY Statute and Article 17 (3) ICTR Statute.

¹⁵³⁴ Article 20 (4) (f) ICTR Statute, Article 21 (4) (f) ICTY Statute and Article 17 (4) (f) SCSL Statute.

¹⁵³⁵ Consider *e.g.* ICTY, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, T. Ch., 25 September 1995; ICTR, Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel, *Prosecutor v. Muhimana*, Case No 95-1B-1, T. Ch. I, 6 November 2001; ICTY, Order for the Translation of Documents, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, PTJ, 17 January 2006; ICTY, Decision on the Defence Counsel's Request for Translation of all Documents, *Prosecutor v. Ljubičić*, Case No. IT-00-41-PT, T. Ch. II, 20 November 2002, p. 3; see also ICTY, Order on Translation of Documents, *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, T. Ch. II, 6 March 2003; ICTY, Decision on Defence Motion Concerning Translation of All Documents, *Prosecutor v. Naleitić and Martinović*, Case No. IT-98-34-T, T. Ch. I-A, 18 October 2001; ICTY, Decision on Motion to Translate Procedural Documents into French, *Prosecutor v. Talić*, Case No. IT-99-36-PT, T. Ch. II, 16 December 1999.

¹⁵³⁶ ICTY, Decision on the Motion Ex Parte by the Defence of Zdravko Mucić Concerning the Issue of a Subpoena to an Interpreter, *Prosecutor v. Delalić*, Case No. IT-96-21-T, T. Ch., 8 July 1997.

¹⁵³⁷ *Ibid.*, par. 10.

¹⁵³⁸ *Ibid.*, par. 19.

IV.4.2. The International Criminal Court

The right to have the assistance of a competent interpreter free of charge and such translations as necessary for the requirements of fairness, if such person is questioned in a language other than the language the person fully understands and speaks, is provided for *all* persons questioned during the investigation.¹⁵³⁹ The right seems to be broader than corresponding human rights provisions in that it requires a ‘competent’ interpreter and interpretation and translation if questioned in another language than the person *fully* understands and speaks.¹⁵⁴⁰ Consequently, the mere fact of being conversant with a language does not seem to be sufficient. The Appeals Chamber clarified in the *Katanga and Ngudjolo Chui* case that “[a]n Accused fully understands and speaks a language when he or she is completely fluent in the language in ordinary, non-technical conversation; it is not required that he or she has an understanding as if he or she were trained as a lawyer or judicial officer.”¹⁵⁴¹ In addition, ‘such translations as are necessary to meet the requirements of fairness’ should be provided for. This does not require translation in the native language of the suspect or the accused.

The requirement to have documents translated in order to be used during questioning is also in line with human rights jurisprudence. Both the ECtHR and the HRC have interpreted the right to the free assistance of an interpreter so as to apply to documentary materials as well. More precisely, the ECtHR ruled that “construed in the context of the right to a fair trial guaranteed by Article 6, paragraph 3 (e) signifies that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter *for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand in order to have the benefit of a fair trial.*”¹⁵⁴² No translation of all items of written evidence or official documents in the procedure is required; fairness is used as a yardstick. Likewise, the Human Rights Committee (HRC)

¹⁵³⁹ Article 55 (1) (c) and Article 67 (1) (f) ICC Statute.

¹⁵⁴⁰ Compare with Article 14 (3) (f) ICCPR, Article 6 (3) (e) ECHR and Article 8 (2) (a) ACHR. Human rights law has acknowledged the applicability of this right to the pre-trial phase and to interrogations of a suspect or an accused by the police or by an examining magistrate, see ECtHR, *Kamasinski v. Austria*, Application No. 9783/82, Judgment of 19 December 1989, par. 74; M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR commentary (2nd edition), Kehl am Rein, Engel, 2005, p. 344.

¹⁵⁴¹ See ICC, Judgment on the Appeal of Mr. Germain Katanga Against the Decision of Pre-Trial Chamber I Entitled “Decision on the Defence Request Concerning Languages”, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07, A. Ch., 27 May 2008, par. 61.

¹⁵⁴² ECtHR, *Leudicke, Belkacem and Koç v. Germany*, Application Nos. 6210/73; 6877/75; 7132/75, Judgment of 28 November 1978, par. 48; ECtHR, *Hermi v. Italy*, Application No. 18114/02, Judgment of 18 October 2006, par. 69.

confirmed that the accused's right to translations of documents does not extend to all documents in the case file.¹⁵⁴³ However, the Committee considered this right in light of the accused's right to have adequate time and facilities to prepare a defence.¹⁵⁴⁴ Since the ECtHR and the HRC both refer to fairness as a yardstick, this reference to the 'requirements of fairness' by the ICC Statute has been criticised insofar that "it does not offer any guidance on its actual meaning."¹⁵⁴⁵ It remains to be seen what translations the Court's jurisprudence will require to meet the requirements of fairness.

Human rights law can offer some guidance as to what is meant by a *competent* interpreter. *Griffin v. Spain* established that the free assistance of an interpreter implies a certain minimum quality of interpretation in order to ensure a fair trial.¹⁵⁴⁶ According to the ECtHR, the person being questioned should be able to understand the questions that are put to him and be able to make him or herself understood in his replies.¹⁵⁴⁷

IV.4.3. Internationalised criminal courts and tribunals

Lastly, all internationalised criminal tribunals provide for the suspect's or accused person's right to the free assistance of an interpreter in case they do not speak or understand the language used in the interrogation. The ECCC's procedural framework provides for a suspect's right to interpretation into and from a language they can speak and understand 'as necessary'.¹⁵⁴⁸ Similarly, accused persons enjoy the general right of the free assistance of an interpreter if the accused person cannot understand or speak the language used in court.¹⁵⁴⁹ In a similar vein, an interpreter had to be provided free of charge, if the suspect or accused could not understand or speak one of the official languages of the SPSC.¹⁵⁵⁰ Nevertheless, translation problems plagued the SPSC and SCU investigations. One SPSC Judge recalled

¹⁵⁴³ HRC, *Harward v. Norway*, Communication No. 451/1991, U.N. Doc. CCPR/C/51/D/451/1991, 16 August 1994, par. 9.5.

¹⁵⁴⁴ *Ibid.*, par. 9.4. It seems more problematic to include such right to translation of documents into Article 14 (3) (f) ICCPR as the *travaux préparatoires* show that motions to include the translation of relevant written documents were rejected. See M. BOSSUYT, Guide to the *Travaux Préparatoires* of the ICCPR, Dordrecht, Nijhoff Publishers, 1987, p. 303.

¹⁵⁴⁵ S. ZAPPALÀ, *Human rights in International Criminal Proceedings*, Oxford, Oxford University Press, 2003, p. 50.

¹⁵⁴⁶ HRC, *Gerald John Griffin v. Spain*, Communication No. 493/1992, U.N. Doc. CCPR/C/53/D/493/19925 April 1995, par. 9.5.

¹⁵⁴⁷ ECtHR, *Kamasinski v. Austria*, Application No. 9783/82, Judgment of 19 December 1989, par. 77.

¹⁵⁴⁸ Article 24 new ECCC Law.

¹⁵⁴⁹ Article 35 new (f) ECCC Law.

¹⁵⁵⁰ Section 6.3 (c) TRCP.

that on occasion, statements made by suspects to investigators were clearly not properly transcribed and translated.¹⁵⁵¹ Finally, the STL Statute and RPE provide the right to the free assistance of an interpreter if the suspect cannot understand or speak the language used for questioning or when the accused person does not understand or speak the language used in Court.¹⁵⁵²

IV.5. The right not be subjected to torture or inhuman or degrading treatment

IV.5.1. The *ad hoc* tribunals and the SCSL

It follows from the application of the prohibition of torture and inhuman or degrading treatment or punishment to the context of criminal proceedings that torture and other forms of moral and physical violence are prohibited during questioning.¹⁵⁵³ Several accused have filed motions to exclude statements resulting from interrogations because of the alleged use of torture or duress.¹⁵⁵⁴ However, there are no instances where one of the *ad hoc* tribunals or the SCSL found these allegations to be proven. Requiring a video or audio recording---assuming that the recording is executed properly---offers an effective protection against such practices. Regarding the *use* of evidence obtained through such treatment, the ECtHR held that evidence resulting from *torture* should always be excluded insofar that it renders the trial unfair.¹⁵⁵⁵

¹⁵⁵¹ D. COHEN, *Indifference and Accountability: The United Nations and the Politics of Justice in East-Timor*, in «East-West Center Special Reports», Nr. 9, 2006, p. 27 (the authors refers to an interview with Judge Samith de Silva).

¹⁵⁵² Rule 65 (A) (iii) STL RPE. Article 15 (d) STL Statute; Article 16 (4) (g) STL Statute.

¹⁵⁵³ See Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, as adopted on 10 December 1984, entry into force on 26 June 1987 (Article 15 provides that “[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, as adopted on 26 November 1987, entry into force 1 February 1989, European Treaties Series, No. 126, 1987; Article 7 ICCPR, Article 3 ECHR, Article 5 ACHR, Article 5 ACHPR.

¹⁵⁵⁴ E.g. ICTR, Decision on Defence Motion to Lodge Complaint and to Open Investigation into Alleged Acts of Torture under Rules 40 (C) and 73 (A) of the Rules of Procedure and Evidence, *Prosecutor v. Kabiligi*, Case No. ICTR-97-34-I, T. Ch II, 6 October 1998; ICTR, Decision on Kanyabashi’s Oral Motion to Cross-Examine Ntahobali Using Ntahobali’s Statements to Prosecution Investigators in July 1997, *Prosecutor v. Ndayambaje et al.*, T. Ch. II, 15 May 2006, par. 80; ICTR, Decision on “Appeal of Accused Arsène Shalom Ntahobali Against the Decision on Kanyabashi’s Oral Motion to Cross-Examine Ntahobali Using Ntahobali’s Statements to Investigators in July 1997, *Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Case No. ICTR-97-21-AR73, A. Ch., 27 October 2006.

¹⁵⁵⁵ ECtHR, *Jalloh v. Germany*, Application No. 54810/00, Judgment (Grand Chamber) of 11 July 2006, par. 105 (“incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of the victim’s guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, as it was so well put in the United States Supreme Court’s judgment in the Rochin case (see paragraph 50 above), to ‘afford brutality the cloak of law’”); ECtHR, *Harutyunyan v. Armenia*, Application

However, in *Jalloh*, the Court left the question open as to whether or not evidence obtained through *inhuman and degrading treatment* automatically rendered the trial unfair; that is, irrespective of the seriousness of the evidence, the weight attached to the evidence, its probative value and the opportunities of the defendant to challenge its admission and use at trial.¹⁵⁵⁶ Later case law has been reluctant when it comes to adopting a rule of automatic exclusion. In *Gäfgen*, for instance, the Court distinguished between *statements* obtained by an act that qualified as inhuman and degrading treatment and *real evidence* obtained by an act qualified as inhuman and degrading treatment.¹⁵⁵⁷ Statements resulting from an act qualified as inhuman and degrading treatment should always be excluded. Using statements obtained in breach of Article 3 ECHR always render the proceedings as a whole unfair. The same does not hold true for the latter category of real evidence, obtained by an act qualified as inhuman and degrading treatment.¹⁵⁵⁸ For this category, it should be shown that the breach of Article 3 had an impact on his or her conviction or sentence.¹⁵⁵⁹ These principles apply irrespective of whether the defendant was the actual victim of such conduct.¹⁵⁶⁰

No. 36549/03, Judgment of 28 September 2007, par. 66; ECtHR, *Levinta v. Moldova*, Application No.17332/03, Judgment of 16 December 2008, par. 104; ECtHR, *Gäfgen v. Germany*, Application No. 22978/05, Judgment (Grand Chamber) of 1 June 2010, Reports 2010, par. 165; ECtHR, *El Haski v. Belgium*, Application No. 649/08, Judgment of 15 September 2012, par. 85.

¹⁵⁵⁶ ECtHR, *Jalloh v. Germany*, Application No. 54810/00, Judgment (Grand Chamber) of 11 July 2006, par. 106-107. Note that the same factors are referred to in *Gäfgen*, but the reference to the ‘seriousness of the offence’, which had been criticised in the literature, is not repeated. See ECtHR, *Gäfgen v. Germany*, Application No. 22978/05, Judgment (Grand Chamber) of 1 June 2010, Reports 2010, par. 167.

¹⁵⁵⁷ ECtHR, *El Haski v. Belgium*, Application No. 649/08, Judgment of 15 September 2012, par. 85.

¹⁵⁵⁸ ECtHR, *Gäfgen v. Germany*, Application No. 22978/05, Judgment (Grand Chamber) of 1 June 2010, Reports 2010, par. 167, 173.

¹⁵⁵⁹ *Ibid.*, par. 178. This holding was criticized by a minority of judges. They convincingly argued that “criminal proceedings form an organic and inter-connected whole. An event that occurs at one stage may influence and, at times, determine what transpires at another. When that event involves breaching, at the investigation stage, a suspect's absolute right not to be subjected to inhuman or degrading treatment, the demands of justice require, in our view, that the adverse effects that flow from such a breach be eradicated entirely from the proceedings. [...] Instead of viewing the proceedings as an organic whole, the majority's *modus operandi* was to compartmentalise, parse and analyse the various stages of the criminal trial, separately, in order to conclude that the terminus arrived at (conviction for murder warranting maximum sentence) was not affected by the route taken (admission of evidence obtained in violation of Article 3). Such an approach, in our view, is not only formalistic; it is unrealistic since it fails altogether to have regard to the practical context in which criminal trials are conducted and to the dynamics operative in any given set of criminal proceedings. See ECtHR, *Gäfgen v. Germany*, Application No. 22978/05, Judgment (Grand Chamber) of 1 June 2010, Reports 2010, Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power, par. 4-6.

¹⁵⁶⁰ ECtHR, *Othman (Abu Qatada) v. United Kingdom*, Application No. 8139/09, Reports 2012, Judgment of 17 January 2012, par. 263 and 267; ECtHR, *El Haski v. Belgium*, Application No. 649/08, Judgment of 15 September 2012, par. 85.

IV.5.2. The International Criminal Court

Article 55 (1) (a) prohibits the use of coercion, duress, threats, torture and other forms of cruel, inhuman or degrading treatment during interrogation. This formulation surpasses the protection offered by the procedural frameworks of the *ad hoc* tribunals and the SCSL. However, it was previously discussed how the right to remain silent and as well as the right to not be compelled to incriminate oneself have been interpreted by the jurisprudence of the *ad hoc* tribunals and the SCSL as also including prohibition of forms of ‘coercion, duress or threats’ when conducting interrogations.

IV.5.3. Internationalised criminal courts and tribunals

The ECCC Internal Rules prohibit any form of inducement, physical coercion or threats thereof during an interview, whether directed against the interviewee or others.¹⁵⁶¹ The consequence of using such inducement, physical coercion or threats is the exclusion of the evidence before the Chambers and the disciplining of the person responsible. Hence, there are severe consequences attached to such behaviour, including the automatic exclusion of the evidence so obtained.

The TRCP provided that no coercion, duress, threats, torture or other forms of cruel, inhuman or degrading treatment or punishment could be used against the suspect or the accused.¹⁵⁶²

Finally, the STL does not provide for an explicit prohibition of forms of oppressive conduct including coercion, duress, threats, torture or other forms of cruel, inhuman or degrading treatment. Nevertheless, it clearly follows from the RPE that evidence is not admissible when gathered in violation of international human rights standards or by means of torture.¹⁵⁶³ The prohibition of torture or other forms of inhuman or degrading treatment is narrower in the STL RPE than the protection offered by provisions of the ICC, ECCC or SPSC, which include forms of coercion, duress or threats. Hence, it is recommended that such behaviour is explicitly prohibited by the RPE.

¹⁵⁶¹ Rule 21 (3) ECCC IR.

¹⁵⁶² Section 6.3 (i) TRCP.

¹⁵⁶³ Rule 162 (B) STL RPE.

IV.6. Recording Procedure

IV.6.1. The *ad hoc* tribunals and the SCSL

§ *Recording of the interview*

The procedure for conducting interrogations is detailed in Rule 43 of the ICTY, ICTR and SCSL RPE.¹⁵⁶⁴ Requiring audio or video recording offers an important safeguard against any pressure that the suspect could be subjected to. The suspect should be informed about the fact that the questioning is being recorded.¹⁵⁶⁵ He or she should be given the opportunity to clarify anything that was said or add anything that he or she would like.¹⁵⁶⁶ The time at which the interrogation concludes should be noted. The fact and time of breaks should be recorded along with the time that the recording is resumed. One of the original tapes should be sealed in the suspect's presence.¹⁵⁶⁷ After the interrogation, the content of the recording should be transcribed either 'as soon as practicable' (ICTR/SCSL)¹⁵⁶⁸ or if the suspect becomes an accused (ICTY).¹⁵⁶⁹ There is no definite time limit within which this must be accomplished.¹⁵⁷⁰

Although these provisions may be regarded as mere technicalities, they provide important safeguards to the suspect or the accused. Recording the interrogation allows the precision of an interview statement or translation to be challenged. Furthermore, it offers the possibility to effectively control the voluntariness of the interview. In this regard, recording interviews is the most suitable means of preventing undue pressure being put on the person being interrogated. Video recording would even be preferable as this makes it possible to assess the environment in which the statement was taken as well as the interviewee's body language.¹⁵⁷¹

¹⁵⁶⁴ While Rule 43 concerns the recording of the questioning of suspects, it follows from Rule 63 (B) ICTY, ICTR and SCSL RPE that the provision also applies where accused persons are interrogated.

¹⁵⁶⁵ Rule 43 (i) ICTY, ICTR and SCSL RPE.

¹⁵⁶⁶ Rule 43 (iii) ICTY, ICTR and SCSL RPE.

¹⁵⁶⁷ Rule 43 (ii) and (v) ICTY, ICTR and SCSL RPE.

¹⁵⁶⁸ Rule 43 (iv) ICTR and SCSL RPE.

¹⁵⁶⁹ Rule 43 (vi) ICTY RPE, as amended on 12 December 2002.

¹⁵⁷⁰ ICTY, Decision on Lukić Request for Reconsideration of the Trial Chamber's Admission into Evidence of his Interview with the Prosecution (Exhibit P948), *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, T. Ch., 22 May 2008, par. 10.

¹⁵⁷¹ ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Separate Opinion of Judge Schomburg, par. 2 (according to *Judge Schomburg*, these technical rules are all the more important as "[i]t is a general observation in criminal proceedings that summaries, replacing the question/answer standard, and even the best translation or interpretation are among the most significant sources of error in the fact-finding process").

Ideally, recording should be required for all interviews, regardless of the status of the person concerned and regardless of the position of the interrogator. Again, however, the changing status of persons during investigations can lead to uncertainties regarding the procedural safeguards that should be respected.

§ *Breaks in the recording*

The Rules do not explicitly require that an explanation be given as to what occurred during a break in the interview recording. However, the ICTY Appeals Chamber in *Halilović* stated that if a matter is discussed which potentially affects the non-voluntariness of the interview during a break, the interview should recommence with a full explanation of what occurred during the break.¹⁵⁷² *In casu*, it was clear that the recording was stopped to address an on-the-record question by the accused and his counsel on certain agreements reached with the Prosecutor.¹⁵⁷³ The accused and his counsel asked for a break in order to clarify whether these agreements were to be respected. In the *Sesay* case, the SCSL Trial Chamber was faced with a similar situation where a Prosecution investigator testified that his role throughout the interviewing process had been to talk to the accused during the breaks and to ensure the continuation of cooperation “by continuously restating and reaffirming what the Prosecution could do for him in exchange for his cooperation.”¹⁵⁷⁴ No recordings were made of what was said during the breaks, leaving the Chamber with no evidence as to what was said, the manner it was said and the way it was perceived by the accused person.¹⁵⁷⁵ The Chamber endorsed the ICTY Appeals Chamber’s reasoning and concluded that “this irregularity raises a serious and reasonable doubt as to the voluntariness of the Accused’s statements recorded by the Prosecution.”¹⁵⁷⁶ Consequently, as a rule, every time the recording is interrupted, the interrogators should analyse whether the discussion during the break possibly affects the voluntariness of the interview and, if so, should start the recording with a full explanation of break discussions.

¹⁵⁷² ICTY, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 19 August 2005, par. 41.

¹⁵⁷³ The accused alleged that the Prosecution agreed for the indictment to be withdrawn if he provided information showing that that course was warranted.

¹⁵⁷⁴ See SCSL, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15, T. Ch. I, 30 June 2008, par. 47 (“Mr Morissette deemed it necessary to keep repeating the *quid pro quo* assurances because there had been a fear that he was going to stop cooperating”).

¹⁵⁷⁵ *Ibid.*, par. 48.

¹⁵⁷⁶ *Ibid.*, par. 51.

IV.6.2. The International Criminal Court

§ Recording procedure

A record should be made of every formal statement made by a person during the criminal investigation (as well as questioning in connection with trial proceedings).¹⁵⁷⁷ A distinction is made between records of questioning in general (Rule 111 ICC RPE) and recordings in particular cases (Rule 112 ICC RPE). These ‘particular cases’, which require a video or audio recording, relate to the situations in which Article 55 (2) of the ICC Statute applies or when a warrant of arrest or summons to appear has been issued. As a consequence, for all interrogations of persons who may have committed crimes within the jurisdiction of the Court, a recording will be required. Additionally, the Prosecutor is free to apply this procedure in other cases, “in particular where the use of such procedures could assist in reducing any subsequent traumatisation of a victim of sexual or gender violence, a child or a person with disabilities in providing their evidence.”¹⁵⁷⁸ Upon request by the Prosecution, the Pre-Trial Chamber may order that this procedure be applied in case there is a ‘unique investigative opportunity’. It seems that the Pre-Trial Chamber may not *proprio motu* order this procedure to be followed in case of a unique investigative opportunity.¹⁵⁷⁹ Overall, this provision is a welcome addition as it favours a wide application of the recording procedure

¹⁵⁷⁷ Rule 111 ICC RPE. Rule 112 is *lex specialis* to Rule 111, meaning that when the Prosecution records the questioning of a person in accordance with Rule 112, it is not required to create an additional record of the person's statements under Rule 111. See ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber IV of 12 September 2011 Entitled "Reasons for the Order on Translation of Witness Statements (ICC-02/05-03/09-199) and Additional Instructions on Translation", *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09-295, A. Ch., 17 February 2012, par. 26 – 28. The Appeals Chamber thereby reversed the decision of Trial Chamber IV, which held that a written and signed record of the statements of witnesses questioned in accordance with Rule 111 is always required. Trial Chamber IV in turn based its conclusion on the earlier holding in ICC, Decision on the Prosecution Request for the Addition of Witness P-219 to the Prosecution List of Incriminating Witnesses and the Disclosure of Related Incriminating Material to the Defence, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-1553, T. Ch. II, 23 October 2009, par. 35 (“The Chamber is aware of the specific procedure laid down in rule 112, but it is of the view that this concerns an additional measure of protection for persons questioned under article 55(2) and not an alternative to the procedure laid down in rule 111”).

¹⁵⁷⁸ Rule 112 (4) ICC RPE. The Rule further provides that ‘the Prosecutor may make an application to the relevant Chamber’.

¹⁵⁷⁹ Rule 112 (5) ICC Statute only refers to Article 56 (2) ICC Statute (measures to ensure the efficiency and integrity of the proceedings and to protect the rights of the defence, requested by the Prosecutor) but does not refer to Article 56 (3) (which includes the possibility for the Pre-Trial Chamber to consult with the Prosecutor on the taking of such measures and the possibility for the Pre-Trial Chamber to take such measures *proprio motu*).

not only to respect the rights of suspects and accused but also to honour the specific interests of victims and other persons in a vulnerable position.¹⁵⁸⁰

The conduct of questioning is regulated in more detail than before the *ad hoc* tribunals and the SCSL.¹⁵⁸¹ The waiver of the right to assistance by counsel should be recorded. Similar to the procedural regime of the *ad hoc* tribunals, interruptions should be recorded as well as the time of interruptions and resumptions.¹⁵⁸² Before concluding the questioning, the person questioned should be given an opportunity to clarify anything said or add anything they would like to the statement. The time at which the questioning concludes should also be noted.¹⁵⁸³ The tape should be transcribed ‘as soon as practicable after the conclusion of the questioning’ and the suspect or accused should be given a copy of the transcript and the recorded tape.¹⁵⁸⁴ The original tape is to be sealed in the presence of the accused or suspect and his or her counsel, if present, and be signed by them and the Prosecutor.¹⁵⁸⁵

§ *Waiver of the right to video recording*

The suspect or accused person can object to audio or video recording. The person should be informed about this possibility and the answer should be noted in the record of the questioning.¹⁵⁸⁶ The suspect or accused person can speak in private to his or her counsel before responding.¹⁵⁸⁷ However, the Prosecutor can question a suspect or accused person without audio or video recording in exceptional circumstances that prevent such recording.¹⁵⁸⁸ The reasons that prevent such recording should be stated in writing. If the person being questioned objects to recording the interview or if circumstances prevent a recording, a record

¹⁵⁸⁰ The intention behind including this provision was to prevent re-traumatization by using such testimonies at trial. See H. FRIMAN, *Investigation and Prosecution*, in R.S. LEE (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, Transnational Publishers, 2001, pp. 514-515; H. FRIMAN, *The Rules of Procedure and Evidence in the Investigative Stage*, in H. FISHER, C. KRESS and S.R. LÜDER (eds.), *International and National Prosecution of Crimes under International Law: Current Developments*, Berlin, Berlin Verlag Arno Spitz GmbH, 2001, pp. 197-198.

¹⁵⁸¹ In that regard, Friman recalls that at the time the proposals were discussed, some delegations thought they were “excessively detailed.” See H. FRIMAN, *Investigation and Prosecution*, in R.S. LEE (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, Transnational Publishers, 2001, p. 514.

¹⁵⁸² Rule 112 (1) (b) and (c) ICC RPE.

¹⁵⁸³ Rule 112 (1) (d) ICC RPE.

¹⁵⁸⁴ Rule 112 (1) (e) ICC RPE.

¹⁵⁸⁵ Rule 112 (1) (f) ICC RPE.

¹⁵⁸⁶ Rule 112 (1) (a) ICC RPE.

¹⁵⁸⁷ Rule 112 (1) (a) ICC RPE.

¹⁵⁸⁸ Rule 112 (2) ICC RPE.

shall be kept of the interrogation, in accordance with the procedure applicable to the questioning of witnesses (Rule 111 ICC RPE).¹⁵⁸⁹

At the time of the adoption of the RPE, some proposals were made that the same procedure should be respected during questioning by national authorities, except where this is prohibited under national law.¹⁵⁹⁰ However, such a provision would create new obligations for the states which are not provided for in the Statute. Nevertheless, the possibility exists for the Court to request that a national state conducts the recording of questioning in accordance with Rule 112.¹⁵⁹¹

IV.6.3. Internationalised criminal courts and tribunals

The rules of the internationalised criminal courts and tribunals on the conduct of the interrogations closely resemble the procedural safeguards of the other, international criminal tribunals. The Internal Rules of the ECCC provide that audio or video recording and a written record are required whenever possible along with the possibility for the suspect or charged person to object to such a recording.¹⁵⁹² A waiver of the right to assistance by counsel should be recorded.¹⁵⁹³ Breaks in the recording and the time thereof should be explained and the person should be given an opportunity to clarify what was said or to add anything.¹⁵⁹⁴ Similar to the ICC procedure, the Co-Prosecutors or Co-Investigative Judges may choose to apply audio or video recording to other persons, in particular when such recording would assist in reducing subsequent traumatisation.¹⁵⁹⁵ Further in line with the ICC procedure is the possibility for the questioning to proceed without audio or video recording when circumstances prevent such recording from taking place.¹⁵⁹⁶ Unlike the procedures of other tribunals, the questioning of deaf or mute persons is regulated in detail.¹⁵⁹⁷

¹⁵⁸⁹ See Rule 111 ICC RPE. In such case, the person interviewed should be given a copy of his or her statement. See *infra*, Chapter 5 on the questioning of witnesses.

¹⁵⁹⁰ H. FRIMAN, *The Rules of Procedure and Evidence in the Investigative Stage*, in H. FISHER, C. KRESS and S.R. LÜDER (eds.), *International and National Prosecution of Crimes under International Law: Current Developments*, Berlin, Berlin Verlag Arno Spitz GmbH, 2001, pp. 197-198.

¹⁵⁹¹ The Court can do so pursuant to Articles 93, 96 and 99 of the ICC Statute. Note that, as mentioned earlier, the rights of Article 55 (2) ICC Statute also apply in case the questioning is conducted by national authorities.

¹⁵⁹² Rule 25 ECCC IR.

¹⁵⁹³ Rule 25 (1) (b) ECCC IR.

¹⁵⁹⁴ Rule 25 (1) (c) and (d) ECCC IR.

¹⁵⁹⁵ Rule 25 (4), compare with Rule 112 (4) ICC RPE, *supra*, Chapter 4, IV.6.2.

¹⁵⁹⁶ Rule 25 (2) ECCC IR.

¹⁵⁹⁷ Rule 27 ECCC IR.

The importance of the questioning of the charged person by the Co-Investigating Judges is peculiar to the procedural system of the ECCC and in line with the procedural system of a number of civil law jurisdictions.¹⁵⁹⁸ It is important to underline the difference between a ‘charged person’ and an accused person. What is meant by the former is a ‘*personne mise en examen*’; a person who is ‘put under judicial investigation’.¹⁵⁹⁹ It requires that a suspect be brought before the Co-Investigating Judges and officially informed, pursuant to Rule 55 (4) ECCC IR, that there is clear and consistent evidence that he or she may be criminally responsible for the commission of a crime included in an introductory or a supplementary submission, even where such person were not named in the submission.¹⁶⁰⁰ He or she should thus be informed of the ‘charges’. The Co-Investigating Judges may then interview the charged person during the initial appearance, if he or she agrees or soon thereafter.¹⁶⁰¹ The charged person can also request to be interviewed him or herself.¹⁶⁰² The Co-Investigating Judges can reject such a request and render a rejecting order stating the factual reasons for such a rejection.¹⁶⁰³ The charged person can appeal this rejecting order. Before an interview with a charged person takes place, the Co-Investigating Judges summon the lawyer (if he or she has one) to allow him or her to consult the case file.¹⁶⁰⁴ The lawyer should be summoned at least five days before the interview takes place. Apart from this five-day period to prepare for an interview, the Defence has no general right to have adequate time to prepare for the interview.¹⁶⁰⁵ In the Pre-Trial Chamber’s opinion, that refers to the ‘fair trial right’ to have sufficient time to prepare for trial. Since the purpose of an interview with the charged person is to put questions to him or her *about what the person knows*---and not to respond to

¹⁵⁹⁸ See Rule 58 of the ECCC IR.

¹⁵⁹⁹ According to the Glossary annexed to the Internal Rules, the term refers to any person who is subject to prosecution in a particular case, during the period between the introductory submission and indictment or dismissal of the case; see also G. ACQUAVIVA, *New Paths in International Criminal Justice: The internal Rules of the Cambodian Extraordinary Chambers*, in «Journal of International Criminal Justice», Vol. 6, 2008, p. 136.

¹⁶⁰⁰ Rule 55 (4) and 57 ECCC IR; ECCC, Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel, Case No. 004/07-09-2009-ECCC-OCIJ, OCIJ, 17 May 2013, par. 52; ECCC, Order Concerning the Co-Prosecutor’s Request for Clarification of Charges, *The case of Nuon Chea et al.*, Case No. 002/19-09-2007, OCIJ, 20 November 2009, par. 10.

¹⁶⁰¹ Rule 57 (2) and 58 ECCC IR. The Judicial Police or Investigators are not allowed to question the Charged Person, see Rule 62 (3) (b) ECCC IR.

¹⁶⁰² Rule 58 (6) ECCC IR.

¹⁶⁰³ Rule 58 (6) ECCC IR.

¹⁶⁰⁴ Rule 58 (1) ECCC IR.

¹⁶⁰⁵ ECCC, Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, *The case of Nuon Chea et al.*, Case No. 002/19-09-2007, PTC, 26 August 2008, par. 45. *In casu*, no international co-lawyer for the charged person had yet been selected.

accusations---, the right does not apply.¹⁶⁰⁶ The purpose of the interview is not for the charged person to respond to the accusations against him or her.¹⁶⁰⁷

Similar to other interrogations, the interview with the charged person only takes place in the presence of his or her lawyer, unless the charged person has waived this right.¹⁶⁰⁸ An interview in the absence of counsel is also possible in ‘emergency situations’. These emergency situations relate to situations ‘when there is a high probability of irretrievable loss of evidence while awaiting the arrival of a lawyer, such as the impending death of the charged person’.¹⁶⁰⁹ The charged person’s consent to such questioning is required. The Co-Prosecutors can attend the interview and request that certain questions be put to the charged person by the Co-Investigating Judges. The Co-Investigating Judges decide whether to put the question to the charged person or not. A refusal by the Co-Investigating Judges should be noted in the record.¹⁶¹⁰

The rules on how to interview a charged person should be distinguished from (and do in principle not apply to) the *adversarial hearing* on provisional detention.¹⁶¹¹ The Pre-Trial Chamber held that this adversarial hearing is “distinct in its purpose”, as it provides the charged person with a possibility to respond to the request and arguments made by the Co-Prosecutors.¹⁶¹² An interview of the charged person, on the other hand, is aimed at obtaining a statement from the accused, which could then be used as evidence.¹⁶¹³ Interestingly, however, the Pre-Trial Chamber left the door open for a broad application of the procedural safeguards of Rule 58 on the questioning of a charged person. The Pre-Trial Chamber acknowledged a *functional interpretation* of Rule 58, which implies that Rule 58 should be applied to any questioning of the charged person, irrespective of the procedure.¹⁶¹⁴

¹⁶⁰⁶ *Ibid.*, par. 47.

¹⁶⁰⁷ *Ibid.*, par. 47.

¹⁶⁰⁸ Rule 58 (2) ECCC IR. In case the lawyer had been correctly summoned but does not appear at the interview, the Co-Investigating Judges can temporarily assign a counsel. This designated counsel should be given sufficient time to review the case file.

¹⁶⁰⁹ Rule 58 (3) ECCC IR.

¹⁶¹⁰ Rule 58 (4) ECCC IR.

¹⁶¹¹ As regulated in Rule 63 IR.

¹⁶¹² ECCC, Decision on Appeal Against Provisional Detention Order of Nuon Chea, *The case of Nuon Chea et al.*, Case No. 002/19-09-2007, PTC, 20 March 2008, par. 17, 32, 40.

¹⁶¹³ *Ibid.*, par. 17.

¹⁶¹⁴ *Ibid.*, par. 17.

In case of a *confrontation*, the same procedural rules apply. During the confrontation, the lawyers of the other parties can also request the Co-Investigating Judges to put certain questions to the charged person.¹⁶¹⁵

The TRCP did not detail the interrogation procedure. Technical rules, such as requiring a video or audio recording to ensure that procedural safeguards were respected during questioning, were lacking. For the fairness of the investigations, this omission may have had important consequences. One Judge of the SPSC suggested that SCU investigators “may have influenced answers or tried to make them ‘look nicer,’” with regard to statements taken during the investigation.¹⁶¹⁶ It is easy to understand how audio or video recording of the interrogation would have allowed for *ex post* control of the resulting statements.

The SPSC’s practice reveals that the Court made a distinction between using the interview statement during cross-examination and the use of such a statement as evidence. For example, in the case against *Francisco Pedro*, statements made by the accused to the police during the investigation were not admitted into evidence, although the rights of the accused during the interrogation were upheld.¹⁶¹⁷ The Court decided that only those statements that were made in front of the Investigative Judge during the investigation and in the presence of the Public Prosecutor as well as the defense counsel could be admitted. Statements that were made in front of the police or the Public Prosecutor could not be admitted.¹⁶¹⁸ The Court derived this requirement from the limitations within the TRCP on the use of guilt admissions by the accused.¹⁶¹⁹ Judge Rapoza criticized this view. He held that no such limitation could be read into the TRCP.¹⁶²⁰

¹⁶¹⁵ Rule 58 (5) ECCC IR.

¹⁶¹⁶ D. COHEN, *Indifference and Accountability: The United Nations and the Politics of Justice in East-Timor*, in «East-West Center Special Reports», Nr. 9, 2006, p. 27 (the author refers to an interview held with Judge de Silva).

¹⁶¹⁷ SPSC, Decision, *Prosecutor v. Francisco Pedro (alias Chico)*, Case No. 1/2001, 22 May 2001, reprinted in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals*, Vol. 13: Timor Leste—The Special Panels for Serious Crimes 2001-2003, Antwerp, Intersentia, 2008, p. 29.

¹⁶¹⁸ *Ibid.*, p. 7.

¹⁶¹⁹ For any admission of guilt by the accused, it is necessary that such admission was made before a judge to use this statement in evidence. The court should (1) consider whether the accused understands the nature and consequences of the admission of guilt, and (2) the admission should be made voluntarily after sufficient consultation with defense counsel and the admission should be supported by the facts of the case, see Section 33.4 *in* *conjuncto* Section 29A.1 TRCP.

¹⁶²⁰ SPSC, Dissenting Opinion on the Defendant’s Oral Motion to Exclude Statement of the Accused, *Prosecutor v. Francisco Pereira*, Case No.34/2003, SPSC, 17 September 2004, pp. 6 -7. See also *supra*, Chapter 4, IV.2.3.

The recording procedure relevant to the STL resembles the procedural rules of other tribunals. The technical rules on recording interviews mirror the provisions of the *ad hoc* tribunals and the SCSL.¹⁶²¹ However, a provision was added, in line with the ICC RPE and the ECCC Internal Rules, to allow for the questioning of suspects or accused persons without video or audio recording on an exceptional basis, ‘where circumstances make it absolutely impractical for such recording to take place’.¹⁶²² This standard seems lower than the standard in the ICC RPE or the ECCC Internal Rules, which allow for questioning without recording ‘where the circumstances prevent such recording taking place’.¹⁶²³

V. COMPARATIVE ANALYSIS: SOME TENTATIVE CONCLUSIONS

The comparative analysis above allows us to make a number of tentative conclusions regarding the procedural rules applicable to the questioning of suspects and accused persons. A number of procedural safeguards could be identified that are shared by all courts and tribunals. The procedural rules encompassing these rights can be earmarked as firmly established in international criminal procedural law. Other procedural rules do not seem to be shared by all jurisdictions under review. While the jurisprudence of the ICC (and the jurisprudence of other courts with international elements) grows every day, it remains to be seen, with regard to a number of procedural rules on the interrogation of suspects and accused persons outlined in the jurisprudence of the *ad hoc* tribunals and the SCSL, whether the ICC will follow this jurisprudence. For example, it was shown how the case law of the *ad hoc* tribunals only prohibits the use of certain forms of inducements during questioning. On the other hand, the ECCC Internal Rules prohibit all forms of inducements. What the ICC’s attitude towards inducements will be remains to be seen.

Unsurprisingly, the procedural framework of all tribunals scrutinised above provide for the prosecutorial power to question suspects and accused persons. In the course of the preliminary investigation at the ECCC, the Co-Prosecutors, the judicial police officers or investigators at the Co-Prosecutor’s request, may summon and interview any person who may provide

¹⁶²¹ Rule 66 STL RPE.

¹⁶²² Rule 66 STL RPE.

¹⁶²³ Rule 112 (2) ICC RPE, see *supra*, Chapter 4, IV.6.2. The ECCC Internal Rules include a similar formulation, see Rule 25 (2) ECCC IR, see *supra*, Chapter 4, IV.6.3.

relevant information on the case.¹⁶²⁴ All courts and tribunals provide for *the right to have the assistance of counsel during interrogation*. This procedural right was not only found in the procedural frameworks of the ICC, the SCSL and the *ad hoc* tribunals but also in the ECCC and the STL. A potential exception were the SPSC. The TRCP only explicitly mentioned such a right in relation to custodial interrogations. Another notable exception is the possibility for the Co-Investigating Judges of the ECCC to question the charged person without counsel being present in emergency situations. However, in such a situation, the charged person's consent is required. The suspect or accused should be informed about the right to the assistance of counsel with the possibility of waiving it, provided that such a waiver is given voluntarily. The *ad hoc* tribunals and the STL are clearer than the ICC in this regard as they also require that the waiver be express (and unequivocal). The RPE of the *ad hoc* tribunals, the SCSL and the STL provide that if such a waiver is revoked, the questioning should immediately stop and only start again when counsel has been assigned to the suspect or the accused. Neither the ICC Statute nor the RPE explicitly mention such a requirement. It follows from the case law of the *ad hoc* tribunals that the tribunal should investigate a counsel's competence if substantive evidence is adduced which questions his or her competence to adequately represent the suspect's or accused's interests during the interview.

The right for suspects and accused persons to remain silent during questioning is equally established in international criminal procedure. The right can be waived, if such a waiver is given voluntarily. The suspect or accused should be informed of this right prior to questioning. According to the case law of the ICTY, a presumption exists that a person is informed about the right to remain silent during questioning if he or she is assisted by counsel. The procedural frameworks of the SCSL and the *ad hoc* tribunals, as well as the STL Statute and RPE, explicitly state that the suspect or accused should be cautioned that his or her statement can be used as evidence at trial. The right cannot be invoked retroactively. It follows from the case law of the *ad hoc* tribunals that no adverse inferences can be drawn from a suspect's or accused's silence. The Statutes of the ICC and the STL, as well as the TRCP, explicitly mention this prohibition. No methods can be used during questioning that lead an accused or suspect to speak where he or she otherwise would have remained silent. Forms of oppressive conduct including coercion, duress or threats as well as torture or other forms of cruel, inhuman or degrading treatment are clearly prohibited. This follows from the

¹⁶²⁴ Rule 50 (4) ECCC IR.

case law of the *ad hoc* tribunals, the ICC Statute, the TRCP and the ECCC Internal Rules. While the procedural framework of the STL does not explicitly mention such a prohibition, it is clear from the RPE that evidence is not admissible when gathered in violation of international human rights standards or by means of torture (Rule 162 (B) STL RPE). No clearly established rules can be identified regarding inducements. According to the case law of the *ad hoc* tribunals, inducements that render cooperation involuntary are prohibited. However, it remains to be seen whether, and to what extent, the ICC will consider some forms of inducement during questioning as acceptable. The ECCC clearly prohibit any form of inducement.

Prior to being questioned, the *accused person should be informed in detail, in a language he or she understands, about the nature and cause* (and according to the ICC Statute also the content) *of the charges against him or her*. Such a right is provided for under the procedural framework of all tribunals reviewed. Most international criminal tribunals (the *ad hoc* tribunals, the ICC and the STL) require that *the suspect be informed prior to the start of the interrogation that there are reasonable grounds to believe that he or she has committed a crime within the jurisdiction of the court*. Where the SPSC and ECCC require that the suspect be informed about the *charges* at all stages of the proceedings, it is unclear what that means in the absence of confirmed charges. Some case law of the ICTR seems to put a requirement on the Prosecutor to inform the suspect about the provisional charges or allegations.

Furthermore, the suspect or accused person enjoys the *right to the free assistance of an interpreter* during interrogation if he or she cannot understand or speak the language being used. The ICC Statute includes a stronger protection in that it requires a ‘competent’ interpreter and that interpretation be provided to the accused or the suspect if questioned in any language other than the accused or suspect *fully* understands and speaks. It also includes a welcome addition in the form of a right to such translations prior to questioning insofar that this is necessary to meet the requirements of fairness.

All international criminal tribunals (with the exception of the SPSC) require *audio or video recordings* of the questioning of suspects or accused persons. There is a possibility for the Prosecutor to not make such a recording if the circumstances prevent it from taking place (ICC RPE and the ECCC Internal Rules), or where circumstances make it absolutely impractical (STL RPE).

Chapter 5: Questioning of witnesses*

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I. INTRODUCTION

Witnesses need our careful consideration because they are the primary *source* of evidence in most contemporary international criminal proceedings.¹ Consequently, the questioning of

* This chapter is an expanded and updated version of this author's section 'Questioning of Witnesses' in K. DE MEESTER, K. PITCHER, R. RASTAN and G. SLUITER, *Investigation, Coercive Measures, Arrest and*

prospective witnesses, as an investigative measure, is of primary importance in the evidence-gathering process. For example, at the ICTY, by 2009, approximately ten thousand witnesses had been interviewed by the Prosecutor since 1994.² This feature sets these proceedings apart from their post-WWII antecedents, which largely relied on documentary evidence.³

While the importance of witness interviews for both parties in building their respective cases is easily understood, it is equally important to understand the various ways in which statements or transcripts resulting from these interviews play a role in further proceedings. Written statements taken from witnesses during the investigation phase can be tendered into evidence under certain conditions.⁴ Disclosure obligations may dictate the disclosure of witness statements depending on whom the Prosecutor or Defence intends to call at trial.⁵

Surrender, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, pp. 255 – 281.

¹ N.A. COMBS, *Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge, Cambridge University Press, 2010, p. 12 (“the vast bulk of the evidence presented to the current international tribunals comes in the form of witness testimony”); S.N. NGANE, *Witnesses before the International Criminal Court*, in «The International Law and Practice of International Courts and Tribunals», Vol. 8, 2009, pp. 432 – 433. Consider additionally S.J. MALLESON, *The OTP v. Thomas Lubanga Dyilo: The Challenges of Using “Intermediaries” in the International Criminal Court*, in «Humanitarian Law Perspectives», 2011 (available at http://www.redcross.org.au/files/2011_the_otp_v_thomas_lubanga_dyilo_the_challenge_of_using_intermediaries_in_the_international_criminal_court.pdf, last visited 30 November 2013), p. 10 (the author argues that at the ICTY “eyewitness evidence is the most important, and occasionally the only, evidence available to the Prosecution”); P. WALD, *Dealing with Witnesses in War Crimes Trials*, in «Yale Human Rights and Development Law Journal», Vol. 5, 2002, p. 140 (“lavish use” has been made of witness testimony before the ICTY).

² ICTY Manual on Developed Practices, Turin, UNICRI Publisher, 2009, p. 12; The ICTR and the SCSL relied on witness evidence to an even larger extent. Unlike at the ICTY, other forms of evidence, including intercepted communications and contemporaneous documents such as agendas, military documents and written orders were mostly not available. See e.g. C. BUISMAN, *Ascertainment of the Truth in International Criminal Justice*, 2012, (available at: <http://bura.brunel.ac.uk/handle/2438/6555>, last visited 18 November 2013), p. 359.

³ This difference can in part be explained by the liberal admission of documentary evidence into evidence before the IMT and IMTFE. See R. MAY and M. WIERDA, *International Criminal Evidence*, Ardsley, Transnational Publishers, 2002, p. 211 (affidavits were widely admitted in historical trials and their role was one of great importance); A. SHERMAN, *Sympathy for the Devil: Examining a Defendant’s Right to Confront Before the International War Crimes Tribunal*, in «Emory International Law Review», Vol. 10, 1996, pp. 864-865; on the admission of documentary evidence before the IMTFE, see the testimony by B.V.A Röling: A. CASSESE, *The Tokyo Trial and Beyond: Reflections of a Peacemaker*, Polity Press, Cambridge, 1993, p. 52; N. BOISTER and R. CRYER, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford, Oxford University Press, 2008, pp. 107-108. Consider also N.A. COMBS, *Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge, Cambridge University Press, 2010, p. 174 (“Unlike the Nuremberg Tribunal, which received from the prosecution reams of documents that proved beyond any shadow of a doubt the defendants’ commission of certain acts, the ICTR, SCSL and Special Panels operate in a fact-finding fog of inconsistent, vague, and sometimes incoherent testimony that leaves them unable to say with any measure of certainty who did what to whom”).

⁴ See *Infra*, Chapter 5, III.

⁵ Consider e.g., with regard to the *ad hoc* tribunals and the SCSL: Rule 66 (A) (ii) ICTY, ICTR and SCSL RPE and Rule 67 (A) (ii) ICTY RPE (requiring the disclosure of witness statements). Consider further Rule 65ter (E) (ii) (b) and (G) (i) (b) ICTY RPE (requiring both the defence and prosecution to provide a summary of the facts on which each witness will testify, rather than the actual witness statement); and 73bis (B) (iv) (b) ICTR and

Witness statements or transcripts may also form part of the written summary of evidence which may be considered by the Single Judge when reviewing the charges or may be introduced as summary or documentary evidence at the confirmation hearing.⁶

Nevertheless, at the outset of our discussion on the interrogation of witnesses as an investigative measure, it should be underlined that, in theory, the preference for oral evidence (or the ‘presumption of orality’) still stands in international criminal procedure.⁷ Most

SCSL RPE as well as 73ter (B) (iii) (b) ICTR and SCSL RPE (the Trial Chamber or a Judge ‘may’ order the Defence and Prosecution to provide a summary of the facts on which each witness will testify. Note that originally, no obligation existed for the Defence to disclose witness statements, see e.g. ICTY, Decision on Prosecution Motion for Production of Defence Witness Statements, *Prosecutor v. Tadić*, Case No. IT-94-1-T, T. Ch., 27 November 1996. Later, the Appeals Chamber held that defence witness statements can be subject to disclosure “only if so requested by the Prosecution and if the Trial Chamber considers it right in the circumstances to order disclosure.” See ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-95-1-A, A. Ch., 15 July 1999, par. 325 – 326.

⁶ Rule 47 (B) ICTY, ICTR and SCSL RPE and Article 61 (5) ICC Statute; see ICC, Decision on the Admissibility for the Confirmation Hearing of the Transcripts of Interview of the Deceased Witness 12, *Prosecutor v. Katanga and Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-412, PTC I, 18 April 2008, pp. 4-5 (“when the Prosecution intends to rely on witnesses for the purpose of the confirmation hearing, it will normally do so through the use of their statements or the transcripts of their audio or video recorded interviews”).

⁷ Indications of the preference for *viva voce* witness testimony can clearly be found in Rule 90 (A) ICTR RPE (“Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71”) and, more indirectly, in Rule 89 (F) ICTY, ICTR and SCSL RPE. Before the 19th Revision of the ICTY RPE of 1 and 13 December 2000, the principle of orality was clearly stated in Rule 90 (A). In a similar vein, before the amendment of the SCSL RPE, Article 90 (A) explicitly included a preference for oral evidence. Consider ICTY, Decision on Prosecution’s Motions to Admit Prior Statements as Substantive Evidence, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, T. Ch. II, 25 April 2005, par. 29 (“Despite the amendments that have been made to the Rules with respect to the form of admissible evidence, oral evidence remains the primary and normal standard”); ICTY, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 19 August 2005, par. 16-17; ICTY, Appeals Chamber Decision on Appeal by Dragan Papić Against Ruling to Proceed by Deposition, *Prosecutor v. Kupreškić*, A. Ch., 15 July 1999, par. 18; ICTY, Decision on Appeal Regarding Statement of a Deceased Witness, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, A. Ch., 21 July 2000, par. 19; SCSL, Decision on Disclosure of Witness Statements and Cross-Examination, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, T. Ch. I, 16 July 2004, par. 25 (“The Special Court adheres to the principle of orality, whereby witnesses shall, in principle, be heard directly by the Court”). In addition, the Appeals Chamber stated that the weight to be attached to hearsay, in the form of out-of-court witness statements will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined. See ICTY, Decision on Prosecutor’s Appeal on Admissibility of Evidence, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, A. Ch., 16 February 1999, par. 15. The preference for oral evidence by the ICC can be found in Article 69 (2) ICC Statute (“The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence”). Confirming see e.g. G. ACQUAVIVA, Written and Oral Evidence, in L. CARTER and F. POCAR (eds.), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, Cheltenham, Edward Elgar Publishing, 2013, p. 108 (“International tribunals have undoubtedly heeded the European Court of Human Rights’ prescription that ‘all the evidence must normally be produced at a public hearing, in the presence of the Accused, with a view to adversarial argument’” [...] “in proceedings before international criminal tribunals – preference is currently given to oral evidence”); M. CAIANIELLO, First Decisions on the Admission of Evidence at ICC Trials: A Blending of Accusatorial and Inquisitorial Models?, in «Journal of International Criminal Justice», Vol. 9, 2011, p. 394. Nevertheless, this preference does not apply to the ICC confirmation hearing: see Article 61 (5), second sentence ICC Statute.

international criminal tribunals reviewed in principle require witness statements to be given orally, in the courtroom setting. This preference follows from the principle of best evidence and the preference for primary over secondary evidence.⁸ However, it will be illustrated how numerous amendments to the procedural regimes of the *ad hoc* tribunals and the SCSL denote a clear tendency towards allowing for more evidence-in-chief of witnesses in writing.⁹ The rationale for these amendments is the wish to expedite the pace of trials.¹⁰ As a consequence, the principle of orality has increasingly become under pressure.¹¹

This chapter outlines the procedural norms applicable to the questioning of witnesses during investigation. It will be established that neither the statutory documents nor the practice of most tribunals and courts under review offer a detailed set of procedural norms on the

Likewise, Article 21 (3) STL evidences such preference: ‘A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form’).

⁸ H. FRIMAN, *Inspiration From the International Criminal Tribunals When Developing Law on Evidence for the International Criminal Court*, in «The Law and Practice of International Courts and Tribunals», Vol. 2, 2003, p. 387.

⁹ Consider e.g. F. GAYNOR, *Admissibility of Documentary Evidence*, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 1049; A. WHITING, *The ICTY as a Laboratory of International Criminal Procedure*, in B. SWART, A. ZAHAR and G. SLUITER (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford, Oxford University Press, 2011, pp. 97 - 100; M. NERENBERG and W. TIMMERMAN, *Documentary Evidence*, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL, *Principles of Evidence in International Criminal Justice*, Oxford, Oxford University Press, 2010, p. 460; C.M. ROHAN, *Rules Governing the Presentation of Testimonial Evidence*, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), *Principles of Evidence in International Criminal Justice*, Oxford, Oxford University Press, 2010, p. 523 (labeling this “yet another reflection of the ongoing adoption in the international courts of procedural practices more familiar to civil law jurisdictions”); S. KAY, *The Move from Oral Evidence to Written Evidence*, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 497; S. ZAPPALÀ, *Human Rights in International Criminal Proceedings*, Oxford University Press, Oxford, 2003, p. 138; M. CAIANIELLO, *Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models*, in «North Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2011, p. 315.

¹⁰ A. WHITING, *The ICTY as a Laboratory of International Criminal Procedure*, in B. SWART, A. ZAHAR and G. SLUITER (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford, Oxford University Press, 2011, pp. 99 - 100.

¹¹ F. GAYNOR, *Admissibility of Documentary Evidence*, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 1071 (“It is clear that the presumption in favour of oral evidence has been eroded in favour of the presentation of the evidence-in-chief of witnesses in written form”). It has been claimed that the ICTY has moved from a system where there was a preference for live testimony to a “no-preference alternative”, see P. WALD, “To Establish Incredible Events by Credible Proceedings”, in «Harvard International Law Journal», Vol. 42, 2001, p. 548; M. FAIRLIE, *Due Process Erosion: The Diminution of Live Testimony at the ICTY*, in «California Western International Law Journal», Vol. 34, 2003, p. 72. Compare P.L. ROBINSON, *Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY*, in «Journal of International Criminal Justice», Vol. 3, 2005, p. 1042 (who argues that the principle of orality has been ‘neutralized’ by the amendments of the ICTY RPE). Two authors note that because of amendments to the RPE, “the principle of orality leads an obscure life in tribunal circles, as judges are divided over the admission of written witness statements.” (A. ZAHAR and G. SLUITER, *International Criminal Law: A Critical Introduction*, Oxford, Oxford University Press, 2008, p. 376.) Some commentators refer to the “[e]nd of [o]rality.” E. O’SULLIVAN and D. MONTGOMERY, *The Erosion of the Right to Confrontation under the Cloak of Fairness at the ICTY*, in «Journal of International Criminal Justice», Vol. 2, 2010, p. 516.

questioning of witnesses as an investigative measure. Even still, no legal provision explicitly allows the Defence to interview witnesses. This right derives from other rights including the right of the defendant to obtain the attendance and examination of witnesses under the same conditions as witnesses against him or her and the general right of the accused to have adequate time and facilities for the preparation of his or her defence. Lacking relevant case law, it is often difficult to discover the Prosecution and Defence's standard procedure for the conduct of pre-trial witness interviews.

After the definition of the terms 'witnesses' and 'witness statements', this chapter will shortly address the extent to which out-of-court witness statements may be admitted into evidence at trial in international criminal procedure. While the admission of evidence, strictly speaking, falls outside the scope of the present study, the procedural rules and practice of the international(ised) criminal courts and tribunals on the admissibility of prior witness statements may provide us with some hints on what procedural norms are to be upheld during the questioning of witnesses and on what the preferable standard is for recording pre-trial witness statements. Evidently, both the Prosecutor and the Defence have an interest in collecting evidence in a manner rendering it admissible at trial.

Secondly, this chapter will look into the interplay between the international Prosecutors and states in collecting testimonial evidence. It will identify the applicable procedural regime for the interrogation of witnesses conducted by national law enforcement officials, the Prosecution or by a combination thereof. Thirdly, the procedural norms and practices of the different tribunals and courts on the interrogation of witnesses will be scrutinised. Attention will be paid to the safeguards which apply to the questioning of witnesses. In particular, it will be asked whether a privilege against self-incrimination should be accorded by investigators to witnesses in international criminal proceedings. Fourthly, the procedural norms and practices identified will be critically assessed in light of international human rights law. Fifthly, some challenges in the gathering of witness testimony in the course of international criminal investigations will be addressed. Finally some tentative conclusions on the questioning of witnesses during the investigation phase of international criminal proceedings will be drawn.

II. DEFINING WITNESSES AND WITNESS STATEMENTS

§ *Witnesses*

In the previous chapter, it was highlighted how the precise status of a person in the course of an investigation may not always be clear and how such status may evolve.¹² A person who is questioned as a witness may later become a suspect. The importance of a proper delineation and understanding of the different and sometimes changing status of a person during the investigation was underlined.¹³

No definition of the term ‘witness’ is included in the Statute or the RPE of the *ad hoc* tribunals, the ICC or any of the internationalised criminal courts and tribunals under review. Nevertheless, some provisions may hint at the meaning of ‘witness’ in international criminal procedural law. Rule 90 (B) ICTY and Rule 90 (C) ICTR and SCSL RPE refer to someone who reports the facts of which he or she has knowledge.¹⁴ In turn, Rule 66 (2) ICC RPE refers to a person who is able to describe matters of which he or she has knowledge. While the term ‘matters’ is used in the second provision and ‘facts’ in the first, it has been argued that such difference is not decisive.¹⁵ Definitions which can be found in some other ICC documents are too specific and of limited use for our study. Among others, the ICC ‘E-Court Protocol’ defines a witness as a ‘person who has provided statements on which the Prosecution or the Defence intends to rely at the hearing’. This definition focuses on the trial phase itself and is therefore too narrow for our purposes.¹⁶ An alternative definition can be found in some of the case-specific protocols which have been adopted by ICC (Pre-)Trial Chambers and which deal with the issue of contacts with witnesses of the opposing party.¹⁷ There, ‘witness’ has been defined as ‘a person whom a party intends to call to testify during the trial proceedings,

¹² See *supra*, Chapter IV, II.1.

¹³ *Ibid.*

¹⁴ See also Rule 150 (B) STL RPE.

¹⁵ KRESS argues that while the task of a witness is to report on fact, some elements of opinion cannot always be excluded, see: C. KRESS, *Witnesses in Proceedings Before the International Criminal Court*, in H. FISHER, C. KRESS and S.R. LÜDER (eds.), *International and National Prosecution of Crimes under International Law: Current Developments*, Berlin, Berlin Verlag Arno Spitz GmbH, 2001, pp. 315 – 316.

¹⁶ ICC, Consolidated E-Court Protocol, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-1263, T. Ch. I, 4 April 2008. The E-Court Protocol is a ‘technical protocol for the provision of evidence, material witness and victims information in electronic form for their presentation during the Trial’.

¹⁷ These protocols apply to persons ‘whom the party is aware of or has reasonable grounds to believe has provided a statement to or otherwise met with members of the opposing party as party of that party’s investigations [...] and that the party has reasonable grounds to believe that the other party may call [...] as a witness.’

provided that such intention has been conveyed to the non-calling party, either by the calling party including the individual on its witness list, or by the witness informing the non-calling party that he or she has agreed to be called as another party's witness, or by any other means that establish a clear intention on behalf of the calling party to call the individual as a witness and that this individual has consented thereto'.¹⁸ Likewise, this definition is trial-focused and too narrow for our study.

Notably, a distinction is drawn in the RPE of some tribunals between 'expert witnesses' and other witnesses.¹⁹ Other distinctions may also be drawn. The category of vulnerable witnesses refers to those witnesses that may suffer from the confrontation with the accused and/or with the memory of the crime. This may result in secondary traumatisation (re-traumatisation or increased traumatisation). It will be explained how certain procedural regulations may be beneficial towards these witnesses by either allowing a limitation of the number of times they have to testify or by providing specific modalities for the conduct of the questioning of such witnesses. Threatened witnesses are witnesses who have good reason to fear violent reprisals (from the accused or others) because of their testimony. This category includes insider witnesses, witnesses that have worked closely with, or in the same organisation of an accused and who may give valuable information on the conduct of the accused.²⁰ The reliance on

¹⁸ Consider ICC, Protocol on the Handling of Confidential Information and Contact between a Party and Witnesses of the Opposing Party, Annex to ICC, Decision on the Protocol on the Handling of Confidential Information and Contact between a Party and Witnesses of the Opposing Party, *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan*, ICC-02/05-03/09-451, T. Ch. IV, 18 February 2013; ICC, Protocol, Annex to ICC, Decision on the Protocol Concerning the Handling of Confidential Information and Contacts of a Party with Witnesses whom the Opposing Party Intends to Call, *Prosecutor v William Samoei Ruto and Joshua Arap Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-449, T. Ch. V, 24 August 2012, par. 1; ICC, Protocol, Annex to Decision on the Protocol Concerning the Handling of Confidential Information and Contacts of a Party with Witnesses whom the Opposing Party Intends to Call, *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-469, T. Ch. V, 24 August 2012, par. 1.

¹⁹ See Rules 94bis and 90 (C) ICTY RPE and Rules 94bis and 90 (D) ICTR and SCSL RPE; Rule 140 (3), 91 (3) and (4) and Rule 191 ICC RPE; Rule 150 (C) STL RPE. A distinction can be drawn between the broad categories of 'expert witnesses' testifying in their field of expertise and 'fact witnesses' (eyewitnesses or hearsay witnesses), see D. TOLBERT and F. SWINNEN, *The Protection of, and Assistance to, Witnesses at the ICTY*, in H. ABTAHI and G. BOAS (eds.), *The Dynamics of International Criminal Justice*, Martinus Nijhoff Publishers, Leiden, 2006, pp. 196-199.

²⁰ B. HARMON and F. GAYNOR, *Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by the Prosecutor in International Criminal Proceedings*, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 408, fn. 11; A. WHITING, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, in «Harvard International Law Journal», Vol. 50, 2009, p. 348; ICTY Manual on Developed Practices, Turin, UNICRI Publisher, 2009, p. 20.

insider witnesses may be critical in the context of prosecuting international crimes, involving senior political and military leaders.²¹

§ *Witness Statements*

A definition of ‘witness statements’ is equally lacking in the statutory documents of the *ad hoc* tribunals, the Special Court or the ICC. Nevertheless, on several occasions in the context of determining the boundaries of the disclosure obligations incumbent on the Prosecutor, Trial Chambers had to establish the precise scope of witness statements. A functional definition was provided by the Trial Chamber in *Milutinović*. A statement is a more or less verbatim account of what the witness has said to the Prosecution, which has been reviewed and signed by the witness. Such statements should be distinguished from interview notes, which are less than verbatim accounts of what the witness has said to the Prosecution, and which are not necessarily reviewed and signed by the witness.²² SCSL Trial Chamber II held in *Brima et al.* that a ‘witness statement’ should be understood as “any statement or declaration made by a witness in relation to an event he or she witnesses and recorded in any form by an official in the course of an investigation.”²³ In *Blaškić*, the Appeals Chamber gave the following definition for witness statements in the context of Rule 66 on the Prosecutor’s disclosure obligations: “it is the account of a person’s knowledge of a crime, which is recorded through due procedure in the course of an investigation into a crime.”²⁴ This latter definition includes a normative element by requiring a recording through due procedure. The first definition can be distinguished by its requirement of a signature from the witness and its limitation to the

²¹ C. DEL PONTE, Investigation and Prosecution of Large-Scale Crimes at the International Level: the Experience of the ICTY, in «Journal of International Criminal Justice», Vol. 4, 2006, p. 599.

²² ICTY, Decision on Renewed Prosecution Motion for Leave to Amend its Rule 65ter List to add Michael Philips and Shaun Byrnes, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, 15 January 2007, par. 12.

²³ SCSL, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators’ Notes Pursuant to Rules 66 and/or 68, *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, T. Ch. II, 4 May 2005, par. 16; SCSL, Decision on Disclosure of Witness Statements and Cross-Examination, *Prosecutor v. Norman et al.*, Case No. SCSL 04-14-PT, T. Ch. I, 16 July 2004, par. 10. In *Sesay*, the Trial Chamber agreed with the definition offered by the Prosecution and held that a witness statement can be “anything that comes from the mouth of the witness, regardless of the format.” “By parity of reasoning, the fact that a statement does not contain a signature, or is not witnessed does not detract from its substantive validity.” The Chamber added that the fact that a witness statement is not in the ‘first person’ but in the ‘third person’ goes more to the form than to the substance and does not deprive the materials in question of the core quality of a statement. See SCSL, Decision on the Joint Defence Motion Requesting Conformity of Procedural Practice for Taking Witness Statements, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, T. Ch. I, 26 October 2005, par. 25-26.

²⁴ ICTY, Decision on the Appellant’s Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, A. Ch., 26 September 2000, par. 15.

Prosecutor's investigation. In the context of a discussion on investigative measures, a broader definition is preferred. For the purposes of this chapter, a witness statement will be defined as 'any statement or declaration taken from a witness in relation to an event he or she has witnessed, taken out of court, in the course of an investigation, by either party, and recorded in any form'.²⁵ The agreed upon definition also includes interview notes, taken by the investigator during the interview, in whatever form.²⁶

III. WITNESS STATEMENTS AS A SOURCE OF EVIDENCE: ADMISSIBILITY OF OUT-OF-COURT WITNESS-STATEMENTS

As shortly touched upon in the introduction to this chapter, out-of-court witness statements, resulting from the questioning of prospective witnesses, have increasingly been admitted into evidence in the proceedings before the *ad hoc* tribunals and the SCSL. Their introduction may be problematic as different problems regarding their reliability are associated with out-of-court witness statements: the statements have often been made years before, are often not taken under oath, are not subjected to cross-examination, are taken through interpretation and are sometimes unsigned.²⁷ Recall that the *ad hoc* tribunals have not adopted a system resembling inquisitorial judicial systems whereby the witness statements are gathered by a non-partisan judicial officer, who should seek both exculpatory and inculpatory evidence and put these statements in a dossier for use at trial.²⁸ Witness statements are prepared by a party

²⁵ In the literature, other definitions have been advanced. For example, consider F. GAYNOR, Admissibility of Documentary Evidence, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 1045 (defining 'witness statements' as "statements taken by either party, signed by the witness but not given under oath and without the possibility of cross-examination") or G. ACQUAVIVA, *Written and Oral Evidence*, in L. CARTER and F. POCAR (eds.), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, Cheltenham, Edward Elgar Publishing, 2013, p. 114, fn. 62 ("non-contemporaneous statements generally produced by a party for submission at trial").

²⁶ Such notes constitute statements within the meaning of Rule 66 (a) (ii); see ICTY, Decision on Renewed Prosecution Motion for Leave to Amend its Rule 65ter List to Add Michael Philips and Shaun Byrnes, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, T. Ch. III, 15 January 2007, par. 15.

²⁷ ICTY, Decision on Appeal Regarding Statement of Deceased Witness, *Prosecutor v. Kordić and Čerkez*, A. Ch., 21 July 2000, par. 27. The Appeals Chamber argued that such statements differ from the courtroom setting, with professional, double checked translation. *In casu*, the Appeals Chamber found that there were no formal circumstances that might increase its reliability, such as the hearing before an investigating Judge. In *Sesay*, the Trial Chamber emphasized that witnesses are often interviewed in rural, war-torn areas and witnesses are often illiterate: see SCSL, Decision on the Joint Defence Motion Requesting Conformity of Procedural Practice for Taking Witness Statements, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, T. Ch. I, 26 October 2005, par. 10.

²⁸ See *supra*, Chapter 3, III, on the principle of objectivity in international criminal procedure.

for the purpose of legal proceedings in which they are tendered and not by an independent officer.²⁹ They could be considered less reliable than depositions.³⁰

In the case that the witness is present before the Chamber, the practice of the *ad hoc* tribunals is not to admit prior statements of a witness when that witness has given oral evidence, with the exception that the party who did not call the witness is allowed, during cross-examination, to refer to the witness' prior statements to attempt to impeach the witness' credibility by challenging the consistency and reliability of his or her testimony.³¹ The party calling the witness can use a prior witness statement when turning a witness into a hostile witness, with leave from the Chamber.³² Their admission can also be allowed in the interest of justice.³³ A prior inconsistent written statement can only be admitted into evidence if the witness is confronted with it and given the opportunity to explain or deny the alleged inconsistencies with full awareness of what he or she had previously said.³⁴

Through amendments to Rule 90, the introduction of former Rule 94*ter* on the admission of affidavits and Rule 92*bis* on the admission of written hearsay evidence, the ICTY Judges made it possible for out-of-court witness statements to be admitted into evidence, without the witness testifying at trial.³⁵ The use of written evidence was prompted by the need to expedite trials.³⁶ Additionally, overlaps between cases tried before the ICTY and the wish to avoid the

²⁹ See e.g. ICTY, Decision on Interlocutory Appeal on the Admissibility of Evidence-In-Chief in the Form of Written Statements, *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.4, A. Ch., 30 September 2003, Dissenting Opinion of Judge Hunt on Admissibility of Evidence-in-Chief in the Form of Written Statement, par. 6.

³⁰ S. ZAPPALÀ, *Human Rights in International Criminal Proceedings*, Oxford University Press, Oxford, 2003, p. 137.

³¹ ICTY, Decision on Admission into Evidence of Prior Statement of a Witness, *Prosecutor v. Halilović*, Case No. IT-01-48-T, T. Ch. I, Section A, 5 July 2005, p. 4.

³² *Ibid.*, p. 4.

³³ *Ibid.*, p. 4.

³⁴ *Ibid.*, p. 6.

³⁵ Rule 94*ter* was deleted and Rule 92*bis* was inserted at the 23rd Plenary (29 November – 1 December 2000, IT/32/Rev.19). The former rule seemed unworkable and was deleted after two Appeals Chamber decisions in *Kordić and Čerkez*: ICTY, Decision on Appeal Regarding Statement of Deceased Witness, *Prosecutor v. Kordić and Čerkez*, A. Ch., 21 July 2000; ICTY, Decision in the Appeals Chamber Regarding the Admission into Evidence of Seven Affidavits and one Formal Statement, *Prosecutor v. Kordić and Čerkez*, A. Ch., 18 September 2000. See generally, M. FAIRLIE, *Due Process Erosion: The Diminution of Live Testimony at the ICTY*, in «California Western International Law Journal», Vol. 34, 2003.

³⁶ G. BOAS, *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings*, Cambridge University Press, Cambridge, 2007, p. 49. P.L. ROBINSON, *Fair but Expeditious Trials*, in H. ABTAHI and G. BOAS (eds.), *The Dynamics of International Criminal Justice*, Martinus Nijhoff Publishers, Leiden, 2006, p. 180 (calling Rule 92*bis* the most ambitious and far-reaching of the expediting measures); M. NERENBERG and W. TIMMERMAN, *Documentary Evidence*, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), *Principles of Evidence in International Criminal Justice*, Oxford, Oxford University Press,

need for witnesses to reappear several times to present testimony led to these changes.³⁷ At present, the *ad hoc* tribunals, the SCSL and the STL contain analogous provisions on the admission of out-of-court witness statements as written evidence in lieu of oral testimony.³⁸ These witness statements are allowed when they go to proof of a matter *other than the acts or conduct of the accused as charged in the indictment*. The ICTY Appeals Chamber ruled in *Galić* that prior statements given by prospective witnesses to an OTP investigator during the investigation cannot be tendered through the general Rule 89 (C) to avoid the stringent requirements of Rule 92bis.³⁹ The latter Rule is *lex specialis* to Rule 89 (C).⁴⁰ Such stringent conditions are justified given that the admission of such prior statements infringes upon the right of the accused to confront witnesses and diminishes the chances for the accused to challenge an aspect of the case against him or her.

Some technical safeguards to ensure the authenticity and veracity of the statement are provided for under Rule 92bis and require the maker of the statement to attach a declaration

2010, p. 463 (noting that Rule 92bis is “most commonly used to introduce cumulative evidence about the broader crimes at issue in the trials, bolstering the evidence while avoiding the need for repetitive testimony on matters other than the specific acts and conduct of the accused”); E. O’SULLIVAN and D. MONTGOMERY, *The Erosion of the Right to Confrontation under the Cloak of Fairness at the ICTY*, in «Journal of International Criminal Justice», Vol. 8, 2010, p. 516 (“Its general aim was to make trials more expeditious”). Whether these procedural reforms have in fact expedited trial proceedings and reduced the number of witnesses put on the stand, is another question. Critical of such expediting effects of Rule 92bis are LANGER and DOHERTY: M. LANGER and J.W. DOHERTY, *Managerial Judging Goes International, but its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms*, in «Yale Journal of International Law», Vol. 36, 2011, pp. 305 - 306; F. GAYNOR, *Admissibility of Documentary Evidence*, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 1049 (noting that in *Karadžić*, the large majority of evidence-in-chief of almost all of the prosecution witnesses was admitted in writing).

³⁷ *Ibid.*, p. 1049; G. ACQUAVIVA, *Written and Oral Evidence*, in L. CARTER and F. POCAR (eds.), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, Cheltenham, Edward Elgar Publishing, 2013, p. 114.

³⁸ Rule 92bis (A) ICTY RPE, ICTR RPE (proof of facts other than by oral means); Article 92bis SCSL RPE (alternative proof of facts) and Rule 155 STL RPE. Note that these provisions are not identical. Various modifications have led to distinctions in the formulation of these provisions. As noted by NERENBERG and TIMMERMAN, “[w]hile the different courts have influenced each other, borrowing both rules and jurisprudence from each other to suit their own specific goals, each judicial body has seen this area of the law evolve independently and differently such that, although there are large areas of overlap, there is no single scheme of general application that covers the entire field.” See M. NERENBERG and W. TIMMERMAN, *Documentary Evidence*, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), *Principles of Evidence in International Criminal Justice*, Oxford, Oxford University Press, 2010, p. 461.

³⁹ ICTY, Decision on Interlocutory appeal Concerning Rule 92bis (C), *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, A. Ch., 7 June 2002, par. 31.

⁴⁰ *Ibid.*, par. 31; Note that the SCSL Appeals Chamber ruled that Rule 92bis is not *lex specialis* to Rule 89 (C) SCSL RPE. However, the scope of Rule 92bis SCSL RPE is broader than equivalent Rule 92bis ICTY RPE and applies to information *in lieu* of oral testimony ‘including written statements and transcripts’, and is thus not limited to written statements and transcripts. See SCSL, Decision on ‘Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents’, *Prosecutor v. Taylor*, Case No. SCSL-2003-01-AR73, A. Ch. 6 February 2009, par. 30.

that the content of the statement is true and correct to the best of that person's knowledge and belief.⁴¹ The declaration should be witnessed either by 'a person authorized to witness such a declaration in accordance with the law and procedure of a state' or by 'a presiding officer appointed by the Registrar for that purpose'. A non-exhaustive list of factors in favour of and against the admission of such evidence is included in Rule 92bis (A) (i) and (ii) ICTY and ICTR RPE and Rule 155 (A) (i) and (ii) STL RPE.⁴² It is for the Trial Chamber to decide whether or not witnesses are required to appear for cross-examination.⁴³ Rule 92bis (A) ICTY, ICTR and SCSL RPE also allow for the admission of parts of a prior witness statement.⁴⁴ Hearsay evidence of a summary prepared by an OTP investigator of the contents of the written statements given to the OTP investigators by prospective witnesses is admissible when the evidence summarised is itself admissible.⁴⁵

Rule 92bis is only *lex specialis* to 89 (C) for written evidence and transcripts falling within its terms.⁴⁶ Rule 92bis only applies in the case that a statement was "prepared for the purposes of legal proceedings."⁴⁷ In addition, a written statement given to OTP investigators for legal proceedings can be received in evidence notwithstanding its non-compliance with Rule 92bis, when no objection has been taken to it, or when it otherwise becomes admissible (when the

⁴¹ Rule 92bis (B) ICTY RPE.

⁴² On the non-exhaustiveness of this list, consider e.g. ICTY, Decision on Interlocutory Appeal Concerning Rule 92bis (C), *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, T. Ch., 7 June 2002, par. 9; ICTY, Decision on Prosecution's Motions for the Admission of Written Evidence pursuant to Rule 92bis of the Rules, *Prosecutor v. Martić*, Case No. IT-95-11-T, T. Ch. 1, 16 January 2006, par. 5; ICTY, Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 92bis, *Prosecutor v. Perišić*, Case No. IT-04-81-T, 20 October 2008, par. 13; ICTR, Decision on Nzabonimana's Motion for the Admission of Written Witness Statements, *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, T. Ch. III, 10 May 2011, par. 21.

⁴³ Rule 92bis (C) ICTY RPE and Rule 92bis (E) ICTR RPE. There is no equivalent provision to be found in Article 92bis SCSL RPE.

⁴⁴ Rule 92bis (A) ('in whole or in part'). Note that Rule 155 (A) STL RPE is not clear in that regard. See ICTY, Decision on Interlocutory Appeal Concerning Rule 92bis (C), *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, A. Ch., 7 June 2002, par. 46. It was underlined by Judge Hunt in his dissenting opinion to the 2003 Appeals Chamber Decision in *Milošević* that witness statements taken early on in the investigation contain much information which is irrelevant to the issues at trial. See: ICTY, Decision on Interlocutory Appeal on the Admissibility of Evidence-In-Chief in the Form of Written Statements, *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.4, A. Ch., 30 September 2003, Dissenting Opinion of Judge Hunt on Admissibility of Evidence in Chief in the Form of Written Statement, par. 13.

⁴⁵ *Ibid.*, par. 21.

⁴⁶ ICTY, Decision on Interlocutory Appeal Concerning Rule 92bis (C), *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, A. Ch., 7 June 2002, par. 31; ICTY, Decision on Interlocutory Appeal on the Admissibility of Evidence-In-Chief in the Form of Written Statements, *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.4, A. Ch., 30 September 2003, par. 12-13.

⁴⁷ ICTY, Decision on Interlocutory Appeal Concerning Rule 92bis (C), *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, A. Ch., 7 June 2002, par. 31; ICTY, Decision on Admissibility of Prosecution Investigator's Evidence, *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.2, A. Ch., 30 September 2002, par. 18 (3).

statement is asserted to contain a prior inconsistent statement).⁴⁸ Remarkably, the Appeals Chamber further expanded the possibilities to rely on written statements in *Milošević* when it held that the written evidence should also be intended to be in lieu of oral evidence: when the witness (i) is present, (ii) can orally attest to the accuracy of the statement and (iii) is available for cross-examination and questioning by the Judges, Rule 92*bis* will not apply. In such case, testimony cannot be considered to be exclusively written within the meaning of Rule 92*bis*.⁴⁹ Rather, in such a situation, the written statement may be admitted through Rule 89 (F) ICTY RPE which allows for the admission of evidence in written form ‘where the interests of justice allow’.⁵⁰

Later, this practice was codified in Rule 92*ter* of the ICTY and SCSL RPE, which now allows for the possibility to admit the written evidence of a witness even going to the acts and conduct of the accused as charged in the indictment, where the witness is present for cross-examination and questioning by the Judges.⁵¹ Other procedural innovations have since been introduced and allow for the admission of written evidence of witnesses who subsequently died, can no longer be traced or are, because of bodily or mental conditions, unable to testify⁵²

⁴⁸ *Ibid.*, par. 18.

⁴⁹ ICTY, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements, *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.4, A. Ch., 30 September 2003, par. 16-17. The Appeals Chamber argued that the determination that, despite the appearance of the witness the evidence constitutes written evidence pursuant to Rule 92*bis* would be a too formalistic interpretation.

⁵⁰ Judge Hunt severely criticised the interpretation given to the relationship between Rule 89 (F) and Rule 92*bis* ICTY RPE. See ICTY, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements, *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.4, A. Ch., 30 September 2003, Dissenting Opinion of Judge Hunt on Admissibility of Evidence-in-Chief in the Form of Written Statement (arguing that the decision was a result of pressure following from the ‘completion strategy’). Also critical are M. NERENBERG and W. TIMMERMAN, *Documentary Evidence*, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), *Principles of Evidence in International Criminal Justice*, Oxford, Oxford University Press, 2010, p. 470 (noting that on occasion, this route allows the witness to simply attest “that the statement accurately reflects his or her declaration and what he would say if examined”, thereby undercutting the possibilities of cross-examining the witness).

⁵¹ Rule 92*ter* ICTY (Rev. 39, 13 September 2006) and SCSL RPE (as amended on 24 November 2006). The witness should attest that the written statement or transcript accurately reflects that witness’ declaration and what the witness would say if examined (Rule 92*ter* (A) (iii) ICTY and Rule 92*ter* (iii) SCSL RPE). Note that Rule 92*ter* SCSL RPE differs from Rule 92*ter* ICTY RPE in that written statements and transcripts can only be admitted ‘[w]ith the agreement of the parties’. Compare Rule 92*ter* with Rule 156 STL RPE.

⁵² Rule 92*quater* ICTY RPE (Rev. 39, 13 September 2006) and Rule 92*quater* SCSL RPE (as adopted on 14 May 2007); Rule 92*bis* (C) ICTR RPE (which unlike Rule 92*quater* ICTY and SCSL RPE, does not allow for the admission of written evidence going to the acts and the conduct of the accused as charged). Compare Rule 158 STL RPE.

and of witnesses subjected to interference.⁵³ In addition, the STL RPE provide for the admission of anonymous witness statements.⁵⁴

In line with the *ad hoc* tribunals and the SCSL, when this is not prejudicial to or inconsistent with the rights of the accused, the ICC allows for the admission of prior recorded testimony under certain conditions (which are more stringent than the requirements for the use of prior recorded evidence at the *ad hoc* tribunals).⁵⁵ Prior recorded witness statements or audio or video records are admissible at trial in the case that the witness is present for cross-examination.⁵⁶ In the case that the witness is not present at trial, the statement can only be admitted into evidence if both the Prosecutor and the Defence were present during the interview and had the opportunity to examine the witness.⁵⁷ In both scenarios, the Trial Chamber retains discretion to admit the prior recorded evidence.⁵⁸ Evidence concerning the acts and conduct of the accused may be admitted.⁵⁹ Consequently, it may be important for the Prosecution to indicate in a request for taking a witness statement that certain persons should be permitted to be present and be allowed to assist in the execution process.⁶⁰ Interestingly, no other requirements seem to apply which raises the question whether the parties can choose whether to take the testimony at the pre-trial stage or at trial. The said rule may even be an incentive to take witness statements in the course of the investigation.⁶¹ As underlined by KRESS, it is unlikely that Judges will adopt such a view. They will probably state that the trial proceedings should be the focal point of the presentation and evaluation of evidence.⁶² At the ICC, witness statements may play an important role at the confirmation hearing, where the

⁵³ Rule 92*quinquies* ICTY RPE (Rev. 44, 10 December 2009). The person should have failed to attend as a witness or, having attended, not have given evidence at all or in material respect (Rule 92*quinquies* (A) (i) ICTY RPE).

⁵⁴ Rule 159 STL RPE. The explanatory memorandum refers to the importance of anonymous witness testimony for the type of criminality (terrorism) the tribunal is dealing with. See STL Rules of Procedure and Evidence (as of 25 November 2010): Explanatory Memorandum by the Tribunal's President, par. 36.

⁵⁵ Article 69 (2) ICC Statute *juncto* Rule 68 ICC RPE.

⁵⁶ Rule 68 (a) ICC RPE; While the first paragraph of Rule 68 only refers to previously recorded audio or video testimony, prior written witness statements are included in 'other documented evidence'. See ICC, Decision on the Prosecutor's Application for the Admission of Prior Recorded Statements of two Witnesses, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06, T. Ch. I, 15 January 2009, par. 18.

⁵⁷ Rule 68 (b) ICC RPE.

⁵⁸ ICC, Decision on the Prosecutor's Request to Allow the Introduction into Evidence of the Prior Recorded Testimony of P-166 and P-219, *Prosecutor v. Katanga and Mathieu Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-2362, T. Ch. II, 3 September 2010, par. 15.

⁵⁹ *Ibid.*, par.19.

⁶⁰ Article 99 (1) ICC Statute.

⁶¹ C. KRESS, *Witnesses in Proceedings Before the International Criminal Court*, in H. FISHER, C. KRESS and S.R. LÜDER (eds.), *International and National Prosecution of Crimes under International Law: Current Developments*, Berlin, Berlin Verlag Arno Spitz GmbH, 2001, p. 363.

⁶² *Ibid.*, p. 363.

Prosecutor need not call witnesses who are expected to testify at trial but can rely on documentary or summary evidence.⁶³

A distinct avenue for the admission of prior witness statements is Article 56 ICC Statute.⁶⁴ It allows the Prosecutor to request the assistance of the Pre-Trial Chamber, if the investigation presents a unique opportunity to take testimony or a statement from a witness who may not be available subsequently for the purposes of trial. The Pre-Trial Chamber may ‘take such measures to enable the taking of such evidence as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence’.⁶⁵ The Defence should be informed of any unique opportunity to take the statement of a witness.⁶⁶

However, witness statements taken pursuant to Article 56 are not automatically admissible at trial.⁶⁷ It seems unlikely that such a witness statement would be admissible if both parties did not have a chance to examine the witness during the recording.⁶⁸ This would violate the right of the accused under Article 67 (1) (e) to examine the witnesses against him or her. The possibility for the Pre-Trial Chamber to authorise counsel for the accused person to participate or to appoint a counsel ‘to attend and represent the interests of the defence’, is included in the non-exhaustive list of measures that can be taken in Article 56 (2) ICC Statute.⁶⁹ As noted by GOSNELL, such appointment would not allow for competent cross-examination “unless an appointed counsel is told who the target of the investigation is; knows the essential nature of the charges and the material facts; and has adequate opportunity to consult with the target of the investigation in order to be properly instructed.”⁷⁰ In case the witness testimony could be

⁶³ Article 61 (5) ICC Statute.

⁶⁴ See the *chapeau* of Rule 68 ICC RPE (‘When the Pre-Trial Chamber has not taken measures under article 56’).

⁶⁵ Article 56 (1) (b) ICC Statute; Rule 114 ICC RPE. Such measures may include: (a) 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 witness to participate, or otherwise 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.

⁶⁶ As provided for under Article 56 (1) (c) ICC Statute.

⁶⁷ Article 56 (4) ICC Statute; The Trial Chamber will have to determine the admissibility and weight of such witness statement, in accordance with Article 69 ICC Statute.

⁶⁸ C. SAFFERLING, *The Rights and Interests of the Defence in the Pre-Trial Phase*, in «Journal of International Criminal Justice», Vol. 9, 2011, pp. 661 – 662.

⁶⁹ Article 56 (2) (d) ICC Statute.

⁷⁰ C. GOSNELL, *Admissibility of Evidence*, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), *Principles of Evidence in International Criminal Justice*, Oxford, Oxford University Press, 2010, p. 415.

relevant for several potential future suspects, it may even be more difficult for any appointed counsel to adequately defend the interests of the Defence. The interests of these suspects will not necessarily coincide.⁷¹

An example of a unique opportunity to record testimony or a statement from a witness is that of a witness who suffers from a terminal illness. Whether this procedure also applies to vulnerable witnesses when exposure to repetitive questioning may be harmful, is an issue which was left undetermined at the Preparatory Commission.⁷² Consequently, the practice of the Court will have to clarify this issue.

IV. APPLICABLE PROCEDURAL REGIME

As noted in relation to the questioning of suspects or accused persons, the procedural regime that applies depends on the status of the person conducting the interview.⁷³ In practice, witness statements are usually taken by an OTP investigator, assisted by an interpreter.⁷⁴ In turn, defence investigators will interview potential defence witnesses. The scenario whereby witness statements are taken by a prosecution or defence investigator seems preferable to the scenario where they are taken by national law enforcement officials. It helps to ensure that the statement is taken in a manner for it to be admissible as evidence in the proceedings before the tribunal. However, other scenarios are possible. Alternatively, the interview may be conducted by tribunal investigators with national law enforcement officials present. Lastly, the international Prosecutor can request the national law enforcement officials to conduct the questioning of the witness. In the latter scenario, pursuant to the still prevalent '*locus regit actum*' rule, the requirements and rules of procedure and evidence under national law will

⁷¹ C. SAFFERLING, The Rights and Interests of the Defence in the Pre-Trial Phase, in «Journal of International Criminal Justice», Vol. 9, 2011, p. 664.

⁷² H. FRIMAN, The rules of Procedure and Evidence in the Investigative Stage, in H. FISHER, C. KRESS and S.R. LÜDER (eds.), International and National Prosecution of Crimes under International Law: Current Developments, Berlin, Berlin Verlag Arno Spitz GmbH, 2001, p. 156. In a similar vein: C. SAFFERLING, The Rights and Interests of the Defence in the Pre-Trial Phase, in «Journal of International Criminal Justice», Vol. 9, 2011, p. 664 (“The examination of the witness turns out to be a rather hypothetical enterprise from the defence’ point of view. Without knowing the person of the suspect it will not be possible to formulate concrete questions and test the reliability of the witness in a thorough way. Without knowing the ‘story’ of the suspect it is difficult to envisage a counterpoint for assessing the testimony”); F. GUARIGLIA and G. HOCHMAYR, Article 56, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, München, Verlag C.H. Beck, 2008, p. 1110.

⁷³ See *supra*, Chapter 4, II.2.

⁷⁴ ICTY Manual on Developed Practices, Turin, UNICRI Publisher, 2009, p. 23.

normally be followed.⁷⁵ These differences in the procedural regime which applies are less problematic than regarding the interrogation of suspects or accused persons because the rules on the conduct of witness interviews in international criminal procedure are scarce. Consequently, the need for uniformity between the procedure of the trial forum and the executing state is less felt here. No specific procedural guarantees for witnesses (which can be identified as ‘minimum rules’) are explicitly provided. Consequently, stronger procedural safeguards may be provided for under national procedural rules.

As far as the ICC is concerned, it follows from the Statute that if the Prosecution decides to question a witness, it may either request the responsible national authorities of the state where the witness is present to conduct the questioning (in accordance with the laws of the requested state), or it may conduct the questioning itself.⁷⁶ In case the Prosecutor decides to request that the responsible national authorities conduct the questioning, the ICC Statute leaves broad discretion for the Prosecutor to participate in the questioning.⁷⁷ Alternatively, where the Prosecutor conducts the questioning directly on the territory of the state, different scenarios may apply.⁷⁸ Firstly, the State Party may voluntarily allow the ICC Prosecutor to conduct the questioning on its territory.⁷⁹ Secondly, the Prosecutor may conduct the questioning directly on the territory of the State Party pursuant to Article 99 (4) ICC Statute. Overall, this possibility to directly execute the questioning on the territory of a State Party is *lex specialis* to the general regime for the execution of requests for assistance (under Part 9 of the ICC Statute).⁸⁰ Under Article 99 (4) ICC Statute, the State Party must allow requests for the on-site

⁷⁵ In inter-state legal assistance in criminal matters, this principle entails that the requested state executes a request according to its own procedural norms. It is primarily (but not solely) grounded on the sovereignty of the requested state. A shift from the prevalent *locus regit actum* rule towards the *forum regit actum* principle can be noted in inter-state legal assistance. The execution of requests is increasingly determined by the procedural rules of the requesting State. This trend can clearly be noted in the cooperation in criminal matters between EU Member States. On the *locus regit actum* principle, consider e.g. B. DE SMET, *Internationale samenwerking in strafzaken tussen Angelsaksische en continentale landen*, Intersentia, Antwerpen – Groningen, 1999, p. 146 – 159; G. SLUITER, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, Antwerp, Intersentia, 2002, pp. 204 – 206.

⁷⁶ Articles 93 (1) (c) and 99 (1) and (4) ICC Statute respectively.

⁷⁷ Article 99 (1) ICC Statute stipulates that Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request.

⁷⁸ Article 99 (4) ICC Statute.

⁷⁹ Consider e.g. C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, p. 264. In such scenario, Article 54 (3) (d) ICC Statute is at the Prosecutor’s disposal (‘The Prosecutor may: Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person’).

⁸⁰ ICC, Decision on ‘Defence Application Pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an Order for the Preparation and Transmission of a Cooperation Request to the Government of the Republic of the

gathering of evidence provided that (i) the witness voluntarily participates in the questioning and (ii) the taking of evidence directly by the Prosecutor is ‘necessary for the successful execution of the request’. Consequently, the possibilities to directly interview witnesses on the territory of the State Party, against the wishes of that state, are normally limited.⁸¹ If the Prosecutor directly interviews witnesses on the territory of a State Party, then the possibility also exists to conduct this interview in the absence of the authorities of the requested state.⁸² Such a possibility is important, as a witness may feel intimidated and be reluctant to be interviewed in the presence of the authorities. As the text of the Statute requires that the questioning in the absence of the authorities be ‘essential for the execution of the request’, the availability of this course will probably be limited to the scenario where the witness refuses to be questioned while national authorities are present.⁸³ If the state requested, pursuant to Article 99 (4) ICC Statute, is also the state on whose territory the alleged crimes have been committed, and there has been a determination of admissibility pursuant to Articles 18 and 19 ICC Statute, then the Prosecutor may directly execute such an interview following all possible consultations with the requested state.⁸⁴ In other cases, the Prosecutor may execute such requests following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party.

Thirdly, Article 57 (3) (d) ICC Statute allows the Prosecutor to conduct the questioning directly on the territory of a State Party in the scenario of a failed state, when authorised to do so by the Pre-Trial Chamber. Fourthly, it could be argued that the Prosecutor may request that the State Party conduct compulsory measures on the territory of the state concerned, pursuant to a request under 93 (1) (l) ICC Statute. The requested State Party can refuse such requests if prohibited by domestic law. This course of action would even allow for the direct questioning of witnesses by the Prosecutor on a non-voluntarily basis, unless this is prohibited under the laws of the requested state.

Sudan”, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan*, ICC-02/05-03/09-169, T. Ch. IV, 1 July 2011, par. 23; ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan*, Case No. ICC-02/05-03/09-410, T. Ch. IV, 26 October 2012, par. 99.

⁸¹ C. KRESS and K. PROST, Article 99, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, München, Verlag C.H. Beck, 2008, p. 1621 (referring to the ‘exceptional character of this provision’).

⁸² Article 99 (4) ICC Statute.

⁸³ C. KRESS and K. PROST, Article 99, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, München, Verlag C.H. Beck, 2008, p. 1624.

⁸⁴ Article 99 (4) (a) and (b) ICC Statute.

Unlike the procedural frameworks of the *ad hoc* tribunals and the Special Court, the ICC Statute includes several procedural safeguards which apply to the questioning of witnesses. It should be asked whether these safeguards equally apply in cases where witnesses are questioned by national authorities or other actors. Article 55 (2), which applies to suspects, expressly states that the safeguards listed therein also apply to situations when questioning is conducted by national authorities pursuant to a request under Part 9. In turn, Article 55 (1) ICC, which provides several procedural safeguards for individuals interviewed, does not expressly refer to the questioning by national authorities pursuant to a request.⁸⁵ However, Rule 111 (2) of the ICC RPE remedies this *lacuna* and states that ‘when the Prosecutor or national authorities question a person, due regard shall be given to Article 55’.

Consequently, similar to the procedural safeguards applicable to the questioning of suspects and accused persons, it is argued here that these safeguards constitute ‘minimum rules’, which should be applied to the questioning of a witness by *any authority*.⁸⁶ Whenever a state executes a request for assistance in the questioning of witnesses, these minimum rules should be upheld, otherwise risking the exclusion of the resulting statement. However, recall that the procedural safeguards of Article 55 (1) ICC Statute apply “[i]n respect of an investigation under this Statute” and hence, only apply to investigative acts which are “taken either by the Prosecutor or by national authorities *at his or her behest*.”⁸⁷ It follows that these procedural safeguards do not apply when a witness is questioned in the context of national proceedings which are unrelated to the proceedings before the Court.

Where Rule 111 (1) ICC RPE, which outlines the formal requirements regarding the taking of the statement, does not explicitly refer to questioning by national authorities, it would be good practice to also include these requirements in any request for the interview of a witness.⁸⁸

⁸⁵ Compare Article 55 (2) ICC Statute.

⁸⁶ Compare, *supra*, Chapter 4, II.2.2.

⁸⁷ ICC, Decision on the ‘Corrigendum of the Challenge to the Jurisdiction of the International Criminal Court on the Basis of Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute Filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)’, *Prosecutor v. Gbagbo, Situation in Côte d’Ivoire*, Case No. ICC-02/11-01/11-212, PTC I, 15 August 2012, par. 96. See *supra*, Chapter 4, II.2.2.

⁸⁸ In accordance with Article 99 (1) ICC Statute. For a discussion of these formal requirements, see *infra*, Chapter 5, V.2.4.

V. POWER AND APPLICABLE PROCEDURAL NORMS

V.1. The *ad hoc* tribunals and the SCSL

V.1.1. The power of the parties to interview witnesses

The statutory documents provide the Prosecutor with the power to question witnesses during an investigation.⁸⁹ While the power is located in the investigation section of the Rules, this power clearly extends to both the pre-trial stage *sensu stricto* and to the trial phase.⁹⁰ Unlike the interrogation of suspects and accused persons, no set of procedural norms regulate the questioning of witnesses in the course of an investigation. The right for the Defence to interview witnesses is not explicitly provided for but derives from the principle of ‘equality of arms’, the right to obtain the attendance and examination of witnesses on the accused’s behalf under the same conditions as witnesses against him or her as well as from the right of the accused to have adequate time and facilities for the preparation of his or her defence.⁹¹

V.1.2. The power to compel witnesses to be interviewed

An important question is whether, and to what extent, a witness can be compelled to be interviewed by the parties during the investigation. When assessing the safeguards surrounding the conduct of witness interviews, e.g. the existence of a privilege against self-incrimination for witnesses, the possibility to compel witnesses to be interviewed or not is a primary concern.⁹² It should be reiterated that the prospect of compelling a witness to be interviewed by national law enforcement personnel following a request to that extent depends on the national law. Besides, what is at issue here is not the possibility for the Chamber to require the attendance of witnesses before the Chamber, but the prospect of the Prosecutor or Defense to interview unwilling witnesses in the course of their respective investigations.

⁸⁹ Article 18 (2) ICTY Statute, Article 17 (2) ICTR and Article 15 (2) SCSL Statute; Rule 39 (i) ICTY, ICTR and SCSL RPE.

⁹⁰ ICTY, Decision on Prosecution’s Motion to Interview Defence Witnesses, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, T. Ch. II, 1 October 2006, par. 3.

⁹¹ Article 19 (1) and Article 20 (4) (b) and (e) ICTR Statute, Articles 20 (1) and 21 (4) (b) and (e) ICTY Statute and 17 (4) (b) and (e) SCSL Statute. ICTY, Judgment, *Prosecutor v. Tadić*, A. Ch., 15 July 1999, par. 43 - 52.

⁹² Indeed, the existence of such privilege will arguably be more important in case witnesses can be compelled, by the Prosecutor or by the Defence, to be interviewed.

The answer to the question formulated above, depends on the answer to another question. It should first be determined whether or not individuals are under the obligation to cooperate with the tribunal. If so, then witnesses may be required to participate in an interview in the course of the investigation. The question whether the tribunal may subpoena witnesses was at stake in the *Blaškić* case.⁹³ The Appeals Chamber held that it follows from provisions such as Article 18 (2) (conferring upon the Prosecutor certain powers, including the power to question suspects, victims and witnesses) as well as from the spirit and purpose of the Statute, that the tribunal “has an incidental or ancillary jurisdiction over individuals other than those whom the International Tribunal may prosecute and try.”⁹⁴ This concerns individuals that may be of assistance in the task of dispensing criminal justice entrusted to the tribunal.⁹⁵ Consequently, witnesses can be subpoenaed by the tribunal.

However, the Appeals Chamber also stated that no binding orders can be directed to state officials with the exception of state officials acting in their private capacity.⁹⁶ This only concerns the production of documents in their custody in their official capacity. The Appeals Chamber in *Krstić* distinguished this scenario from evidence of what the official saw or heard in the course of exercising his official functions.⁹⁷ The functional immunity enjoyed by state officials does not prevent them from being compelled to give evidence in the latter case.

Normally, in order to enter into contact with witnesses, the Prosecutor should rely on the cooperation of the competent judicial or prosecutorial authorities of the country concerned, unless (i) the legislation of the state authorises the tribunal to enter into direct contact with a private individual or (ii) the state or entity prevents the Court from fulfilling its functions.⁹⁸ Furthermore, with regard to states or entities of the Former Yugoslavia, there is no need to go

⁹³ ICTY, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v. Blaškić*, Case No. IT-95-14, A. Ch., 29 October 1997.

⁹⁴ *Ibid.*, par. 47-48.

⁹⁵ *Ibid.*, par. 48; the Chamber continues that “Article 29 also imposes upon states an obligation to take action required by the International Tribunal *vis-à-vis* individuals subject to their jurisdiction.”

⁹⁶ *Ibid.*, par. 39-45, 49-51.

⁹⁷ ICTY, Decision on Application for Subpoenas, *Prosecutor v. Krstić*, Case No. IT-98-33-A, A. Ch., 1 July 2003, par. 27; Judge Shahabuddeen dissented and held the view that the Tribunal does not have the competence to subpoena a state official to testify on what he or she has seen or heard. Interestingly, Judge Shahabuddeen in this regard referred to the wording of Rule 54*bis* ICTY RPE, which was adopted on 17 November 1997 and which he ‘reasonably assumed’, was based on *Blaškić* and which the judges who adopted the Rule understood as implying that information acquired by a state official in his or her official capacity could only be obtained from the state and not from the state official, neither through a binding order nor through a subpoena.

⁹⁸ ICTY, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v. Blaškić*, Case No. IT-95-14, A. Ch., 29 October 1997, par. 53 and 55.

through official channels to identify, summon and interview witnesses.⁹⁹ According to the Appeals Chamber, “[i]n particular, the presence of State officials at the interview of a witness might discourage the witness from speaking the truth, and might also imperil not just his own life or personal integrity but possibly those of his relatives. It follows that it would be contrary to the very purpose and function of the International Tribunal to have State officials present on such occasions.”¹⁰⁰

The question whether a similar obligation exists for individuals to cooperate with the SCSL does not seem to have been given much attention in its jurisprudence. Nevertheless, since Rule 54 SCSL RPE closely resembles Rule 54 of the ICTY and ICTR, it seems logical that witnesses on the territory of Sierra Leone can be subpoenaed.¹⁰¹

Once it is established that the Chambers of the *ad hoc* tribunals as well as the SCSL hold the power to issue binding orders to private individuals, who are consequently under an obligation to cooperate, it must be asked whether and how a witness can be compelled to be interviewed by the Prosecutor or Defence in the course of the investigation. Neither the Prosecutor nor the Defence holds the power to compel an unwilling party to submit to a pre-trial interview.¹⁰² Rather, if they want to compel an unwilling person, they must seek the assistance of the Chamber. Under Rule 54, the Chamber holds the power to subpoena the witness.¹⁰³ In *Krstić*, the Appeals Chamber stated that Rule 54 includes the possibility to issue a subpoena to require a prospective witness to attend at a nominated place and time in order to

⁹⁹ *Ibid.*, par. 53. According to the Appeals Chamber, this category includes states on the territory of which crimes may have been perpetrated and some authorities which might be implicated in the commission of these crimes.

¹⁰⁰ *Ibid.*, par. 53.

¹⁰¹ Consider in this regard: SCSL, Dissenting Opinion of Hon. Justice Bankole Thompson on Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of Subpoena *Ad testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, *Prosecutor v. Norman et al.*, Case No 04-14-T, T. Ch. I, 13 June 2006, par. 6. In contrast, it would be difficult to subpoena witnesses residing in other states, where these states are not a party to the SCSL Agreement. For a similar view, see G. SLUITER, Legal Assistance to Internationalized Criminal Courts, in C. P. R. ROMANO, A. NOLLKAEMPER and J. KLEFFNER (eds.), *Internationalized Criminal Courts: Sierra Leone, East-Timor, Kosovo and Cambodia*, Oxford, Oxford University Press, 2004, p. 401, fn. 66. Consider also Interview with a Defence counsel at the SCSL, SCSL-03, Freetown, 20 October 2009, p. 8 (holding that such subpoena “would be enforceable through the Sierra Leone police and judiciary” and would not be enforceable in other countries).

¹⁰² ICTY, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, *Prosecutor v. Mrksić*, Case No. IT-95-13/1-AR73, A. Ch., 30 July 2003, par. 15; ICTR, Decision on Reconsideration of Protective Measures for Prosecution Witnesses, *Prosecutor v. Karemera et al.*, T. Ch. III, 30 October 2006, par. 6.

¹⁰³ ICTY, Decision on Application for Subpoenas, *Prosecutor v. Krstić*, Case No. IT-98-33-A, A. Ch., 1 July 2003; ICTY, Decision in the Issuance of Subpoenas, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, A. Ch., 21 June 2004.

be interviewed by the Defence if such attendance is necessary (necessity requirement) for the preparation or conduct of trial (purpose requirement).¹⁰⁴ Such a request can only be honoured by the Chamber after showing “a reasonable basis for the belief that there is a good chance that the prospective witness will be able to give information which will *materially assist* him in his case, in relation to clearly identified issues.”¹⁰⁵ The assessment hereof will be based mainly on the position held by the prospective witness in relation to the events: any relationship he or she has or had with the accused which is relevant to the charges, the opportunity he or she may reasonably be thought to have had to observe or learn about the events and any statement made by him or the Prosecution or others in relation to those events.¹⁰⁶ According to the Appeals Chamber, the test should be applied in a liberal way but any fishing expedition should be prevented.¹⁰⁷ The party must show that it was unable to obtain voluntary cooperation from the witness (a reasonable attempt is required¹⁰⁸) and it should at least be reasonably likely that an order would produce the degree of cooperation needed to interview the witness.¹⁰⁹ Furthermore, the evidence should not be obtainable by other means.¹¹⁰ The Appeals Chamber in *Krstić* emphasised that the Chamber should not

¹⁰⁴ ICTY, Decision on Application for Subpoenas, *Prosecutor v. Krstić*, Case No. IT-98-33-A, A. Ch., 1 July 2003, par. 10, 17; ICTY, Decision in the Issuance of Subpoenas, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, A. Ch, 21 June 2004, par. 5; ICTR, Decision on Nzirorera’s Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 12 July 2006, par. 9. Judge Shahabuddeen disagreed with the majority on this particular point. He took issue with the fact that the Chamber would have the power under Rule 54 to subpoena a witness to an out-of-court defence interview, in which the Prosecution has no right to participate, which is not held under oath, and is not part of the proceedings of the Court itself. While he agreed that the Chamber has the power to *facilitate* the attendance of a potential witness at a defence interview (by removing any obstacles), he did not agree that the Chamber has power to *compel* such attendance. He argued that Rule 54 should be interpreted in accordance with the principles known to nations in the international community. According to Judge Shahabuddeen, these principles do not allow for such subpoena (as domestic or international jurisprudence is lacking). See ICTY, Decision on Application for Subpoenas, *Prosecutor v. Krstić*, Case No. IT-98-33-A, A. Ch., 1 July 2003, Dissenting Opinion of Judge Shahabuddeen and ICTY, Decision in the Issuance of Subpoenas, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, A. Ch, 21 June 2004, Declaration of Judge Shahabuddeen. The ‘purpose-requirement’ (for the preparation or conduct of trial) may imply that the possibility to compel witnesses to attend pre-trial witness interviews is limited to the post-indictment stage. For a similar view, consider A. ALAMUDDIN, Collection of Evidence, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), Principles of Evidence in International Criminal Justice, Oxford, Oxford University Press, 2010, p. 252.

¹⁰⁵ ICTY, Decision on Application for Subpoenas, *Prosecutor v. Krstić*, Case No. IT-98-33-A, A. Ch., 1 July 2003, par. 10 (emphasis added).

¹⁰⁶ *Ibid.*, par. 11.

¹⁰⁷ *Ibid.*, par. 11.

¹⁰⁸ ICTR, Decision on Nzirorera’s Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 12 July 2006, par. 9.

¹⁰⁹ *Ibid.*, par. 17.

¹¹⁰ ICTY, Decision on the Issuance of Subpoenas, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, A. Ch., 21 June 2004, par. 7.

issue subpoenas lightly.¹¹¹ Especially in the early years, the ICTY was reluctant to issue subpoenas compelling witnesses to testify.¹¹² The ICTR formulated the conditions for it to issue a subpoena to a prospective witness slightly differently: (i) reasonable attempts to obtain voluntary cooperation by the witness are required, (ii) the testimony of the witness should be able to materially assist the case and (iii) the witness' testimony must be necessary and appropriate for the conduct and fairness of the trial.¹¹³ In the absence of a police force, the *ad hoc* tribunals need to rely on the cooperation by the national states to enforce all subpoenas.

In the *Krstić* case, the Appeals Chamber took into consideration the argument put forward by the Defence that "in a situation where the Defence is unaware of the precise nature of evidence which a prospective witness can give and where the Defence has been unable to obtain his voluntary cooperation, it would not be reasonable to require the Defence to [...] force the witness to give evidence 'cold' in court without knowing first what he will say." "That would be contrary to the duty owed by counsel to their client to act skilfully and with loyalty."¹¹⁴ Leading such evidence would be imprudent.¹¹⁵

In practice, Defence counsels are rather reluctant to rely on Rule 54 to compel a witness to testify at trial. Forcing a witness to come and speak may not be a good strategy.¹¹⁶ The

¹¹¹ For example, the tribunals have declined to honour requests in case there is no prospect for the necessary cooperation, see *e.g.* ICTR, Decision on Defence Motion for Subpoena to Witness G, *Prosecutor v. Nzirorera et al.*, Case No. ICTR-98-44-I, T. Ch. III, 20 October 2003, par. 22.

¹¹² J. JACKSON and Y. M'BOGE, The effect of Legal Culture on the Development of International Evidentiary Practice: From the "Robbing Room" to the "Melting Pot", in «Leiden Journal of International Law», Vol. 26, 2013, pp. 956 – 957.

¹¹³ ICTR, Decision on Joseph Nzirorera's Motion to Subpoena Michel Bagaragaza for an Interview, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 12 January 2010, par. 2; ICTR, Decision on Nzirorera's Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 12 July 2006, par. 9; ICTR, Decision on Nzirorera's Motions to Subpoena Witnesses G and AWD for Interview, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 10 February 2009, par. 4; ICTR, Decision on Nzirorera's Motion for Subpoena to Jean-Marie Vianney Mudahinyuka, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 24 March 2009, par. 3; ICTR, Decision on the Defence's Urgent Motion for a Subpoena to Ms. Loretta Lynch, *Prosecutor v. Nshogoza*, Case No. ICTR-07-91-T, T. Ch. III, 10 February 2009, par. 4; ICTR, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. I, 23 June 2004, par. 10.

¹¹⁴ ICTY, Decision on Application for Subpoenas, *Prosecutor v. Krstić*, Case No. IT-98-33-A, A. Ch., 1 July 2003, par. 8. However, consider also ICTY, Decision on Application for Subpoenas, *Prosecutor v. Krstić*, Case No. IT-98-33-A, A. Ch., 1 July 2003, Dissenting Opinion of Judge Shahabuddeen, par. 33.

¹¹⁵ Consider in that regard: Interview with Mr. Gershom Otachi BW'Omanwa, Defence Counsel, ICTR-27, Arusha, 30 May 2008, p.4 ("In our adversarial system, if you want to subpoena someone, if you want someone to testify and to give information that serves your case, you are not going to subpoena someone to come, and you do not even know what they are going to say").

¹¹⁶ Interview with Mr. Gershom Otachi BW'Omanwa, Defence Counsel, ICTR-27, Arusha, 30 May 2008, pp. 4, 6 ("When you subpoena a witness, you are literally forcing someone to come and say this or the other. A witness

mechanism of compelling witnesses to attend a pre-trial interview may take away some of this reluctance. Nevertheless, the willingness of Trial Chambers to subpoena witnesses differs.¹¹⁷ Some ICTR Defence counsel criticise the broad discretion that is given to the Judges to either honour or reject a request to subpoena a particular witness.¹¹⁸ In the exercising of this discretion lies an inherent risk of prejudging by determining that the testimony of a specific witness will not be helpful and that for this reason the witness need not be subpoenaed.¹¹⁹ One counsel notes that the completion strategy and the need to speed up trials may have led to a decreased willingness of the Judges to honour such requests.¹²⁰ Another defence counsel held that whether or not to issue a subpoena on behalf of the Defence is a political decision.¹²¹ For example, all SCSL Defence counsels interviewed alleged that political reasons may have led SCSL Trial Chamber I to decline to subpoena the former president of Sierra Leone in the *Norman et al.* (CDF) case while honouring such request in the *Sesay et al.* (RUF) case.¹²²

who is not willing to speak, and you force them to come and speak, it is a little tricky, particularly when they are apprehensive”).

¹¹⁷ Interview with Mr. Peter Robinson, Defence Counsel, ICTR-18, Arusha, 22 May 2008, p. 5 (“It is very difficult to get that kind of enforcement”).

¹¹⁸ Interview with a Defence Counsel at the ICTR, ICTR-25, Arusha, 29 May 2008, p. 4 (“The problem, of course, is that a subpoena should be virtually automatic. If you act responsibly you should be able to get your subpoena automatically, and the law is that you have to – there is discretion to refuse a subpoena, which is broader than my simple subpoenaing of a witness in a national jurisdiction”). Compare e.g. SCSL, Decision on Interlocutory Appeals against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, *Prosecutor v. Norman et al.*, SCSL-2004-14-T, A. Ch., 11 September 2006, par. 8 (“The determination whether a subpoena should be issued is in the discretion of the Trial Chamber. This is emphasised in Rule 54 by the word “may”; a Trial Chamber may issue a subpoena as may be necessary. There is nothing in this rule that makes it mandatory on the Trial Chamber to issue a subpoena”).

¹¹⁹ Interview with Peter Zaduk, Defence Counsel, ICTR-22, Arusha, 26 May 2008, p. 6.

¹²⁰ Interview with Mr. Taku, Defence counsel, ICTR-21, Arusha, 23 May 2008, p. 13.

¹²¹ Interview with Mr. Black, Defence Counsel, ICTR-19, Arusha, 22 May 2008, p. 8.

¹²² Interview with a Defence Counsel at the SCSL, SCSL-01, Freetown, 22 October 2009, p. 7 (“I think, and I hope I am wrong, there was some suspicion that perhaps there was some manipulation of the Judges. Not by the Judges, of the Judges, in turning down the application”); Interview with a Defence counsel at the SCSL, SCSL-02, Freetown, 22 October 2009, p. 5 (“Justice Itoe was very mentally against that. For him, political considerations overruled legal considerations”); Interview with Mr. Jordash, Defence Counsel, SCSL-11, The Hague, 7 December 2009, p. 6 (“In the *Norman* [CDF] case they declined to subpoena Kabbah and in [the RUF case] they did not. I would say they probably had more reason to order a subpoena in the *Norman* case but of course that would not have made good theatre, to have him answering the same allegations as Norman, whereas in our case it did make good theatre because there was not going to be any harm done to the prosecution case apart from a few pieces of mitigation evidence”); Interview with a Defence Counsel at the SCSL, SCSL-04, Freetown, 19-20 October 2009, p. 18 (“You have to realize that at the time, Moses Blah was testifying in the *Taylor* trial in The Hague a few days before. A lot of people say there are reasons other than necessarily legal ones why it might have been allowed. [...] Interestingly, the Judges banned any of the lawyers from asking him anything about the CDF, obviously because a lot of people wanted to know about the CDF and the chain of command. But we were not allowed to ask anything about the CDF”). Consider in this regard, for the CDF case: SCSL, Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of Subpoena *Ad testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, *Prosecutor v. Norman et al.*, Case No 04-14-T, T. Ch. 1, 13 June 2006; SCSL, Dissenting Opinion of Hon. Justice Bankole Thompson on Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of Subpoena *Ad testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, *Prosecutor v.*

Even if a Trial Chamber issues a subpoena, there is the problem of enforcing that subpoena in case of non-compliance.¹²³ Still, requesting a subpoena, even if unsuccessful, serves a useful purpose where it creates a record that the evidence was effectively not available at trial as this is a prerequisite for its potential future admission as new evidence on appeal.¹²⁴

V.1.3. Procedural safeguards

Unlike the situation where a suspect or accused person is interrogated, no procedural set of norms apply to the questioning of witnesses.¹²⁵ One author rightly noted that “[t]he procedure concerning summons and questioning of [...] witnesses [...] appears to have taken place largely in a non-judicial context [...]”¹²⁶ In the absence of such norms, many questions arise on the actual practice of the Prosecutor and Defence investigators. Indirectly, the jurisprudence of the *ad hoc* tribunals and the SCSL on the admission of prior recorded witness statements and on the disclosure obligations of the Prosecutor provides some indications with regard to the ‘preferable practice’ for the interviewing of witnesses. In addition, the ‘ICTY Manual on Developed Practices’ includes some ‘best practices’.¹²⁷

Norman et al., Case No 04-14-T, T. Ch. I, 13 June 2006; SCSL, Decision on Interlocutory Appeals against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, *Prosecutor v. Norman et al.*, SCSL-2004-14-T, A. Ch., 11 September 2006; SCSL, Dissenting Opinion of Hon. Justice Robertson on Decision on Interlocutory Appeals against Trial Chamber Decision Refusing to Subpoena The President of Sierra Leone, *Prosecutor v. Norman et al.*, SCSL-2004-14-T, A. Ch., 11 September 2006; consider for the *RUF* case SCSL, Written Reasoned Decision on Motion for Issuance of a Subpoena to H.E. Dr. Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, T. Ch. I, 30 June 2008 and SCSL, A Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber’s Unanimous Written Reasoned on the Motion for Issuance of a Subpoena to H.E. Dr. Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, T. Ch. I, 30 June 2008.

¹²³ Interview with Mr. Gumpert, Defence Counsel, ICTR-20, Arusha, 22 May 2008, pp. 6-7 (referring to the problems to enforce the subpoena on the former Rwandan Minister of Defence Gatsinzi in the *Military I* case). On the General Gatsinzi subpoena, see ICTR, Decision on Bagosora Request for Ruling or Certification on Subpoena Issued to General Marcel Gatsinzi, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. I, 23 May 2007.

¹²⁴ M. KARNAVAS, *Gathering Evidence in International Criminal Trials – The View of the Defence Lawyer*, in M. BOHLANDER (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, Cameron May, London, 2007, p. 140.

¹²⁵ ICTY, Decision on the Admission into Evidence of Slobodan Praljak’s Evidence in the case of Naletilić and Martinović, *Prosecutor v. Prilic et al.*, Case No. IT-04-74-T, T. Ch. III, 5 September 2007, par. 15 (noting that the procedural guarantees provided for suspects and accused persons under the Statute and the RPE do not apply to witnesses).

¹²⁶ W.A. SCHABAS, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, Cambridge, 2006, p. 356.

¹²⁷ See the references in the footnotes.

A number of important procedural safeguards, which apply to the interrogation of suspects and accused persons, do not apply to the questioning of witnesses. First, and unlike the ICC Statute, the Statutes of the *ad hoc* tribunals and the SCSL do not recognise a privilege against self-incrimination with respect to every person during the investigation.¹²⁸ Such protection (although not absolute) is only offered to witnesses testifying in courtroom.¹²⁹ It allows witnesses to object to any statement which may incriminate him or her.¹³⁰ The statutory documents only provide suspects and accused persons with a right to remain silent during the investigation.¹³¹ Secondly, no right to have the assistance of counsel at the investigation stage is provided for in the Statute, RPE or the directive on the assignment of defence counsel. This is also the case if a potential witness the Defence wants to interview is a person convicted by the tribunal.¹³² A potential defence witness is only entitled to such assistance in case he qualifies as a suspect or an accused person in an ongoing case. In contrast, when a detained person is temporarily transferred to the detention unit to provide witness testimony *at trial*, he or she holds the right to legal assistance.¹³³

Statements which are not given voluntarily, but rather obtained by oppressive conduct cannot be admitted pursuant to Rule 95. When there are *prima facie* indicia of oppressive conduct, the burden is on the party seeking to have the statement admitted into evidence, to prove that the statement was given voluntarily and was not obtained by oppressive conduct.¹³⁴ The ICTY Manual on Developed Practices notes that care should be taken by investigators in making promises of witness protection insofar that they may be portrayed by the Defence as an

¹²⁸ See *infra*, Chapter 5, V, 2.3.1.

¹²⁹ Rule 90 (E) ICTY, ICTR and SCSL RPE. Given that this provision is to be found under Part VI on ‘proceedings before Trial Chambers’, its application to the pre-trial phase is precluded. At least one commentator holds the view that the ‘right not to incriminate oneself or confess guilt’ applies also to witnesses. ALAMUDDIN argues that “[t]he jurisprudence of the *ad hoc* tribunals also confirms that the privilege against self-incrimination applies to interviews conducted by the ICTY or ICTR Prosecutor before a person becomes an accused, and it has specifically been applied in the context of suspect interviews.” It is correct that a ‘right to remain silent’ applies to suspect interviews. Such right does not only follow from the jurisprudence, but is laid down in Rule 42 (A) (iii) ICTY, ICTR and SCSL RPE. However, as far as witness interviews are concerned, it is the opinion of this author that the existence of such guarantee is not certain. See A. ALAMUDDIN, *Collection of Evidence in International Criminal Justice*, Oxford, Oxford University Press, 2010, p. 262.

¹³⁰ The Chamber retains the power to compel the witness to answer the question. In such case, the evidence received cannot be used in any subsequent prosecution for any offence other than false testimony (ICTY) or perjury (ICTR) or false testimony under solemn declaration (SCSL).

¹³¹ See *supra*, Chapter 4, IV.2.1.

¹³² ICTY, Decision on Motion for Assignment of Counsel to Dragomir Milošević, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, T. Ch. III, 6 January 2012, par. 9-11.

¹³³ Rule 90*bis* ICTY Statute *juncto* Article 5 (iii) of the Directive on the Assignment of Defence Counsel.

¹³⁴ ICTY, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, *Prosecutor v. Martić*, Case No. IT-95-11-T, T. Ch. I, 19 January 2006, par. 9; see *supra*, Chapter IV, 4.2.1.

inducement to provide favourable evidence.¹³⁵ Whether the jurisprudence of the *ad hoc* tribunals and the Special Court concerning the voluntariness of statements resulting from interviews of suspects or accused persons applies *mutatis mutandis* to statements resulting from witness interviews has not yet been determined by the case law.¹³⁶

V.1.4. Statement taking modalities

It was argued previously that recording statements may be a helpful tool to enhance transparency and ensure the integrity of the questioning process.¹³⁷ In this section, the existence or nonexistence of such an obligation with regard to witness interviews will be discussed first. Next, it will be asked whether other procedural norms exist which regulate the conduct of the questioning.

According to the RPE, the Prosecutor *may* record witness statements.¹³⁸ Consequently, there seemingly is no obligation incumbent on the Prosecutor to do so. However, such reading may be at tension with the disclosure obligations of the Prosecutor. The Prosecutor has the obligation to make the statements of all witnesses he or she intends to call available to the Defence.¹³⁹ Taking witness statements seems to be a precondition for the meaningful compliance with this disclosure obligation. Moreover, it may be argued that a meaningful defence investigation and cross-examination at trial presupposes the disclosure of such statements. However, in a contempt case, a Trial Chamber at the ICTY has held that no such obligation of statement taking currently exists.¹⁴⁰ According to the Chamber, there is only a duty of the Prosecutor to disclose witness statements insofar that such statements have been taken. The Chamber held that no obligation of the Prosecutor to take witness statements from the witnesses he intends to call at trial can be derived from Rule 39.¹⁴¹ Interestingly, the Chamber subsequently stated that ‘considering the limited scope of the contempt case at

¹³⁵ ICTY Manual on Developed Practices, Turin, UNICRI Publisher, 2009, p. 21.

¹³⁶ At least one author holds that this jurisprudence does apply, see A. ALAMUDDIN, Collection of Evidence, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), Principles of Evidence in International Criminal Justice, Oxford, Oxford University Press, 2010, pp. 262 – 268.

¹³⁷ See *supra*, Chapter 4, IV.6.1.

¹³⁸ Rule 39 (i) ICTY, ICTR and SCSL RPE.

¹³⁹ Rule 66 (A) (ii) ICTY, ICTR and SCSL RPE.

¹⁴⁰ ICTY, Decision on Urgent Defence Motion Requesting an Urgent Motion to the Amicus Curiae to Take and Disclose Witness Statements, *Prosecutor v. Florence Hartmann*, Case No. IT-02-54-R77.5, T. Ch., 29 January 2009. It is important to note that in this contempt case, *amicus curiae* was appointed pursuant to Rule 77 (D) (ii) of the ICTY RPE to prosecute the case.

¹⁴¹ *Ibid.*, par. 6.

hand', fair trial guarantees are respected and the exercising of the defendant's right to cross-examine the witness is guaranteed by the obligation under Rule 65ter (E) ICTY RPE to disclose an adequate summary of the facts on which the witness is expected to testify.¹⁴² *A contrario*, one could understand this statement as implying that in other, more complex cases, the Rule 65ter (E) summaries may not suffice to guarantee the right to a fair trial and the defendant's right to cross-examine witnesses. Consequently, the taking of witness statements may be necessary in order to uphold the right to a fair trial and the right of the Defence to cross-examine witnesses. Considering the large and complex nature of the crimes falling within the jurisdiction of the *ad hoc* tribunals and the SCSL arguably, the right to adequate time and facilities for the preparation of a defence requires taking witness statements.¹⁴³ In addition, the Appeals Chamber's Judgement in *Niyitegeka* may be interpreted as deriving from the disclosure requirements under Rule 66 (A) (ii), an obligation to record witness statements.¹⁴⁴ Nevertheless, in the *Hadžić* case, ICTY Trial Chamber II recently clearly rejected the argument that there exists an obligation to take statements from prospective witnesses who are to testify *viva voce*.¹⁴⁵

Even in the absence of a clear-cut obligation to take witness statements, it has been the Prosecutor's *constant and consistent practice* for investigators or prosecutors to take statements of all witnesses interviewed.¹⁴⁶ Lacking a clear-cut obligation, this consistent practice is important on its own merits and creates certain expectations regarding the level of diligence that is required from the Prosecution in conducting its investigations.

The Statutes and RPE of the *ad hoc* tribunals and the SCSL are equally silent on the existence of any obligation incumbent on the Defence to take witness statements. A straightforward obligation to take statements from all witnesses interviewed does not exist.

¹⁴² *Ibid.*, par. 8.

¹⁴³ Article 20 (4) (b) ICTR Statute, Article 21 (4) (b) ICTY Statute and 17 (4) (b) SCSL Statute.

¹⁴⁴ ICTY, Judgement, *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, A. Ch., 9 July 2004, par. 30 ("Pursuant to Rule 66(A)(ii) of the Rules, the Prosecutor has a duty, *inter alia*, to make available to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial" (emphasis added)).

¹⁴⁵ ICTY, Decision on Urgent Defence Motion to Preclude GH-162's Appearance until after Disclosure of a proper Witness Statement, *Prosecutor v. Hadžić*, Case No. IT-04-75-T, T. Ch. II, 17 May 2013 ("The Trial Chamber observes that there is no requirement for a party to take a statement from a witness who is to testify *viva voce*"). Confirming, consider C. GOSNELL, Admissibility of Evidence, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), Principles of Evidence in International Criminal Justice, Oxford, Oxford University Press, 2010, p. 391.

¹⁴⁶ ICTY Manual on Developed Practices, Turin, UNICRI Publisher, 2009, p. 23 *et seq.*; ICTY, Decision on Urgent Defence Motion Requesting an Urgent Motion to the Amicus Curiae to Take and Disclose Witness Statements, *Prosecutor v. Florence Hartmann*, Case No. IT-02-54-R77.5, T. Ch., 29 January 2009, par. 2.

Lacking a set of procedural norms on the conduct of questioning witnesses, the practice of the *ad hoc* tribunals and the SCSL provide us with some guidelines for the conduct and modalities of witness interviews. In *Niyitegeka*, the Appeals Chamber outlined the ‘ideal standard’ for taking witness statements.¹⁴⁷ It held that ideally, the statement should be composed of all the questions that were put to the witness and of all the answers given by the witness.¹⁴⁸ The time of the beginning and the end of the interview, specific events such as requests for breaks, the offering and accepting of cigarettes, coffee and other relevant events which could have an impact on the statement or its assessment should be recorded as well.¹⁴⁹

The recording must be in a language the witness understands. The witness should have a chance to read the record or to have it read out to him or her as soon as possible in order to make any corrections he or she deems necessary. The statement should be signed by the witness to attest the truthfulness and correctness of its content to the best of the witness’s knowledge and belief.¹⁵⁰ From this signature follows the presumption that the statement was recorded pursuant to the Rules.¹⁵¹ Also the investigator and interpreter should sign the statement.¹⁵² It has been considered that a signature is an important parameter to assess the *authenticity* of the statement, which is central to the credibility and reliability of documentary evidence.¹⁵³ These detailed guidelines mirror at least some of the procedural norms that apply to the interrogation of suspects and accused persons.¹⁵⁴

Nevertheless, the Appeals Chamber subsequently emphasised that a witness statement that was not recorded in accordance with this standard does not necessarily render the proceedings

¹⁴⁷ ICTY, Judgement, *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, A. Ch., 9 July 2004, par. 31-32; see also SCSL, Decision on the Joint Defence Motion Requesting Conformity of Procedural Practice for Taking Witness Statements, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, T. Ch. I, 26 October 2005, par. 27 – 28.

¹⁴⁸ *Ibid.*, par. 31. Whether the statement is redacted in the ‘first person’ or ‘third person’ goes more to the form than to the substance; SCSL, Decision on Disclosure of Witness Statements and Cross-Examination, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, T. Ch., 16 July 2004, par. 22.

¹⁴⁹ ICTY, Judgement, *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, A. Ch., 9 July 2004, par. 31.

¹⁵⁰ *Ibid.*, par. 32.

¹⁵¹ ICTR, Decision on the Defence Motion for Disclosure of Exculpatory Information With Respect to Prior Statements of Prosecution Witnesses, *Prosecutor v. Zigiranyirazo*, Case No. ICTR, 2001-73-T, T. Ch., 6 July 2006, par. 14.

¹⁵² ICTY, Judgement, *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, A. Ch., 9 July 2004, par. 31.

¹⁵³ *Ibid.*, par. 32.

¹⁵⁴ ICTR, Judgement, *Prosecutor v. Musema*, Case No. 96-13-A, T. Ch. I, 27 January 2000, par. 67; SCSL, Fofana-Appeal against Decision Refusing Bail, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-AR65, A. Ch., 11 March 2005, par. 24.

¹⁵⁴ See *supra*, Chapter 4, IV.6.1.

unfair, and can be admitted into evidence. However, the inconsistency with the standard can be taken into consideration when assessing the probative value of the statement.¹⁵⁵

Consequently, it remains up to the Prosecution to determine its witness-taking procedures.¹⁵⁶ While OTP guidelines for questioning witnesses presumably exist they are not publicly available.¹⁵⁷ Meanwhile, the ICTY Manual on Developed Practices provides us with some insights. The ICTY considers it good practice to ask the witness for identification, before the interview.¹⁵⁸ Importantly, the statement should avoid paraphrasing and be recorded in the witness' own words. Preferably, investigators instead of prosecutors should take statements in order to allow them to testify on the circumstances of the statement taking. Care is to be taken about the questioning of traumatised witnesses and the risk of social or cultural stigma of victims of sexual assault. The statement should be recorded and signed in a language the witness understands. If not possible, the statement should be read to the witness by the interpreter and the details of the review and signing process should be recorded.¹⁵⁹

It is unfortunate that this 'best practice' as well as the *Niyitegeka* 'ideal standard' for recording witness statements, outlined above, are often disregarded in practice. Many pre-trial witness statements are in fact mere summaries of the information conveyed during the interview rather than full transcripts.¹⁶⁰ In addition, some of the safeguards which are intended to ensure that the transcript accurately reflects what the witness has said, are not always

¹⁵⁵ ICTY, Judgement, *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, A. Ch., 9 July 2004, par. 36.

¹⁵⁶ At least on one occasion, the Defence in *Zigiranyirazo* has tried to call OTP staff as Defence witnesses to inquire into the witness-taking procedures of the defence to understand the discrepancies between witness's oral testimonies and written submissions. However, given the formulation of the Defence motion, the Chamber dismissed it and considered it 'frivolous' and 'possibly vexatious'. (According to the Trial Chamber, the Defence did not contain the slightest suggestion of showing of misfeasance or an error in the witness statement-taking process). See ICTR, Decision on the Defence Motion for Disclosure of Exculpatory Information With Respect to Prior Statements of Prosecution Witnesses, *Prosecutor v. Zigiranyirazo*, Case No. ICTR, 2001-73-T, T. Ch., 6 July 2006.

¹⁵⁷ Within the ICTR OTP, an investigator handbook detailing the standard operating procedure for the taking of statements was reportedly created in 2001, but is not publicly available, see P. VAN TUYL, *Effective, Efficient and Fair: An inquiry into the Investigative Practices of the Office of the Prosecutor at the Special Court for Sierra Leone*, War Crimes Studies Center, University of California Berkeley, September 2008, p. 36, citing an interview with former SCSL Prosecutor Stephen Rapp.

¹⁵⁸ ICTY Manual on Developed Practices, Turin, UNICRI Publisher, 2009, p. 23.

¹⁵⁹ This practice was prevalent at the ICTR, where witnesses were requested to sign their statements after an oral translation into Kinyarwanda of their statement which was written in English or French. See C. GOSNELL, *Admissibility of Evidence*, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), *Principles of Evidence in International Criminal Justice*, Oxford, Oxford University Press, 2010, p. 391.

¹⁶⁰ N.A. COMBS, *Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge, Cambridge University Press, 2010, p. 279 (arguing, more generally, that investigative practices should be improved in order to reduce omissions and inconsistencies). Consider *ibid.*, p. 280 ("the vast majority of ICTR statements remain merely a summary of the information the witness has provided").

upheld in practice. For example, one Prosecution investigator in the *Sesay et al. (RUF)* case testified that it was not the standard practice to read back statements to the witness.¹⁶¹ More alarming, it has been held that in the early days of the ICTR, the performance review was based on the number of statements taken by the investigator. It is clear that such policy does not offer many incentives to investigators to uphold the standards for recording statements outlined above.¹⁶²

Audio or video-recordings of witness interviews are not systematically made.¹⁶³ At the ICTR, only the interviews with important insider witnesses were audiotaped.¹⁶⁴ Such recordings can help to ensure the integrity of the proceedings.¹⁶⁵ However, it has been noted that certain disadvantages are usually connected to the taping of witness interviews. Witnesses may be reluctant to speak while being recorded¹⁶⁶ and transcribing recordings may create backlogs.¹⁶⁷

In principle, the parties are free to choose which witnesses they will interview. While the Trial Chamber may compel the attendance of a witness at a pre-trial interview, witnesses are not compellable to provide testimony at the investigation stage. No procedural norms allow the sanctioning of the witness in case of non-cooperation during an interview. Only by having a witness directly testifying at trial, can a witness, withstanding some exceptions, be compelled to answer questions put before him or her.¹⁶⁸ However, two exceptions to this principle are to be noted. First, in the exceptional scenario of a deposition-taking, the witness may be compelled to answer questions prior to the commencement of the trial.¹⁶⁹ This follows from

¹⁶¹ SCSL, Transcript, *Prosecutor v. Sesay et al.*, Case No. 2004-15-T, T. Ch. 1, 28 April 2005, p. 16 (“Q. Do you recall reading the statement back to the witness in order that he could verify its contents? A. No, I did not. It was not the practice how we took statements.”).

¹⁶² See N.A. COMBS, *Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge, Cambridge University Press, 2010, p. 127.

¹⁶³ ICTR, Decision on Defence Motion for Order to Prosecutor to Comply with his Disclosure Obligations and Motion for Stay of Proceedings Due to the On-going Violations of the Prosecutor’s Disclosure Obligations, *Prosecutor v. Nshogoza*, Case No. ICTR—07-91-T, T. Ch. III, 10 February 2009, par. 11.

¹⁶⁴ N.A. COMBS, *Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge, Cambridge University Press, 2010, p. 280.

¹⁶⁵ J. JACKSON and Y. M’BOGE, The effect of Legal Culture on the Development of International Evidentiary Practice: From the “Robing Room” to the “Melting Pot”, in «Leiden Journal of International Law», Vol. 26, 2013, p. 960 (it allows to check what was said, what the interpreter has said and to detect any interpretation errors).

¹⁶⁶ ICTY Manual on Developed Practices, Turin, UNICRI Publisher, 2009, p. 24.

¹⁶⁷ *Ibid.*, p. 24.

¹⁶⁸ The ICTY, ICTR and SCSL RPE include the power to hold a witness in contempt if he or she contumaciously refuses or fails to answer a question (Rule 77 (A) (i)).

¹⁶⁹ The scenario set forth in Rule 71 of the ICTY, ICTR and SCSL RPE. Rule 71 does not preclude depositions being taken prior to the commencement of the trial, see ICTY, Decision on Prosecution’s Motion to take

Rule 71 (E) ICTY, ICTR and SCSL RPE, which stipulates that the deposition is to be taken in accordance with the Rules. This implies that the provisions on the hearing of witnesses in court will apply *mutatis mutandis*.¹⁷⁰ Secondly, if a witness is interviewed by national judicial enforcement officers pursuant to a request for legal assistance, national procedural law may provide that witnesses can be compelled to testify.

The scenario where a witness refuses to answer a question is rare. First, a witness who does not want to testify will normally not voluntarily appear for a pre-trial interview. It is to be recalled that a Chamber will only subpoena a witness to attend a pre-trial interview in the case where it is “reasonably likely that there would be cooperation if such an order were made.”¹⁷¹ Most implementing laws allow the questioning of witnesses by the Prosecutor through an on-site investigation only if these witness interviews are voluntary in nature.¹⁷² Of course, if the witness is interrogated by national law enforcement officials pursuant to a request, the national procedure will apply and may require the witness to answer questions put to him or her.

It should be noted that, while both parties are in principle free to call the witnesses they want at trial, testimonial privileges may prevent compelling testimony from certain classes of witnesses. While jurisprudence on requests to subpoena privileged witnesses to pre-trial interviews is lacking, such requests would most likely not be honoured by a Chamber. Arguably, the same approach would be taken as the tribunal takes to requests to subpoena these persons to give evidence at trial. In case the Prosecutor requests the national law enforcement officials to interview a witness, national procedural norms recognising privileges may prevent evidence taking.

Deposition for use at Trial (Rule 71), *Prosecutor v. Nalitić and Martinović*, Case No. IT-98-34-PT, T. Ch. I, 10 November 2000, p. 5.

¹⁷⁰ G. SLUITER, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, Antwerp, Intersentia, 2002, p. 284.

¹⁷¹ ICTY, Decision on Application for Subpoenas, *Prosecutor v. Krstić*, Case No. IT-98-33-A, A. Ch., 1 July 2003, par. 12.

¹⁷² See e.g. the German ‘Law on Cooperation with the International Tribunal in respect of the Former Yugoslavia (Law on the International Yugoslavia Tribunal)’ of 10 April 1995, par. 4 (4); Norway: Section 3 of the ‘Act No. 38 of 24 June 1994 relating to the incorporation into Norwegian law of the United Nations Security Council Resolution on the establishment of international tribunals for crimes committed in the former Yugoslavia and Rwanda’; Article 22 of the Swiss ‘Federal order on cooperation with the International Tribunals for the Prosecution of Serious violations of International Humanitarian Law’, 21 December 1995; Section 5 of the Finnish ‘Act on the Jurisdiction of the International Tribunal for the Prosecution of Persons Responsible for Crimes Committed in the Territory of the Former Yugoslavia and on Legal Assistance to the International Tribunal’ of 5 January 1994.

Pre-trial witness interviews are normally not conducted under oath. This is in contrast to the examination of witnesses at trial, where the witness is in principle required to make a solemn declaration.¹⁷³ However, if a witness is interviewed by national judicial enforcement officers pursuant to a request for legal assistance, national procedural law may require the taking of an oath. In addition, when a deposition is taken in the course of the investigation, the witness will be required to testify under oath during the investigation. The witness should make a solemn declaration to tell the truth, prior to the interview.¹⁷⁴

If a witness knowingly and willingly makes a false statement in a witness statement (SCSL) or in statement taken in accordance with Rule 92*bis* (ICTY and ICTR) or *quater* (ICTY), he or she may be held criminally liable.¹⁷⁵ The witness should know or have reason to know that the statement may be used in proceedings before the court or tribunal. The ICTR Appeals Chamber held that for Rule 91 (H) ICTR RPE to apply, the formal requirements of Rule 92 *bis* should be respected.¹⁷⁶ Since Rule 91 (H) ICTR RPE is a criminal provision, it should be strictly construed.¹⁷⁷ However, where Rule 91 (H) or (D) does not apply, a witness providing false testimony may still be held in contempt pursuant to Rule 77 ICTY, ICTR and SCSL RPE.¹⁷⁸

V.2. The International Criminal Court

V.2.1. The power of the parties to interview witnesses

The prosecutorial power to question witnesses follows from Article 54 (3) (b) of the ICC Statute. During the preliminary examination stage, the Prosecutor may also receive written or oral testimony at the seat of the Court.¹⁷⁹ The possibilities for the Prosecutor to interview witnesses on the territory of a State Party were addressed above.¹⁸⁰ In turn, the Defence's

¹⁷³ Rule 90 (A) ICTY, ICTR and SCSL RPE, Rule 90 (B) includes an exception for children, who in the opinion of the Chamber, do not understand the nature of a solemn declaration.

¹⁷⁴ Rule 71 (E) ICTY, ICTR and SCSL RPE.

¹⁷⁵ Rule 91 (H) ICTY and ICTR RPE and Rule 91 (D) SCSL RPE respectively.

¹⁷⁶ ICTR, Decision on Callixte Nzabonimana's Appeal against the Trial Chamber's Decision on Motion for Rule 91 Proceedings against Prosecution Investigators, *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-AR91, A. Ch., 27 April 2012, par. 13 (*in casu*, the Appeals Chamber held that there was no indication that the statement was witnessed by a person authorized to do so pursuant to Rule 92 *bis* (B) ICTR RPE. Hence, the witness statements were not subject to Rule 91 ICTR RPE).

¹⁷⁷ *Ibid.*, par. 15.

¹⁷⁸ *Ibid.*, par. 15.

¹⁷⁹ Article 15 (2) ICC Statute and Rule 104 (2) ICC RPE. See *supra*, Chapter 3, I.2.

¹⁸⁰ See *supra*, Chapter 5, IV.

power to interview witnesses follows from its rights to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her, to raise defences and to present other evidence admissible under this Statute and to adequate time and facilities for the preparation of the defence.¹⁸¹ Potential witnesses should voluntarily agree to be interviewed.¹⁸²

Article 93 (1) (a) and (b) of the ICC Statute contain the obligation of States Parties to provide assistance in the collection of evidence, including in the identification and localisation of persons as well as the taking of testimony under oath.¹⁸³ States can also be requested to assist in the questioning of any person being investigated or prosecuted.¹⁸⁴ Exceptionally, in case of a ‘unique opportunity’, the Pre-Trial Chamber can be involved in the questioning of witnesses.¹⁸⁵

V.2.2. The power to compel witnesses to be interviewed

Unlike the *ad hoc* tribunals and the SCSL, it is unlikely that the Prosecutor can apply for a subpoena to compel a witness to cooperate with the ICC and to attend a pre-trial witness interview.¹⁸⁶ In the performance of its powers prior to trial or in the course of the trial, Article

¹⁸¹ Article 67 (1) (b) and (e) ICC Statute.

¹⁸² ICC, Decision on Variation of Summons Conditions, *Prosecutor v. Francis Kirimi Muthaura, Uguru Muigai Kenyeta and Mohammed Hussein Ali, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-38PTC II, 4 April 2011, par. 15 (“the defence may approach, in principle, any person willing to give his or her account of the events in relation to this case. This consent by the potential witness approached must be given voluntarily and knowingly and any party is prohibited from trying to influence his or her decision as to whether or not to agree to be contacted by the Defence”). However, consider also ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan*, Case No. ICC-02/05-03/09-410, T. Ch. IV, 26 October 2012, par. 128 (“The Chamber is mindful that it is ultimately the witnesses’ prerogatives to choose whether or not to agree to an interview with the defence. However, given the difficulties experienced by the defence to conduct on-site investigations, the prosecution should spare no efforts to secure defence access to these individuals. The prosecution submitted that it cannot compel the witnesses, but “just put the scenario to them and let them decide”. The Chamber encourages the prosecution to consider doing more than just that. The Chamber notes that measures have been taken and that some progress has been made, but it nevertheless encourages the prosecution to continue its efforts to secure defence contacts or interviews with these witnesses”).

¹⁸³ Article 93 (1) (a) and (b) ICC Statute. Compare with Article 93 (1) (e), which deals with the voluntary appearance of persons as witnesses or experts before the Court. When such request is made, an instruction should be annexed on Rule 74 ICC RPE on self-incrimination (see Rule 190 ICC RPE).

¹⁸⁴ Article 93 (1) (c) ICC Statute.

¹⁸⁵ Article 56 ICC Statute. See *supra*, Chapter 5, IV.

¹⁸⁶ See *supra*, Chapter 5, V.1.2. Consider e.g. J.N. MAOGOTO, A Giant Without Limbs: The International Criminal Court’s State-Centric Cooperation Regime, in «University of Queensland Law Journals», Vol. 102, 2004, p. 114 (“conspicuously absent is any subpoena power. Neither the Judges nor the Prosecutor of the ICC appear to have any power to compel witnesses to appear”).

64 (6) (b) ICC Statute provides the Trial Chamber with the power to require, “the attendance and testimony of witnesses and the production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute.” It has been argued that Article 64 (6) (b) could form the basis for an international obligation for witnesses to appear and testify before the Court. However, neither an obligation for witnesses to cooperate directly with the ICC, nor a power for the Court to compel witnesses to attend a pre-trial witness interview can be derived from this provision.¹⁸⁷ First, Article 64 (6) (b) ICC Statute only applies to the trial stage, and not to pre-trial witness interviews.¹⁸⁸ In addition, the provision refers to ‘requiring the attendance’, which should be distinguished from ‘ordering’ or ‘subpoena’.¹⁸⁹ Further, it should be noted that the relationship between the Court and States Parties (including individuals) is regulated in Part 9 of the Statute and that Article 64 (‘Functions and Powers of the Trial Chamber’) rather delineates powers between the different organs of the Court.¹⁹⁰

Overall, the different model of the ICC, less based on verticality, prevents the Court from directly issuing binding orders to individuals.¹⁹¹ This approach resembles inter-state cooperation rather than of the vertical approach and the *Blaškić* precedent at the *ad hoc* tribunals.¹⁹² It has also been noted that the necessary procedural provisions for the enforcement of individuals to appear at trial or at a pre-trial interview (through state cooperation or through direct action (contempt proceedings)) are equally absent.¹⁹³

¹⁸⁷ K. AMBOS, The Right of Non-Self-Incrimination of Witnesses Before the ICC, in «Leiden Journal of International Law», Vol. 15, 2002, p. 169; W. SCHABAS, The International Criminal Court: A Commentary on the Rome Statute, Oxford, Oxford University Press, 2010, p. 768.

¹⁸⁸ A. ALAMUDDIN, Collection of Evidence, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), Principles of Evidence in International Criminal Justice, Oxford, Oxford University Press, 2010, p. 250.

¹⁸⁹ G. SLUITER, “I Beg You, Please Come Testify” – The Problematic Absence of Subpoena Powers at the ICC, in «New Criminal Law Review», Vol. 12, 2009, p. 600; K. AMBOS, the Right of Non-Self-Incrimination of Witnesses Before the ICC, in «Leiden Journal of International Law», Vol. 15, 2002, p. 169; IBA, ICC Perspectives: Witnesses before the International Criminal Court, 2013 (available at: http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_IBA_Publications.aspx, 23 November 2013), p. 15.

¹⁹⁰ K. AMBOS, the Right of Non-Self-Incrimination of Witnesses Before the ICC, in «Leiden Journal of International Law», Vol. 15, 2002, p. 169.

¹⁹¹ Consider *e.g.* G. SLUITER, “I Beg You, Please Come Testify” – The Problematic Absence of Subpoena Powers at the ICC, in «New Criminal Law Review», Vol. 12, 2009, p. 600; K. AMBOS, The Right of Non-Self-Incrimination of Witnesses Before the ICC, in «Leiden Journal of International Law», Vol. 15, 2002, p. 169; W. SCHABAS, The International Criminal Court: A Commentary on the Rome Statute, Oxford, Oxford University Press, 2010, p. 768.

¹⁹² Informative on the drafting history and the reasons behind this choice is: G. SLUITER, “I Beg You, Please Come Testify” – The Problematic Absence of Subpoena Powers at the ICC, in «New Criminal Law Review», Vol. 12, 2009, pp. 592-599.

¹⁹³ *Ibid.*, pp. 596-599.

Other commentators disagree and argue that Judges hold the power to compel the attendance of witnesses pursuant to Article 64 (6) (b) ICC Statute.¹⁹⁴ The Court could find that a person's attendance and testimony are necessary and on that basis request the assistance of the relevant State to secure his or her appearance, e.g. by making a request for such assistance under the catch-all provision of Article 93 (1) (l) ICC Statute (any other type of assistance not prohibited by the law of the requested State).¹⁹⁵ If the domestic legislation of the State concerned allows the Court to make such a request, or at a minimum does not prohibit it, the Court could seek the assistance of a State in this way. However, such a reading seems at odds with the express limitation of Article 93 (1) (e) ICC Statute of the cooperation obligation of States Parties to facilitate 'the *voluntary appearance* of persons as witnesses or experts before the Court'.¹⁹⁶

Nevertheless, this impossibility for the Prosecutor to compel a witness to attend a pre-trial witness interview may be circumvented. States Parties can always voluntarily go beyond the cooperation obligations provided for under Part 9, if this is allowed by their municipal laws.¹⁹⁷ The Court may make a request to a state under Article 93 (1) (b) for the taking of witness testimony by its law enforcement officials, on the Court's behalf. If the Court cannot require the state to compel the person's appearance for questioning at the national level, then

¹⁹⁴ See e.g. C. KRESS, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, in «Journal of International Criminal Justice», Vol. 1, 2003, p. 616 (noting that there is a conflict between the internal law of the Court (Article 64 (6) (b) ICC Statute) and its external law (Part 9, including Article 93 (1) (e) and (7) (a) (i) ICC Statute) which should be resolved by giving priority to the internal law "because the cooperation regime was not meant to undermine the basic principles of internal procedural law"); C. KRESS and K. PROST, Article 99, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, München, Verlag C.H. Beck, 2008, pp. 1576 – 1577 ("The better view therefore is that the Trial Chamber may well, pursuant to article 64 para. 6 (b) create an international obligation of persons to appear and testify before the Court, but that States are under no duty to enforce that obligation"). Compare S.N. NGANE, *Witnesses before the International Criminal Court*, in «The International Law and Practice of International Courts and Tribunals», Vol. 8, 2009, pp. 433 – 434 (holding that the Trial Chamber may require witnesses to attend and testify at trial, but more hesitant as to whether the Chamber may summon or subpoena witnesses).

¹⁹⁵ R. RASTAN, *Testing Co-operation: The International Criminal Court and National Authorities*, in «Leiden Journal of International Law», Vol. 21, 2008, p. 436 (The author additionally suggests that the wording of Article 64 (6) (b) ICC Statute ('by obtaining, *if necessary*, the assistance of States as provided in this Statute' (emphasis added)), may indicate that the court may directly address individuals, in so far as domestic legislations "recognize the ability of the ICC to issue orders or subpoenas directly to individuals on its territory, thereby bypassing the need to channel a request through its national authorities. In such a case the assistance of the state concerned would not be 'necessary'").

¹⁹⁶ Consider in that regard G. SLUITER, "I Beg You, Please Come Testify" – The Problematic Absence of Subpoena Powers at the ICC, in «New Criminal Law Review», Vol. 12, 2009, p. 600 (arguing that "93(1)(e) entails a general prohibition of compulsion").

¹⁹⁷ Consider e.g. S.N. NGANE, *Witnesses before the International Criminal Court*, in «The International Law and Practice of International Courts and Tribunals», Vol. 8, 2009, p. 441.

the domestic legislation of the state in question will typically enable the police or the judiciary to exercise such powers when required. In addition, the request may indicate that Prosecution investigators should be permitted to be present and be allowed to assist in the questioning of the witness (Article 99 (1) ICC Statute). That being said, it is evident that the absence of such subpoena powers poses important challenges to the investigations. Even greater problems arise in case that parties seek to interview witnesses which reside in states not party.¹⁹⁸

When Chambers of the Court indeed lack the power to subpoena witnesses to appear and give testimony at trial, the ability of parties to rely on interviews conducted during the investigative stage takes on added importance. In order for the recorded witness testimony to be admissible when the subsequent presence of a witness at trial cannot be guaranteed, it may be paramount to secure examination of the witness by both parties during the investigative stage.¹⁹⁹

V.2.3. Procedural safeguards

In Article 55 (1), the ICC statute outlines different procedural safeguards for witnesses. The importance of outlining such rights should be highlighted. It reflects a move away from the traditional focus in national criminal justice systems on the duties of witnesses in the criminal process. Article 55 (1) reflects an understanding of witnesses as ‘participants’ in the criminal process rather than mere sources of evidence.²⁰⁰ The increased significance of testimonial evidence gathered outside the courtroom because of the absence of powers to compel witnesses to testify at trial necessitates the presence of sufficient procedural guarantees. These guarantees are necessary to avoid major discrepancies between the procedural regime that applies when witnesses testify in the courtroom and the situation where testimonial evidence is gathered outside the court. It is important to reiterate that from the moment a person

¹⁹⁸ IBA, ICC Perspectives: Witnesses before the International Criminal Court, 2013, p. 16 (available at: http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_IBA_Publications.aspx, last visited 23 November 2013) (referring to the example of investigations in the *situation of Darfur, Sudan*).

¹⁹⁹ Rule 68 (a) ICC RPE.

²⁰⁰ C. KRESS, Witnesses in Proceedings Before the International Criminal Court, in H. FISHER, C. KRESS and S.R. LÜDER (eds.), *International and National Prosecution of Crimes under International Law: Current Developments*, Berlin, Berlin Verlag Arno Spitz GmbH, 2001, p. 310.

qualifies as a suspect, he or she also enjoys the rights under Article 55 (2) ICC Statute, including the right to the assistance of counsel.²⁰¹

V.2.3.1. Privilege against self-incrimination

The ICC Statute has been hailed for extending the human rights protection to all persons during a criminal investigation, since it provides a privilege against self-incrimination for witnesses.²⁰² Such privilege offers protection to the witness, at the moment of the intake of the evidence.²⁰³ It should be distinguished from the right to remain silent which is available to suspects and accused persons. Where Article 55 (1) (a) ICC Statute speaks of a right not to be *compelled* to incriminate oneself, it must be established that some form of compulsion occurred. Consequently, persons can incriminate themselves during the investigation or can confess guilt, but may not be compelled to do so.²⁰⁴ An explicit obligation to inform the witness about the existence of such a right, before the start of the questioning, is lacking in 55 (1) (a) ICC Statute. However, it is the routine practice of the Prosecution that witnesses are informed of such right and this obligation has been included in the Regulations of the OTP.²⁰⁵ Some clarification is necessary regarding the precise scope of this privilege and its application to national authorities.

²⁰¹ ICC, Judgement pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 149 (“If someone became a suspect, his or her rights were protected by securing the assistance of counsel, in accordance with Article 55(2) of the Statute”).

²⁰² Article 55 (1) (a) ICC Statute; C.K. HALL, Article 55 in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, München, Verlag C.H. Beck, 2008, p. 1093; H. FRIMAN, *Investigation and Prosecution*, in R.S. LEE (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, Transnational Publishers, 2001, p. 251; compare with Article 67 ICC Statute.

²⁰³ It was noted in the 1996 report of the Preparatory Committee that the right of witnesses to enjoy some degree of protection from giving self-incriminating evidence was supported (par. 276), see Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II (Compilation of proposals), 2006, p. 109.

²⁰⁴ W. SCHABAS, *The International Criminal Court: a Commentary on the Rome Statute*, Oxford, Oxford University Press, p. 686.

²⁰⁵ Consider Regulation 40 (c) of the OTP Regulations. Consider also ICC, Prosecution's Observations Regarding Admission for the Confirmation Hearing of the Transcripts of Interview of Deceased Witness 12 pursuant to Articles 61 and 69 of the Statute, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-336, PTC I, 20 March 2008, par. 21 (“Although neither the statute nor Rules so require, the Prosecution has adopted, and consistently applied, a policy of informing all persons questioned – including under Article 55(2) – that their evidence may be used in subsequent proceedings. During Witness 12's interview, the Prosecution ensured that the witness had voluntarily consented to give evidence in relation to the investigation and that his taped evidence might be used as evidence in court proceedings before the ICC”).

When Article 55 (1) (a) ICC Statute is read together with other provisions in the ICC RPE, it can be asked whether the privilege it provides is as unqualified as it seems at first. In particular, Rule 74 ICC RPE may be understood as qualifying this privilege. It provides that the Chamber may require a witness testifying before the Court to answer a question that may lead to self-incrimination. This presupposes that an assurance has been given to the witness by the Chamber that the evidence will be kept confidential, will not be disclosed to the public or any state and that it will not be used, either directly or indirectly, against that person in any subsequent prosecution by the Court.²⁰⁶ The authority of the Court to provide such assurances derives from Article 93 (2) ICC Statute.²⁰⁷ If this rule were to be applicable to the investigation phase, then the witness who has agreed to be interviewed can be similarly required to answer certain questions, provided that an assurance of confidentiality and non-use of the evidence against him or her in any proceedings before the Court has been offered.

However, it follows from the wording of Rule 74 that the provision of such an assurance can only be given by ‘the Chamber’.²⁰⁸ Additionally, Article 93 (2) ICC Statute refers to a ‘witness or an expert appearing before the Court’. It thus appears that Rule 74 can only be applied by extension during investigations when Pre-Trial Chambers are involved in the taking of evidence, such as in case of a unique investigative opportunity under Article 56, as part of judicial proceedings.²⁰⁹ Additionally, the position of a witness being interviewed during the investigation differs considerably with that of a witness testifying in court. In the former situation, there is no possibility for the questioning investigator or Prosecutor to direct

²⁰⁶ Such an assurance of immunity from use is without prejudice to possible offences against the administration of justice under Articles 70 and 71 ICC Statute. See Rule 74 (3) (c) (ii) ICC RPE. See C. KRESS, *Witnesses in Proceedings Before the International Criminal Court*, in H. FISHER, C. KRESS and S.R. LÜDER (eds.), *International and National Prosecution of Crimes under International Law: Current Developments*, Berlin, Berlin Verlag Arno Spitz GmbH, 2001, p. 330.

²⁰⁷ According to Article 93 (2) ICC Statute, ‘[t]he Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State’.

²⁰⁸ Consider ICC, *Version publique expurgée de « Ordonnance relative à la mise en œuvre de l'article 93-2 du Statut et des règles 191 et 74 du Règlement de procédure et de preuve au profit de témoins de la Défense de Germain Katanga »*, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-2748, TC II, 3 May 2011, par. 24 (“La Chambre tient à rappeler que c’est à elle, et non pas au Procureur, d’octroyer les garanties prévues par la règle 74 du Règlement”). Rule 74 ICC RPE mentions the Prosecutor and Defence only with regard to respectively the obligation and possibility to inform the Chamber and Prosecutor on the self-incriminating potential of prospective witness testimony (Rule 74 (8) and 74 (9) ICC RPE).

²⁰⁹ See also K. AMBOS, *The Right of Non-Self-Incrimination of Witnesses Before the ICC*, in «Leiden Journal of International Law», Vol. 15, 2002, p. 157.

the witness to answer a question with an accompanying sanctioning mechanism.²¹⁰ Only the Court can sanction a witness for misconduct in refusing to comply with an order to answer a specific question.²¹¹ In turn, the Prosecutor could enter into an agreement with a witness limiting the use of their statement to solely generating new investigative leads.²¹² This would not serve as a guarantee of immunity from prosecution, but could nonetheless serve as one method to facilitate investigations by encouraging lower-level insiders to provide information which could assist in the investigation of persons situated at higher levels of responsibility.

Finally, it is difficult to conceive how the assurances that are available under Rule 74 ICC RPE could apply to a request that has been made for national authorities to take a witness statement under Article 93 (1) (b) of the ICC Statute. KRESS argues that national authorities are bound to respect Article 55 (1) (a) “in the form of the ‘translation into an immunity from use’ which this provision has received by virtue of Rule 74.”²¹³ However, the national authorities are in no position to offer immunity from use and as such to effectively prevent further prosecution by the ICC.²¹⁴ From the above, it can be concluded that from Article 55 (1) (a) derives an unqualified right for witnesses not to be compelled to incriminate themselves during the investigation.

This view is supported by the jurisprudence of the Court. In the *Situation in the Republic of Kenya*, Pre-Trial Chamber II decided that neither Article 93 (2) ICC Statute, nor Rule 74 ICC RPE apply to the situation where a person is requested by the Prosecution to testify in the Republic of Kenya.²¹⁵ Also Article 57 (3) (c) does not encompass the authority for the Pre-Trial Chamber to provide immunity from prosecution to any person.²¹⁶ Rather, the Pre-Trial

²¹⁰ Compare Rule 65 and Rule 171 ICC RPE. According to Regulation 40 of the OTP Regulations, the witness should be informed, before the commencement of the interview, of the voluntary nature of it and the possibility to conclude the interview at any time. It may be a further indication that the OTP Regulations do not include any limitation to the right against self-incrimination of witnesses.

²¹¹ Article 71 (1) ICC Statute, *juncto* Rule 65 ICC RPE; Rule 171 ICC PRE. Rule 65 includes the power to compel witnesses appearing before the Court.

²¹² Articles 54 (3) (d) and (e) and 67 (2) ICC Statute.

²¹³ C. KRESS, *Witnesses in Proceedings Before the International Criminal Court*, in H. FISHER, C. KRESS and S.R. LÜDER (eds.), *International and National Prosecution of Crimes under International Law: Current Developments*, Berlin, Berlin Verlag Arno Spitz GmbH, 2001, p. 326.

²¹⁴ As pointed out by KRESS, this offering of an immunity of use may also conflict with the principle of legality at the national level: *ibid.*, p. 330, fn. 68.

²¹⁵ ICC, Second Decision on Application by Nine Persons to be Questioned by the Office of the Prosecutor, *Situation in the Republic of Kenya*, Case No. ICC-01/09-39, PTC II, 31 January 2011, par. 10-12.

²¹⁶ *Ibid.*, par. 14 (“A literal and contextual interpretation of this provision makes clear that the Chamber has the authority to order measures designed to protect the individual, who is put at risk on account of the activities of the Court, from physical harm, such as threats and intimidation. This interpretation finds further support in the

Chamber held that if the persons are questioned as witnesses, they enjoy the right not to be compelled to incriminate themselves.²¹⁷

V.2.3.2. Other procedural safeguards

§ The right to have the assistance of a competent interpreter and such translations as necessary to meet the requirements of fairness

This requirement was analysed in the discussion on the legal framework for questioning suspects and accused persons. Previously it was discussed how the requirements of Article 55 (1) (c) ICC Statute exceed human rights norms by specifically requiring interpreters be ‘competent’ and by requiring that the questioning be translated if it occurs in a language the person does not *fully* understand and speak.²¹⁸ It was shown that the right for witnesses interviewed to have ‘such translations as are necessary to meet the requirements of justice’ is in line with human rights jurisprudence.²¹⁹ While common sense dictates that an interpreter be at the disposal of every witness who is unable to understand or speak the interview language, the formulation thereof as a right is a strengthening welcome to the procedural rights of witnesses.

§ The prohibition of any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment

In a similar vein, the right of any person to be free from such forms of behaviour by investigators was discussed above.²²⁰ In the previous section on the interrogation of suspects and accused, it was argued that the prohibition of duress, coercion or threats encompasses forms of ‘oppressive conduct’.²²¹ Unfortunately, these forms of behaviour are not further

language of article 68(1) of the Statute, which also instructs the Chamber to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of witnesses”).

²¹⁷ *Ibid.*, par. 16 (“The Chamber believes that any potential risk of prosecution on the basis of a possibly self-incriminating statement by the Applicants is a scenario for which the Court’s basic texts, in particular article 55 of the Statute, offer the appropriate remedy”).

²¹⁸ See *supra*, Chapter 4, IV.4.2.

²¹⁹ See *supra*, Chapter 4, IV.4.2.

²²⁰ See *supra*, Chapter 4, IV.2.2 and IV.5.2.

²²¹ See *supra*, Chapter 4, IV.2.1.

defined and the Prosecutor has not made public his understanding thereof. It will be for the ICC to determine what forms of behaviour are prohibited.

It was argued that Article 55 (1) provides minimum rights which should be upheld when states interrogate witnesses following a request to that extent. This may seem to prevent the use of compulsory processes by national states to obtain statements from witnesses. Article 55 (1) (b) provides that a person shall not be subjected to any form of coercion. Yet, Article 93 (1) (b) of the ICC Statute has been interpreted and implemented by national states to allow for the use of coercive powers in conducting interviews.²²² Clearly, as opposed to the use of compulsion during the course of such questioning, Article 55 (1) (b) should not be interpreted to prevent, in and of itself, national authorities from using compulsory processes to require the attendance of a person for questioning.

V.2.4. Statement taking modalities

Different from the *ad hoc* tribunals and the SCSL, Rule 111 (1) ICC RPE provides a duty to record the formal statements made by a witness questioned in relation to an investigation or proceeding. Only ‘formal statements’ are to be recorded, not statements resulting from pre-interview assessments.²²³ In the taking of witness statements, the Prosecution in practice follows a two-step approach. Investigators in the field are responsible for the identification and initial screening of potential witnesses. It was previously discussed in Chapters 2 and 3 how the task of identifying and establishing contacts with witnesses is often outsourced to intermediaries.²²⁴ The first step of the statement-taking process consists of an initial meeting with the OTP investigator, which includes a basic interview.²²⁵ This ‘screening interview’ is

²²² C. KRESS, Article 93, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes*, München, Verlag C.H. Beck, 2008, p. 157; C. KRESS and B. BROOMHALL, *Implementing Cooperation Duties under the Rome Statute: A Comparative Synthesis*, in C. KRESS, F. LATTANZI, B. BROOMHALL and V. SANTORI (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders: Volume II: Constitutional Issues, Cooperation and Enforcement*, Nomos Verlagsgesellschaft – Editrice il Serente, Baden-Baden – Ripa di Fagnano Alto, 2005, p. 527.

²²³ See ICC, Public Redacted Version of “Decision on the Defence Request for Disclosure of Pre-Interview Assessments and the Consequences of Non-Disclosure” (ICC-01/05-01/08-750-Conf), *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. 01/05-01/08-750-Red, T. Ch. III, 9 April 2010, par. 31.

²²⁴ Problems surrounding the use and supervision of intermediaries by the ICC Prosecutor were already discussed at length. See *supra*, Chapter 2, VII.1 and Chapter 3, III.

²²⁵ ICC, Transcript of Deposition on 16 November 2010, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-Rule68Deposition-Red2-ENG, 16 November 2010, p. 64 (testimony of P-0582); ICC, Transcript, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009, p. 11. See also *supra*, Chapter 4, II.1.2.

preparatory in nature.²²⁶ Intermediaries are normally not present.²²⁷ Its purpose is to determine the potential usefulness of the witness.²²⁸ In addition, the investigator tries to assess the reliability of the witness, his or her security situation and to find out whether the person may have committed a crime under the ICC Statute.²²⁹ The screened information by investigators is then provided to OTP analysts and a broader OTP team which determines whether a statement should be taken, which can later lead to a testimony before the Court. They also assesses the status of the person concerned.²³⁰ Following this screening process, if it is decided that the individual should testify, a longer interview is held.²³¹ Investigators inform the witness of the voluntariness of the questioning.²³²

The ICC RPE require the signature of the person conducting and recording the questioning as well as the signature from the witness.²³³ The date, time and place of the interview, together with all persons present during the interrogation should also be mentioned in the record.²³⁴ Then the interview is read back to the witness.²³⁵ If someone refuses to sign the record, this should be noted as well as the reasons thereof. From the wording of Rule 111 (2) ICC RPE, it can be derived that these procedural obligations only apply to the Prosecutor, but not to witness interviews conducted by the Defence. Rule 112 (4) of the ICC RPE may be

²²⁶ ICC, Judgement pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 148; ICC, Transcript of Deposition on 16 November 2010, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-Rule68Deposition-Red2-ENG, pp. 64-65 (testimony of P-0582); ICC, Transcript, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009, p. 12.

²²⁷ ICC, Redacted Decision on the “Defence Application Seeking a Permanent Stay of Proceedings”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC01/04-01/06-2011, T. Ch. I, 7 March 2011, par. 125 - 126 (“At no stage during the investigation were intermediaries involved in taking statements of potential witnesses, making decisions as to which witnesses to retain or withdraw or which lines of investigations/inquiry to pursue [...] Instead, it is submitted that the evidence reveals that they served two main purposes: to identify and then contact potential witnesses, and to collect and provide security information regarding the region, particularly to the extent that this material was relevant to potential witnesses”).

²²⁸ Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, pp. 64-65, 75 (testimony of P-0582); ICC, Transcript, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009, p. 11.

²²⁹ *Ibid.*, p. 11.

²³⁰ ICC, Judgment pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 148 - 149; ICC, Transcript of Deposition on 18 November 2010, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, p. 5 (testimony of P-0582).

²³¹ ICC, Judgment pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 150.

²³² ICC, Transcript, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009, pp. 12-13.

²³³ Also the signatures of his or her counsel and of the Prosecutor or Judge, if present, are required.

²³⁴ Rule 111 (1) ICC RPE.

²³⁵ ICC, Transcript, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009, p. 15.

interpreted as an encouragement to the Prosecutor to make an audio or video recording of the interview (especially for interviews with vulnerable witnesses) even though no strict obligation exists. In addition, according to Rule 112 (5), if a unique opportunity to take testimony or a statement from a witness occurs, then the Pre-Trial Chamber may decide to apply the procedure for the audio or video recording of 'suspects' and accused persons' interviews to witness interviews.²³⁶

Upon authorisation by the Pre-Trial Chamber, the information which has to be recorded pursuant to Rule 111 (1) may not be disclosed to the Defence. In allowing such non-disclosure, the Pre-Trial Chamber should take into consideration the rights of the suspect.²³⁷

Because of the stringent conditions for the admission of witness statements at trial, it is recommended that if an Article 93 (1) (b) request is made, that request should provide for the direct participation of both parties in the questioning.²³⁸ It should also request that the recording procedure of Rule 111 (and Rule 112) be followed.

²³⁶ Rule 112 (5) ICC Statute only refers to Article 56 (2) ICC Statute (measures to ensure the efficiency and integrity of the proceedings and to protect the rights of the defence, requested by the Prosecutor) but does not refer to Article 56 (3) ICC Statute (which includes the possibility for the Pre-Trial Chamber to consult with the Prosecutor on the taking of such measures and the possibility for the Pre-Trial Chamber to take such measures *proprio motu*).

²³⁷ ICC, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", *Prosecutor v. Katanga, Situation in the DRC*, Case No. ICC-01/04-01/07-475, A. Ch., 13 May 2008, par. 91 – 97 (The Prosecution sought the non-disclosure of the location of the interview, the names of the persons who took the statement and the names of those persons who attended the interview). Consider also the dissenting opinion of Judge Pikis. See *ibid.*, Dissenting Opinion of Judge Pikis, par. 23 ("A witness statement or a summary of it may be used in evidence at the confirmation hearing. The pertinent question is whether a statement lacking the statutory attributes or insignia does qualify as a statement under the Rules. The obligation to keep a record of the circumstances surrounding the making of a written statement in the course of the investigations is not a mere formality but an essential element of the statement itself. It indicates that the statement was taken according to law and as such it has the attributes of authenticity required thereby. Stripped of these attributes, the statement forfeits the character attached to it by law; it is denuded of information that illuminates its provenance. At the same time the defence would be denied material information to which the person under investigation or the accused are entitled in making his/her defence. If power resided with the court to by-pass disclosure of the essential record of a statement, that would be tantamount to by-passing the ordinance of the law. That cannot be. Neither paragraph 2 nor any other provision of rule 81 confer power upon the Court to sidestep the plain provisions of the law, a course that would derail the process from its ordained Course").

²³⁸ OTP, Informal Expert Paper: Fact-Finding and Investigative Functions of the Office of the Prosecutor, Including International Cooperation, 2003, par. 78.

V.3. Internationalised criminal courts and tribunals

V.3.1. The power of the parties to interview witnesses

In stark contrast with the quasi-absence of procedural norms on the questioning of witnesses in the procedural frameworks of the international criminal tribunals, stands the set of detailed provisions regulating the conduct of questioning at the ECCC. This regulation clearly betrays the civil law-style of proceedings at the investigation stage of proceedings. During the preliminary investigation, the Co-Prosecutors, or the judicial police officers and investigators at the Co-Prosecutors' request, may summon and interview any person who may provide relevant information on the case.²³⁹ When seized, the Co-Investigating Judges hold the power to question witnesses and to record their statements.²⁴⁰ In a similar vein, the Co-Investigating Judges can delegate this power to judicial police officers or investigators.²⁴¹ More dubious is the power they hold to issue an order requesting the Co-Prosecutors to also interrogate witnesses.²⁴² Such power, to allow only one party to the proceedings to conduct an investigative action on behalf of the impartial and independent Co-Investigating Judges sits uneasy with an inquisitorial procedural model encompassing the institution of an Investigative Judge. The reason for the inclusion of such power remains vague.²⁴³ In practice, because of fair trial considerations, this power is never used.

²³⁹ Rule 50 (4) ECCC IR.

²⁴⁰ Article 23new ECCC Law; Rule 55 (5) (a) ECCC IR. According to Rule 55 (5) (b) ECCC IR, the Co-Investigating Judges can also take the appropriate measures to provide for the safety and support of potential witnesses and other sources.

²⁴¹ Rule 55 (9), 15 and 16 ECCC IR.

²⁴² Article 23new ECCC Law.

²⁴³ Interview with Co-Investigating Judge Lemonde, ECCC-04, Phnom-Penh, 11 November 2009, p. 6 (*Q* : *Il y a la possibilité pour les co-juges d'instruction de rendre une ordonnance requérant les co-procureurs d'interroger des témoins. Avez-vous rendu une telle ordonnance ?* R: "On ne l'utilise jamais. Ça c'est un peu une aberration de la loi." *Q* : *Mais pourquoi est-ce que cela existe?* R: "Je crois que c'est parce que la loi a été rédigée par des gens qui ne connaissent pas le système non plus. C'est incompréhensible, on ne comprend pas pourquoi les juges d'instruction vont s'adresser à une des parties pour faire une partie de leur travail. On n'a jamais utilisé ça et on n'utilisera cela jamais. Jamais on ne fera appel au procureur pour faire des investigations"); Interview with a member of the OCIJ, ECCC-03, Phnom-Penh, 16 November 2009, p. 9 (*Q* : *The next question concerns a provision we have been wondering about, which says that the Co-Investigating Judges can order the Co-Prosecutors to interview witnesses in the course of the judicial investigation. Have the Co-Investigating Judges ever used this possibility, and in what situations would they do so?* A: "We certainly have not, and we never will, and from our point of view it is a logical impossibility to do so. It would be a serious breach of a number of defendant's rights." *Q* : *But then why is that possibility there?* A: "Well, I think again it is because the people who wrote the law did not understand the system that they were applying. This, to an extent, is a good example of when the UN administration was asked to create the court, they set it up in such a bizarre way. I think right up until the day the Prosecutor arrived, or a few weeks before, he was under the impression that he would be doing the investigation, and he would recruit the staff").

Under Cambodian criminal procedure, the Prosecutor has the right to assist in the questioning of witnesses.²⁴⁴ However, the Internal Rules limit the presence of the Co-Prosecutors to the interrogation of the Charged Person and to confrontations.²⁴⁵ Again, fairness considerations seem to have guided this deviation from Cambodian criminal procedure. Allowing one of the parties to the proceedings to be present during the questioning of witnesses by the Co-Investigating Judges and putting questions to that witness, although after authorisation by the Co-Investigating Judges, may be considered unfair in that it encroaches upon the equality between the parties.²⁴⁶ In turn, the Defence is not allowed to interview witnesses. They can only request that the Co-Investigating Judges interview a particular witness.²⁴⁷

Instead of prohibiting the presence of the Co-Prosecutors during the questioning of witnesses, another potential solution would be to provide the Defence and Civil Parties with the same right, thus restoring the equality between the parties. Nevertheless, provided that most of the initial interviews with witnesses are conducted outside the premises of the Court, this would cause substantial logistical problems. Indeed, to have all parties present at one time and at one place may well prove to be a logistical nightmare. Budgetary constraints may prevent Co-Prosecutors, Defence and Civil Parties from attending these interviews. However, some efficiency could be gained if the parties were present during the interrogation of witnesses who are going to say something which will likely be contested. One member of the OCIJ suggested that a two-step approach could be followed. This would imply that after the first witness interview, those people who are actually providing information which may be contested are brought to the premises of the Court where a confrontation is organised (to

²⁴⁴ According to Article 136 of the Cambodian Criminal Procedure Code: “Le procureur du Royaume peut assister à tous les actes d’instruction, en particulier aux interrogatoires du mis en examen, confrontations et auditions.” See also Article 151 of the Cambodian Criminal Procedure Code.

²⁴⁵ Rule 58 (4) ECCC IR.

²⁴⁶ As confirmed by former International Co-Investigating Judge Lemonde. See Interview with Co-Investigating Judge Lemonde, ECCC-04, Phnom-Penh, 11 November 2009, p. 6 (“Le principe quand on entend un témoin c’est qu’il va être entendu en territoire neutre, sans subir les pressions des parties. On ne peut pas bien imaginer que le procureur soit présent sans que la défense soit aussi présente. À ce moment-là, on change le système, on revient à un système en quelque sorte accusatoire, ou les parties ont un rôle plus actif et le juge devient d’une certaine façon un peu spectateur de la lutte entre les parties”).

²⁴⁷ Rule 55 (10), 58 (6) and 66 (1) of the ECCC IR. In general, the Defence are prohibited from conducting their own investigations, see ECCC, OCIJ Memorandum to the Defence, *The Case of NUON Chea*, Case No. 002/19-09-2007-ECCC/OCIJ, 10 January 2008, p. 2 (“The capacity of the parties to intervene is thus limited to such preliminary inquiries as are strictly necessary for the effective exercise of their right to request investigative action”).

which the parties can attend).²⁴⁸ This could prevent the need to re-interview witnesses if one of the parties requests that new questions be put to the witness.²⁴⁹

Also the STL Prosecutor holds the power to summon and question witnesses and record their statements.²⁵⁰ The Prosecutor can seek support from any person, entity or state in order to conduct the questioning of witnesses.²⁵¹ Both the Prosecutor and the Head of the Defence Office, at the request of the Defence, can request the Lebanese authorities or other states to have a witness questioned themselves, or by their staff, or jointly.²⁵² The Prosecutor can be assisted by Lebanese authorities as appropriate.²⁵³ Parties can also request the Pre-Trial Judge to authorise the questioning of witnesses in Lebanon.²⁵⁴ In line with the *ad hoc* tribunals and the SCSL, the conditions for this authorisation are not set out in the statutory documents.²⁵⁵

Compared to other international criminal tribunals, the Pre-Trial Judge plays a more important role in assisting the parties with the gathering of evidence. This greater role should be understood in light of the autonomous character of the STL Pre-Trial Judge, who cannot sit on the Trial Chamber and consequently does not run the risk of being contaminated through exposure to the evidence at the pre-trial stage.²⁵⁶ The RPE empower the Pre-Trial Judge to be pro-active.²⁵⁷

²⁴⁸ Interview with a member of the OCIJ, ECCC-03, Phnom-Penh, 16 November 2009, p. 9.

²⁴⁹ Requests to the Co-Investigating Judges to re-interview a witness can be made by the different parties, but the Co-Investigation Judges hold the discretion to either grant or reject such requests (subject to appeal), see Rule 55 (10) IR.

²⁵⁰ Article 11 (5) STL Statute and Rule 61 (i) of the STL RPE.

²⁵¹ Rule 14 STL RPE and Rule 18 (B).

²⁵² Rule 16 (B), (C) and 18 (B), (C) of the STL RPE (as amended on 5 June and 30 October 2009). An *obligation* for Lebanon to cooperate with all organs of the STL is laid down in Article 15 of the Agreement Between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, Annexed to UN Security Resolution 1757, U.N. Doc. S/RES/1757, 30 May 2007 (hereinafter 'STL Agreement'). Different from the *ad hoc* tribunals, third states are under no obligation to cooperate with the STL under Security Resolution 1757. See B. SWART, Cooperation Challenges for the Special Tribunal for Lebanon, in «Journal of International Criminal Justice», Vol. 5, 2007, pp. 1154-1160; M. GILLET and M. SCHUSTER, The Special Tribunal for Lebanon Swiftly Adopts Its Rules of Procedure and Evidence in «Journal of International Criminal Justice», Vol. 7, 2009, pp. 905-906; STL, Rules of Procedure and Evidence: Explanatory Memorandum by the Tribunal's President, 20 March 2009, par. 22.

²⁵³ Article 11 (5) STL Statute.

²⁵⁴ Rule 77 (B) STL RPE (as amended on 5 June 2009).

²⁵⁵ See *supra*, Chapter 5, V.1.2.

²⁵⁶ Article 2 STL Agreement, Article 8 (1) (a) STL Statute. It should be underlined that this potential 'greater involvement' of the Pre-Trial Judge does not confer any *juge d'instruction*-like powers on the Pre-Trial Judge.

²⁵⁷ STL, Rules of Procedure and Evidence: Explanatory Memorandum by the Tribunal's President, 25 November 2010, par. 11; M. GILLET and M. SCHUSTER, The Special Tribunal for Lebanon Swiftly Adopts Its Rules of Procedure and Evidence in «Journal of International Criminal Justice», Vol. 7, 2009, p. 889.

Exceptionally, the Pre-Trial Judge can be involved in the questioning of witnesses. Firstly, if a *unique opportunity* exists to take evidence or a statement from a witness after the indictment has been confirmed, the Pre-Trial Judge may assist the parties in this endeavour. This possibility is clearly based on the ICC model.²⁵⁸ The parties can make a request to that extent to the Pre-Trial Judge. Secondly, in exceptional cases, the Pre-trial Judge can summon and interview witnesses himself or request the competent national authorities to do so if the parties or the participating victims are, on a balance of probabilities, unable to do so, and provided that doing so is in the interests of justice.²⁵⁹ He may do so *proprio motu*.²⁶⁰ Thirdly, and unlike other jurisdictions covered, at the request of either parties or a victim, the STL RPE provide for the Pre-Trial Judge to question anonymous witnesses. This course of action is provided when there is a serious risk that a witness or a close relative of the witness would lose his life or suffer grave physical or mental harm as a result of his identity being revealed, and when other protective measures would be insufficient. It is also provided when there is a serious risk that imperative national security interests might be jeopardised should the identity or affiliation of the witness be revealed.²⁶¹ The detailed procedure provides for questioning in the absence of the parties and legal representatives of the victims. Nevertheless, the parties and victims can request the Pre-Trial Judge to put certain questions to the witness.²⁶² On the basis of a provisional transcript, the parties can ask that additional questions be put to the witness.²⁶³ Together with an opinion by the Pre-Trial Judge on the veracity of the witness statement and on the potential for any serious risk in case the name or affiliation of the witness is revealed, the final version will then be given to the parties and the legal representatives.²⁶⁴

Finally, and similar to the other international criminal tribunals, in case there is reason to believe that evidence would later not be available for trial, the RPE include a procedure of deposition-taking by the Pre-Trial Judge, on request of a party or *proprio motu*.²⁶⁵ The other party and the legal representatives of the victims should have the chance to put questions to

²⁵⁸ The Pre-Trial Judge may take such measures as are necessary to ensure the integrity of the proceedings and the equality of arms, see Rule 89 (I) STL RPE.

²⁵⁹ Rule 92 (A) STL RPE.

²⁶⁰ Rule 92 (C) STL RPE. This decision by the Pre-Trial Judge is subject to appeal as of right (Rule 92 (D)).

²⁶¹ Rule 93 STL RPE.

²⁶² Rule 93 (B) STL PRE.

²⁶³ Rule 93 (C) STL RPE.

²⁶⁴ Rule 93 (D) STL RPE.

²⁶⁵ Rule 123 STL RPE. There is an apparent inconsistency between Rule 123 (A), which seemingly excludes the possibility for the Pre-Trial Judge to take such order *proprio motu* and Rule 123 (C).

the witness. Deposition may also be given by video-conference.²⁶⁶ When states object to such procedure, the judicial authorities of the country concerned can collect the evidence on the basis of a bilateral agreement or an *ad hoc* arrangement.²⁶⁷

At the SPSC, the Public Prosecutor likewise held the power to question witnesses.²⁶⁸ The police could also conduct witness interviews. It is doubtful whether many witnesses were interviewed by the Defence. In many cases, no witnesses were called by the Defence.²⁶⁹ One example is the *Los Palos* case, where the Defence blamed this on a lack of time and logistical constraints such as a lack of cars to travel to the districts and to speak with potential witnesses.²⁷⁰

V.3.2. The power to compel witnesses to be interviewed

At the ECCC, the Co-Investigating Judges can summon witnesses to an interview.²⁷¹ If a witness refuses to appear, the Co-Investigating Judges can issue an order requesting the Judicial police to compel the witness.²⁷² A witness who refuses to attend an interview before

²⁶⁶ Rule 124 STL RPE.

²⁶⁷ Rule 125 STL RPE. This alternative requires that the judicial authorities allow the party calling the witness and the other party and, if considered necessary by the Pre-Trial Judge or the Chamber, the legal representatives of the victim to be present during the questioning. When allowed under the national law, the parties should be able to put questions directly to the witness. Questioning proceeds on the basis of questions submitted to that authority (Rule 125 (B) STL RPE). The interview will be video or audio recorded by the Registry, which may also have to provide a transcript (Rule 125 (C) and (E) STL RPE). Subject to the consent of the state concerned, the Pre-Trial Judge, or a Judge appointed by the President of the Chamber may be present, if considered necessary (Rule 125 (D) STL RPE).

²⁶⁸ Section 7.4 (b) TRCP.

²⁶⁹ S. LINTON and C. REIGER, *The Evolving Jurisprudence and Practice of East Timor's Special Panels for Serious Crimes on Admissions of Guilt, Duress and Superior Orders*, in «Yearbook of International Humanitarian Law», Vol. 4, 2001, p. 30; C. REIGER and M. WIERDA, *The Serious Crimes Process in Timor-Leste: In Retrospect*, International Center for Transnational Justice 2006, p. 29 (available at www.ictj.org/static/Prosecutions/Timor.study.pdf, last visited 1 December 2013). It has been stated that no single defence witness was called during the first two years of trials. See S. BIBAS and W.W. BURKE-WHITE, *International Idealism Meets Domestic-Criminal Procedure Realism*, in «Duke Law Journal», 2010, p. 679 (the authors find an explanation in the fact that the Prosecutor was directly paid by the UN, whereas the defence had to be paid by the poor East-Timorese government).

²⁷⁰ JSMP Trial Report, *The General Prosecutor v. Joni Marques and nine others (The Los Palos Case)*, March 2002.

²⁷¹ Rule 41 ECCC IR. The minimum time between the issuance of the summons and the appearance of the witness should normally be five days. However, this period does not apply in case the summons concerns a detained person, when the Co-Investigating Judges are conducting interviews in the field or in 'exceptional circumstances' (the latter exception was introduced during the 6 March 2009 amendment).

²⁷² Rule 60 (3) ECCC IR.

the Co-Investigating Judges without just excuse, may be sanctioned.²⁷³ Equally, witnesses who attend interviews but subsequently refuse to produce evidence may be sanctioned.

In turn, at the STL, the Pre-Trial Judge may summon a witness to appear.²⁷⁴ A duty for the witness to speak and accompanying judicial power to compel the witness to answer a question (including any exception in case of risk of self-incrimination) is only provided for witness testifying before a *Chamber*.²⁷⁵ A witness making a false statement during the investigation, including statements made in front of the Pre-Trial Judge and statements made before national authorities or before the parties, may be sanctioned when that person knows or has reason to know that their statements made in the proceedings before the tribunal may be used as evidence.²⁷⁶ However, if such statements were not made under solemn declaration, their statements can only be sanctioned if that statement is accompanied by a formal acknowledgement by the witness that he or she has been made aware of the potential criminal consequences of making a false statement.²⁷⁷

V.3.3. Procedural safeguards

§ *Privilege against self-incrimination*

Similar to the ICC, the Internal Rules of the ECCC provide a *right* against self-incrimination for witnesses.²⁷⁸ All witnesses who are interviewed have the right to refuse to answer questions that may tend to incriminate them, not only in front of the Co-Investigating Judges, but also in front of the Co-Prosecutors in the course of preliminary investigations.²⁷⁹ The witness should be notified of this right prior to the commencement of the interview.²⁸⁰ This privilege is unqualified during any preliminary investigation. During the judicial

²⁷³ In such case, the Co-Investigating Judges may deal with the matter summarily, conduct further investigations to determine whether sufficient grounds can be found to initiate proceedings or choose to refer the matter to the competent authorities of the United Nations or the Kingdom of Cambodia, see Rule 35 (2) ECCC IR.

²⁷⁴ Rule 78 and Rule 77 (A) of the STL RPE. However, jurisprudence confirming the existence of such power is lacking. Following a request by a party, the Chamber or Pre-trial Judge can also request the Registrar to issue a safe-conduct (Rule 81 STL RPE).

²⁷⁵ Rule 60*bis* (A) (ii) and Rule 150 (F) STL RPE.

²⁷⁶ Rule 152 (H) *juncto* Rules 93, 123, 125, 156, 157 and 158 STL RPE. However, Rule 152 refers to statements taken “under solemn declaration”, while witnesses interviewed by the parties will normally not make such declaration “under solemn declaration”.

²⁷⁷ Rule 60*bis* (A) (i) STL RPE.

²⁷⁸ Rule 28 ECCC IR.

²⁷⁹ Rule 28 (1) ECCC IR.

²⁸⁰ Rule 28 (2) ECCC IR.

investigation, the witness can be required to answer a question by the Co-Investigating Judges under certain conditions.²⁸¹ In case the Co-Investigating Judges consider that a witness should be required to answer a question, they may assure the witness that (1) the response will be kept confidential and will not be disclosed to the public; and / or (2) that it will not be used either directly or indirectly against that person in any subsequent prosecution by the ECCC. The views of the Co-Prosecutors should first be sought. If no assurance is given the witness shall not be required to answer the question. In deciding whether or not to give assurances, a number of considerations should be made by the Co-Investigating Judges, as outlined in the Internal Rules. They include the importance of the anticipated evidence, whether the same evidence can be acquired elsewhere and whether, in the particular circumstance of the case, sufficient protection is available.²⁸² The Internal Rules further outline the gamut of measures at the Co-Investigating Judges' disposal to give effect to the assurances provided.²⁸³

The right to the assistance of counsel for witnesses is limited to the situation where an issue of self-incrimination arises during the proceedings. In such a case, the testimony-taking should be suspended and a lawyer should be provided.²⁸⁴

At the STL, a qualified privilege against self-incrimination is only provided at trial. A witness testifying at trial may object to making a statement which may incriminate him or her. The Chamber can compel the witness to answer, provided that the testimony is not used in any subsequent prosecution against the witness except for instances of contempt or false evidence.²⁸⁵

§ Other procedural safeguards

A further procedural safeguard in the procedural framework of the ECCC follows from the fundamental principle that 'no form of inducement, physical coercion or threats thereof,

²⁸¹ Rule 28 (3) ECCC IR.

²⁸² Rule 28 (5) ECCC IR.

²⁸³ Rule 28 (7) ECCC IR. They include the possibility to order that evidence is given *in camera*, the possibility to order that the evidence will not be disclosed, subject to contempt, the possibility to advise the parties and representatives of the consequences of a breach, order of the sealing of the records of the proceedings, as well as the possibility to order protective measures. The possibility to give evidence *in camera* is an exception to the principle of publicity (Rule 79 (6) ECCC IR) and should therefore be narrowly construed.

²⁸⁴ Rule 28 (9) ECCC IR.

²⁸⁵ Rule 150 (F) and Rule 60*bis* (A) (ii) STL RPE.

whether directed against the interviewee or others, may be used in any interview'.²⁸⁶ The sanction is the non-admissibility of the statement recorded and the disciplinary sanctioning of the persons involved in such conduct. In the context of witness interviews, an intriguing question is to what extent the prohibition of inducement can prevent interviewers from holding out promises of protective measures to witnesses. However, it is the practice of the OCIJ not to make such promises.²⁸⁷ The precise boundaries of this provision remain to be clarified by the ECCC's jurisprudence. Lastly, the Internal Rules provide that every witness may request the use of an interpreter where needed.²⁸⁸

V.3.4. Conduct of the interview

At the ECCC, before the start of the interview by the Co-Investigating Judges, witnesses have to take an oath.²⁸⁹ A witness giving false evidence under solemn declaration exposes himself or herself to a sanction under Cambodian law.²⁹⁰ The Internal Rules provide for exceptions to the general obligation to take the oath before being questioned by the Co-Investigating Judges for certain types of witnesses when they have a close connection to the charged person, accused, civil party or victim (father, mother, ascendants, descendants, brothers, sisters (in law or not), husband or wife (divorced or not)) or on the basis of their age (younger than 14 years old).²⁹¹

No audio or video recording is prescribed. As noted elsewhere, similar to the ICC, the recording procedure which applies to the interrogation of suspects and charged persons can also be applied to other persons, "in particular where the use of such procedures could assist

²⁸⁶ Rule 21 (3) IR. Consider also the discussion of this provision, *supra*, Chapter 4, IV.5.3.

²⁸⁷ Interview with a member of the OCIJ, ECCC-03, Phnom-Penh, 16 November 2009, p. 9 ("Q: According to Internal Rule 21, there is an absolute prohibition to use any form of inducement during interrogations. In your opinion, would that prevent any promises to be made to witnesses regarding possible protective measures? It is an interesting question which, unfortunately for you, has not arisen in this context, because from the very beginning, the Co-Investigating Judges decided that they would make no promises of protective measures to anybody, and that they would make no general decisions on protective measures. They set a number of criteria based on international case law, as to when protective measures requested by a particular person would be entertained").

²⁸⁸ Rule 30 ECCC IR.

²⁸⁹ Rule 24 (1) ECCC IR.

²⁹⁰ Rule 36 IR. The Co-Investigating Judges can decide to either deal with the matter summarily, conduct further investigations themselves as to ascertain whether sufficient grounds for instigating proceedings exist or refer the matter to the appropriate authorities of Cambodia or to the United Nations (Rule 35 (2) ECCC IR).

²⁹¹ Rule 24 (2) ECCC IR.

in reducing the subsequent traumatising of a victim of sexual or gender violence, a child, an elderly person or a person with disabilities in providing their evidence.”²⁹² Such wording can be interpreted as a stimulus for the Co-Investigating Judges to apply the recording procedure which applies to the interrogation of suspects and charged persons as widely as possible. When testifying in person is not possible and as far as such is not inconsistent with defence rights, live testimony by audio or video-link technology may be allowed by the Co-Investigating Judges in the course of the judicial investigation.²⁹³ A special procedure applies if an interrogated witness is deaf or mute.²⁹⁴

A written record should be made of every interview and signed or fingerprinted by the interviewee after reading.²⁹⁵ If necessary, the record will be read back and if the person refuses to sign, this should be noted on the record. The Internal Rules do not provide further indications in what format these witness statements should be recorded. According to the Cambodian code of criminal procedure, they are taken in the form of a *procès-verbal*.²⁹⁶

Special procedural norms apply to the questioning of a civil party by the Co-Investigating Judges. Being a party to the proceedings, the civil party should be summoned five days before the interview and be given access to the case file within this timeframe.²⁹⁷ The lawyer should be present during the interrogation, unless this right has been properly waived.²⁹⁸ If the counsel fails to be present, the interview may continue, but the absence of counsel should be noted in the record. While normally, no other parties will be present during this interrogation, the Co-Investigating Judges can confront the civil party with another party or a witness. During such confrontation, the other parties present may request the Co-Investigating Judges to put a question to the civil party, but the Co-Investigating Judges hold the discretion to deny such request.²⁹⁹ Civil parties can request to be interviewed, or request the Co-Investigating Judges to interview other witnesses, but the Judges hold discretion whether or not to grant the

²⁹² Rule 25 (4) ECCC IR; see *supra*, Chapter 4, IV.6.3.

²⁹³ Rule 26 ECCC IR.

²⁹⁴ Rule 27 ECCC IR.

²⁹⁵ Rule 55 (7) ECCC IR.

²⁹⁶ Article 242 of the Cambodian Code of Criminal Procedure. This article provides that the *procès-verbal* should reflect truthfully the questions put to the witness, the answers given and the spontaneous declarations made by the witness in the course of the interview. The witness (and the interpreter if present) should sign every page of the witness statement.

²⁹⁷ See the glossary annexed to the Internal Rules; Rule 59 (1) ECCC IR.

²⁹⁸ Rule 59 (2) ECCC IR.

²⁹⁹ Rule 59 (4) ECCC IR.

request. If they decide to reject the request, they issue a rejection order, which may be appealed before the Pre-Trial Chamber.³⁰⁰ Under certain conditions and upon issuance of a rogatory letter, investigators can also question civil parties.³⁰¹

With regard to the STL, detailed guidelines or directions on how witness statements should be taken are not provided for. This absence is striking in light of the aforementioned possibilities to rely on witness statements at trial. Nevertheless, the President of the tribunal issued a practice direction (pursuant to Rule 32 (E) STL RPE) on the procedure to be followed for depositions and witness statements to be admissible *in lieu* of oral evidence.³⁰²

Finally, in the TRCP, only a few provisions dealt with the conduct of interviews by the Public Prosecutor (or the Defence). Some provisions dealt with some specific rights afforded to the victims of the crimes alleged. More specifically, when a victim of the crime was interviewed, the officer conducting the interview had to inform that victim of the right to be notified when proceedings occurred wherein the victim had a right to be heard.³⁰³ In the event that the victim interviewed was a female victim of sexual assault, such interviews had to be conducted by a female officer unless the victim did not object to a different procedure.³⁰⁴ Other provisions prohibited the interviewing of some categories of witnesses in relation to the information obtained or revealed by the accused (priest or monk, lawyer and medical professional).³⁰⁵

³⁰⁰ Rule 59 (5) ECCC IR.

³⁰¹ The civil party (a) must expressly agree thereto, such agreement being mentioned in the written record of interview; (b) when the Civil Party has a lawyer, he or she must waive the lawyer's presence in a separate written record, as provided in sub-rule 2 above; (c) he or she must be questioned in the absence of any other parties. See Rules 62 (3) (b) and 59 (6) ECCC IR.

³⁰² STL, Practice Direction on the Procedure for Taking Depositions under Rule 126 and 157 and for Taking Witness Statements for Admission in Court under Rule 155, 15 January 2010. The Practice Direction prescribes the procedure for the taking of depositions by the Pre-Trial Judge. The following order should be respected: (i) interrogation of the witness by the requesting party or by the Pre-Trial Judge if he *proprio motu* requested that the deposition be taken, (ii) the legal representatives of the victims (where permitted), (iii) cross-examination by the other party or parties, (iv) re-examination. The Pre-Trial Judge can ask questions at any time and the accused can normally be present (see Article 1 (5) of the Practice Direction). Audio-visual registration is provided for under Article 1 (9). Besides, the Practice Direction sets out the procedure to be followed for statements to be admitted in lieu of oral evidence. Among others, the Practice Direction stipulates that the party requesting the questioning should ensure witness interviewed should have the possibility to read the statement and should have the possibility to make corrections, after which the final statement is read back to the witness and signed (Article 2 (3) of the Practice Direction). In this regard, it "supplements Rule 155 [and] is directed at ensuring that – in circumstances in which the right to cross-examine is curtailed - witness statements have the indicia of reliability necessary to admit them into evidence under Rule 155." See STL, Decision on Compliance with the Practice Direction for the Admissibility of Witness Statements under Rule 155, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC, T. Ch., 30 May 2013, par. 240.

³⁰³ Section 14.3 (a) TRCP.

³⁰⁴ Section 14.3 (c) TRCP.

³⁰⁵ Section 35 (3) and 35 (7) TRCP.

VI. INTERNATIONAL HUMAN RIGHTS NORMS

From a human rights perspective, the procedural regulation and the practice of the tribunals regarding the pre-trial questioning of witnesses may not immediately raise any major concerns. However, several human rights issues are relevant here. First, whether or not a privilege from self-incrimination for witnesses can be discerned under human rights law will be examined. The existence of such privilege is important as a positive answer entails that the procedural model of the ICC is to be preferred, because it provides for such procedural safeguard for witnesses during the investigation.³⁰⁶

Secondly, the right of the accused to examine witnesses may be at stake if witness statements resulting from pre-trial witness interviews are increasingly admitted into evidence. Could it be argued from a human rights perspective that both parties should be allowed to participate in such investigative action for the resulting statement to be admissible in evidence? If so, the ICC model will again be preferred, since its procedure safeguards this right of the parties.

VI.1. The privilege against self-incrimination for witnesses

The right of the accused not to be compelled to testify against himself, or to confess guilt, was discussed above.³⁰⁷ This right is laid down in Article 14 (3) (g) ICCPR. While no equivalent right can be found in the ECHR, the *nemo tenetur* principle has been read into Article 6 ECHR by the ECtHR.³⁰⁸ Notwithstanding the ‘substantive’ rather than formal understanding of a ‘person charged’ by the ECtHR, it is difficult to see how this provision can be applied to witnesses interviewed during the investigation stage of proceedings.

However, at least one author holds the position that as soon as somebody is confronted with questions or with a request for documents which could result in self-incrimination, that person is *de facto* ‘charged’ within the autonomous meaning of Article 6.³⁰⁹ It is clear that there may be situations where a person is interrogated as a witness, whereas, in the autonomous meaning

³⁰⁶ Also the ECCC provides for such procedural safeguard. Unlike at the ICC, this safeguard is limited in the course of the judicial investigation. See *supra*, Chapter 5, V.3.3.

³⁰⁷ See *supra*, Chapter 4, IV.2.1.

³⁰⁸ ECtHR, *Saunders v. The United Kingdom*, Application No. 19187/91, Reports 1996-VI, Judgment of 17 December 1996, par. 68.

³⁰⁹ S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, p. 349.

of Article 6 (1) of the ECHR, that person should be considered ‘charged’ and should therefore be protected against improper compulsion by the authorities. Consequently, ‘witnesses’ may benefit from the protection of the *nemo tenetur* principle. The Court will apply the “substantially affected” criterion to determine whether or not the witness should be considered ‘charged’ within the meaning of Article 6 (1) ECHR.³¹⁰

Several commentators have argued, on the basis of the character and purpose of Article 14 (3) (g) of the ICCPR, that the drafters of the Covenant intended to codify the *nemo tenetur* principle as a general principle of law and were guided by the US Fifth Amendment of the US Constitution. The drafters were not specifically thinking in terms of procedural distinctions between investigation and trial or distinctions between witnesses, suspects and accused persons.³¹¹ Consequently, this right should be applied to witnesses as well.

Arguably, further support for the existence of privilege against self-incrimination may be found in the case law of the ECommHR on freedom of expression. In *K. v. Austria*, the Commission held that the negative aspect of freedom of expression under Article 10 ECHR includes the freedom to withhold information and that such freedom *in casu* prevails over the interest of the judiciary to obtain evidence from a person who by giving evidence would run the risk of self-incrimination.³¹² However, this holding predates the recognition of a privilege against self-incrimination by the case law of the ECtHR.³¹³

The existence of a privilege against self-incrimination for witnesses was considered by one ICTY Judge in a dissenting opinion in the *Tadić* case. The suggestion of the existence of such privilege for witnesses under international human rights law was dismissed by Judge

³¹⁰ This term was already discussed at length. See *supra*, Chapter 2, III.4 and Chapter 4, II.1.4.

³¹¹ K. AMBOS, the Right of Non-Self-Incrimination of Witnesses Before the ICC, in «Leiden Journal of International Law», Vol. 15, 2002, p. 161, referring to K. ROGALL, *Der Beschuldigte als Beweismittel gegen sich selbst: Ein Beitrag zur Geltung des Satzes “Nemo tenetur seipsum prodere”* im Strafprozess, Duncker & Humblot, Berlin, 1977, p. 117.

³¹² ECommHR, *K v. Austria*, Application No. 16002/90, Report of 13 October 1992, par. 45-53 (“In the present case, the applicant was forced, by the use of a fine and of detention for five days, to testify against his will. The Commission finds that this constituted an interference with the negative aspect of his right to freedom of expression”). The case was struck out of the list following a friendly settlement.

³¹³ J.D. JACKSON and S.J. SUMMERS, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*, Cambridge, Cambridge University Press, 2012, p. 249; J. JACKSON, *Re-Conceptualising the Right of Silence as an Effective Fair Trial Standard*, in «International and Comparative Law Quarterly», Vol. 58, 2009, p. 841.

McDonald.³¹⁴ She held that no such privilege for witnesses can be found under the ICCPR and that no such right has been recognised in the jurisprudence of the ECtHR.³¹⁵

VI.2. Right to examine witnesses

Two different aspects of the right to confront witnesses are relevant for this chapter on the questioning of witnesses during the investigation. First, (i) the right to examine or to have examined the witnesses against him or her and (ii) the right to obtain the attendance and examination of witnesses under the same conditions as witnesses testifying against him or her.³¹⁶ The right to examine witnesses is found in the Statutes of all jurisdictions under review.³¹⁷

It follows from the consistent case law of the ECtHR that while in principle, evidence will be produced at public hearings, in light of adversarial argumentation, infringements to this principle are allowed so long as they do not infringe upon the rights of the accused.³¹⁸ Exceptions to the ability to question witnesses in open court are possible. While the defendant should be given the opportunity to challenge and question witnesses against him or her, this opportunity can either be given when witnesses make their statements or at a later stage of the proceedings.³¹⁹ The accused may, thus, be given the possibility to examine the witness outside

³¹⁴ ICTY, Separate and Dissenting Opinion of Judge McDonald on Prosecution Motion for Production of Defence Witness Statements, *Prosecutor v. Tadić*, Case No. IT-94-1-T, T. Ch., 27 November 1996, par. 32, fn. 4.

³¹⁵ *Ibid.*, par. 32, fn. 4, stating that the case cited by the Defence (*Funke*) does not support the Defence's argument where that case did not deal with witness statements.

³¹⁶ Article 14 (3) (e) ICCPR; Article 6 (3) (d) ECHR. The ACHR limits the application of this right to examine witnesses to witnesses 'present in the court': see Article 8 (2) (f) ACHR. The African Charter on Human and Peoples' Rights does not mention this right.

³¹⁷ Article 21 (4) (e) ICTY Statute, Article 20 (4) (e) ICTR Statute, Article 17 (4) (e) SCSL Statute, Article 16 (4) (e) STL Statute; Article 67 (1) (e) ICC Statute; Article 35new ECCC Law; Section 6 (3) (g) TRCP.

³¹⁸ The principle of a fair trial presupposes adversarial proceedings. See e.g. ECtHR, *Belziuk v. Poland*, Application No. 23103/93, Reports 1998-II, Judgment of 25 March 1998, par. 37; ECtHR, *Jasper v. the United Kingdom*, Application No. 27052/95, Judgment (Grand Chamber) of 16 February 2000, par. 51; ECtHR, *Brandstetter v. Austria*, Applications Nos. 11170/84, 12876/87, 13468/87, Series A, No. 211, Judgment of 28 August 1991, par. 66–67; ECtHR, *Edwards and Lewis v. the United Kingdom*, Applications Nos. 39647/98, 40461/98, Judgment of 22 July 2003, par. 52; ECtHR, *Öcalan v. Turkey*, Application No. 46221/99, Reports 2005-IV, Judgment of 12 May 2005, par. 146; HRC, *Moraal v. France*, Communication No. 207/1986, U.N. Doc. CCPR/C/36/D/207/1986, 28 July 1989, par. 9.3.

³¹⁹ Consider e.g. ECtHR, *Caka v. Albania*, Application No. 44023/02, Judgment of 8 December 2009, par. 100 – 101 ("Under certain circumstances it may be necessary for the courts to have recourse to statements made during the criminal investigation stage. If the accused had sufficient and adequate opportunity to challenge such statements, at the time they were taken or at a later stage of the proceedings, their use does not run counter to the guarantees of Article 6 §§ 1 and 3 (d)"). See also, among others, ECtHR, *Lüdi v. Switzerland*, Application No. 12433/86, Judgment of 15 June 1992, par. 47; ECtHR, *Lucà v. Italy*, Application No. 33354/96, Judgment of 27

the courtroom or have the witness examined (e.g. by a national judge).³²⁰ However, this does not imply that a *right* exists under Article 6 (3) (d) of the ECHR for the accused to be present during the interrogation of witnesses during the investigation nor that a right exists to question that witness (directly or indirectly).³²¹ In a similar vein, the HRC understands this right as encompassing the right for Defence to examine witnesses against it at some stage of the proceedings.³²²

Pre-trial witness examinations are often secret in nature. Still, providing the defendant with the opportunity to challenge witnesses at that stage does not conflict with the right of the defendant to a public hearing, provided that this right only applies at trial.³²³ That said, it has rightly been noted that such pre-trial witness examinations *may* call into question the present understanding of the right to a public hearing, based as it is on the assumption that all evidence could be challenged at trial.³²⁴ Where the right to confront witnesses may be guaranteed outside the courtroom and at the investigation stage, it follows that it is legitimate for the Defence to hear and challenge evidence in a context which may not protect all aspects

February 2001, par. 35; ECtHR, *S.N. v. Sweden*, Application No. 34209/96, Reports 2001-II, Judgment of 2 July 2002, par. 49; ECtHR, *Vozhigov v. Russia*, Application No. 5953/02, Judgment of 26 April 2007, par. 51 *et seq.*; ECtHR, *Al-Khawaja and Tahery v. The United Kingdom*, Application Nos. 26766/05 and 22228/06, Reports 2011, Judgment (Grand Chamber) of 15 December 2011, par. 118. In the *Unterpertinger* case, the first reference to the possibility of interviewing witnesses outside the courtroom was made. However, in that particular case, the accused had neither had the chance to examine the witness at the trial phase nor at the pre-trial phase, rendering that statement *obiter dictum*. See ECtHR, *Unterpertinger v. Austria*, Application No. 9120/80, Series A, No. 110, Judgment of 24 November 1986, par. 31.

³²⁰ G. SLUITER, “I Beg You, Please Come Testify” – The Problematic Absence of Subpoena Powers at the ICC, in «New Criminal Law Review», Vol. 12, 2009, p. 602; C. SAFFERLING, The Rights and Interests of the Defence in the Pre-Trial Phase, in «Journal of International Criminal Justice», Vol. 9, 2011, p. 661.

³²¹ ECtHR, *X. v. Federal Republic of Germany*, Application No. 8414/78, DR17, Judgment of 4 July 1979, p. 231.

³²² HRC, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, 23 August 2007, par. 39 (“It does not, however, provide an unlimited right to obtain the attendance of any witness requested by the accused or their counsel, but only a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them *at some stage of the proceedings*”).

³²³ J.D. JACKSON and S.J. SUMMERS, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*, Cambridge, Cambridge University Press, 2012, p. 98; S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, p. 122 (Noting that the ECtHR and the HRC stressed that “the public-hearing requirement only applies to the trial”). See HRC, *Kavanagh v. Ireland*, Communication No. 819/1998, U.N. Doc. CCPR/C/71/D/819/1998, 4 April 2001, par. 10.4 (“The Committee considers that the right to public hearing applies to the trial. It does not apply to pre-trial decisions made by prosecutors and public authorities”).

³²⁴ J.D. JACKSON and S.J. SUMMERS, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*, Cambridge, Cambridge University Press, 2012, p. 98 (the author notes that “this is particularly problematic if the public hearing requirement is viewed as integral to the fairness of the proceedings”).

of Article 6.³²⁵ For example, when the Prosecution is supervising pre-trial witness interviews, it can legitimately be asked whether or not the defendant's rights, including the right to challenge witness evidence, would not require a more impartial context, which fully respects defence rights such as equality of arms or the right to an impartial judge.³²⁶ Although it may be objected that the ICC Prosecutor is bound by a principle of objectivity, it was underscored previously how the ECtHR occasionally expressed a certain mistrust about this objectivity, because the Prosecutor is also a 'party' to the proceedings.³²⁷ Further, it would seem to follow from the principle of adversarial proceedings that the accused would need to be assisted by counsel at such occasion.³²⁸ Human rights jurisprudence has been reluctant to set out strict safeguards for the pre-trial opportunities to challenge witness evidence.³²⁹ Hence, the stage of proceedings where the defendant is provided with the right to challenge a witness may well define the extent of such an opportunity.³³⁰

The ECtHR accepted that it may prove necessary for the judicial authorities on certain occasions to refer to depositions taken in the course of the investigation.³³¹ In this regard, the Court acknowledges the difficulties which may arise in producing witness evidence, for example if the witness can no longer be found. If a conviction is based solely or in a decisive manner on depositions from a witness who has not been examined by the defence, either in the course of the investigation or at trial, the right to a fair trial is violated.³³² This was

³²⁵ S.J. SUMMERS, *Fair Trials: the European Criminal Procedural Tradition and the European Court of Human Rights*, Oxford, Hart Publishing, 2007, p. 164; J.D. JACKSON and S.J. SUMMERS, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*, Cambridge, Cambridge University Press, 2012, p. 100.

³²⁶ *Ibid.*, pp. 98, 345-346 (noting that some "[s]cepticism about any 'impartial' role, at least in the sense of Article 6(1) of the ECHR, for the prosecuting authorities is inherent in the equality of arms doctrine and would seem to disqualify prosecution authorities from supervising hearings during the investigation, which are designed to provide the defence with its principal opportunity to challenge the evidence" (original footnotes omitted)).

³²⁷ See e.g. ECtHR, *Sanoma Uitgevers BV v. The Netherlands*, Application No. 38224/03, Judgment (Grand Chamber) of 14 September 2010, par. 93. See the discussion thereof, *supra*, Chapter 3, III.

³²⁸ HRC, *Simpson v. Jamaica*, Communication No. 695/1996, U.N. Doc. CCPR/C/73/D/695/1996, 31 October 2001, par. 7.3; HRC, *Brown v. Jamaica*, Communication No. 775/1997, U.N. Doc. CCPR/C/65/D/775/1997, 23 March 1999, par. 6.6; J.D. JACKSON and S.J. SUMMERS, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*, Cambridge, Cambridge University Press, 2012, pp. 99, 345.

³²⁹ *Ibid.*, p. 342.

³³⁰ *Ibid.*, pp. 344- 345.

³³¹ ECtHR, *A.M. v. Italy*, Application No. 37019/97, Judgment of 14 December 1999, par. 25.

³³² ECtHR, *Mild and Virtanen v. Finland*, Application Nos. 39481/98 and 40227/98, Judgment of 26 July 2005, par. 42; *mutatis mutandis*, ECtHR, *Doorson v. Netherlands*, Application No. 20524/92, Reports 1996-II, Judgment of 8 December 1998, par. 76; ECtHR, *Van Mechelen and Others v. The Netherlands*, Application Nos. 21363/93, 21364/93, 21427/93 and 22056/93, Reports 1997-III, Judgement of 23 April 1997, par. 55; ECtHR, *Lucà v. Italy*, Application No. 33354/96, Judgment of 27 February 2001, par. 40; ECtHR, *Al-Khawaja and*

confirmed by the ICTY Appeals Chamber. Likewise, it held that the right to cross-examination is not absolute. It follows that “as a matter of principle nothing bars the admission of evidence that is not tested or might not be tested through cross-examination.”³³³ However, “[u]nacceptable infringements of the rights of the defence [...] occur when a conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial.”³³⁴

On some occasions, where convictions were based solely or in a decisive manner on witness evidence the defendant could not challenge, the ECtHR did not find a violation of Article 6 (3) (d) ECHR. In the *S.N. v. Sweden* case, no violation of the right to examine witnesses was found when a witness (whose statements were virtually the only evidence) did not testify at trial and the defence counsel was absent during the pre-trial police interviews. Rather than to ask for the postponement of the interview, the defence counsel instead consented not to be present and did not stipulate the manner in which the interview was to be conducted.³³⁵ It has been argued that it follows that defence counsel should exercise the necessary diligence.³³⁶ In the *Solakov* case, the Court did not conclude a violation of Article 6 (3) (d) ECHR had occurred even though some witness statements which played an important role in the finding of guilt were taken in the US following a rogatory letter in the absence of the defendant’s counsels.³³⁷ The counsels of the defendant had been summoned but they chose not to attend the hearing nor did they expressly provide any question the defendant would like to put to the witness.³³⁸

Consequently, under international human rights law witness statements resulting from pre-trial interviews may normally be admitted without the possibility for the Defence to examine these witnesses as long as the finding of guilt is not based ‘solely’ or ‘in a decisive manner’

Tahery v. The United Kingdom, Application Nos. 26766/05 and 22228/06, Reports 2011, Judgment (Grand Chamber) of 15 December 2011, par. 119.

³³³ ICTY, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.6, A. Ch., 23 November 2007, par. 52 - 55; ICTY, Judgement, *Prosecutor v. Haraqiija and Morina*, Case No. IT-04-84-R77.4-A, A. Ch., 23 July 2009, par. 61.

³³⁴ ICTY, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.6, A. Ch., 23 November 2007, par. 53, 61.

³³⁵ ECtHR, *S.N. v. Sweden*, Application No. 34209/96, Judgment of 2 July 2002, par. 49.

³³⁶ S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, p. 298.

³³⁷ ECtHR, *Solakov v. The Former Yugoslav Republic of Macedonia*, Application No. 47023/99, Reports 2001-X, Judgment of 31 October 2001.

³³⁸ *Ibid.*, par. 60, 62.

on these witness statements. At first sight, Rule 92*bis* of the ICTY, ICTR and SCSL RPE may be held to be in accordance with this rule insofar that it only allows for the admission without possibility of cross-examination of witness statements that go to proof of a matter other than the acts or conduct of the accused as charged in the indictment. Hence, the verdict can never be based solely or in a decisive manner on witness evidence that could not be confronted by the Defence. In a similar vein, the admission of witness statements without possibility of cross-examination under Rule 92*quater* (unavailable persons) and Rule 92*quinquies* (persons subjected to interference) would be in accordance with international human rights law as long as it is not used to admit witness statements to the extent that a conviction is based solely or in a decisive manner on these witness statements.

However, some commentators are sceptical on the compliance of Rule 92*bis* with international human rights law. For example, ROBINSON argues that the amount of Rule 92*bis* evidence admitted may prejudice the fairness of the trial.³³⁹ He holds that in the absence of a dossier, the Trial Chamber lacks sufficient information to determine whether or not cross-examination is necessary.³⁴⁰ Such a system would be acceptable in a civil law system where the Judges have more information on the facts and on the case and are in a position to be more proactive in asking questions which can compensate for the absence of cross-examination.³⁴¹ Hence, the underlying problem is the superimposition of a civil-law feature into a predominantly common-law system, without making the necessary adjustments.³⁴² Other commentators note that the tendency of admitting prior-recorded witness statements at trial may have led to an erosion of the accused's right to confront witnesses.³⁴³

It is to be observed that divergent answers have been given in the case law as to what exactly constitutes the 'acts and conduct' of the accused, for which no written witness statements can

³³⁹ P.L. ROBINSON, *Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY*, in «Journal of International Criminal Justice», Vol. 3, 2005, pp. 1042 -1043 (“Although the witness statement does not go to proof of the acts and conduct of the accused [...] it may yet be of importance to the case of an accused who may wish to cross-examine its maker to show that the incident did not take place at all, or for some other reason relevant to his case”). Consider also S. KAY, *The Move from Oral Evidence to Written Evidence*, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 496 (noting that as a consequence of rule amendments and the case law of the ICTY, the right to confront witnesses has been ‘left to be but an echo of its worth’).

³⁴⁰ P.L. ROBINSON, *Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY*, in «Journal of International Criminal Justice», Vol. 3, 2005, pp. 1042 – 1043, 1045.

³⁴¹ *Ibid.*, pp. 1045 – 1046.

³⁴² *Ibid.*, p. 1046.

³⁴³ E. O’SULLIVAN and D. MONTGOMERY, *The Erosion of the Right to Confrontation under the Cloak of Fairness at the ICTY*, in «Journal of International Criminal Justice», Vol. 8, 2010, p. 512.

be admitted *in lieu* of oral evidence. For example, in *Karemera et al.*, ICTR Trial Chamber III narrowly interpreted this notion as to also include acts and conduct of subordinates, while other jurisprudence would allow for its admission.³⁴⁴ However, the Chamber later reconsidered this stance.³⁴⁵ It may indeed be difficult to distinguish between evidence going to ‘the acts and conduct of the accused’ and other evidence when extended forms of criminal liability are relied upon.³⁴⁶ Firstly, witness statements may refer to the acts and conduct of immediate proximate subordinates. Secondly, evidence so admitted may still be crucial in establishing the ‘crime base’, and still be decisive with regard to the conviction.³⁴⁷

Nonetheless, it is unclear from the above argumentation how Rule 92*bis* precisely violates the right to a fair trial and the right of the defendant to challenge witnesses. As indicated by JACKSON, it may indeed be difficult to argue in the abstract that the admission of Rule 92*bis* statements is unfair upon the accused. Overall, the Trial Chamber retains considerable discretion whether or not to require the witness to appear for cross-examination. It follows that “[s]o long as tribunals are sensitive to the requirement that convictions are not based

³⁴⁴ ICTR, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92*bis* of the Rules; and Order for Reduction of Prosecution Witness List, *Prosecutor v. Karemera et al.*, Case No. ICTR 98-44-T, T. Ch. III, 11 December 2006, par. 19 – 21 (“Having reviewed all of the material sought to be admitted, the Chamber notes that none of the rapes and/or sexual assaults alleged are alleged to have been physically perpetrated by any of the Accused in this case. Rather, all of the rapes and/or sexual assaults are alleged to have been physically perpetrated by Interahamwe and militiamen, and not by any of the Accused in this case. [...] However, according to the forms of liability pleaded in the Indictment [...] the evidence is to be relied upon to prove that rapes were committed on a widespread and systematic basis by the Accused’s subordinates and/or co-perpetrators. *These allegations are so pivotal to the Prosecution’s case that it would be unfair to the Accused to permit the evidence to be given in written form without an opportunity to cross-examine the witnesses.* The Prosecution Motion falls to be rejected” (emphasis added)). However, Compare e.g. ICTY, Decision on Interlocutory Appeal Concerning Rule 92*bis* (C), *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, A. Ch., 7 June 2002, par. 9 – 14. See further Y. MCDERMOTT, The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis, in «Leiden Journal of International Law», Vol. 26, 2013, p. 977.

³⁴⁵ As a consequence, and after the Prosecution reduced the number of witnesses whose evidence the Prosecution sought to admit in written form, the Trial Chamber decided to reconsider its decision of 11 December 2006 and to admit 16 witness statements in written form. See ICTR, Decision on Reconsideration of Admission of Written Statements in Lieu of Oral Evidence and Admission of the Testimony of Witness GAY, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 28 September 2007, par. 24.

³⁴⁶ J. JACKSON, Finding the Best Epistemic Fit for International Criminal Tribunals, in «Journal of International Criminal Justice», Vol. 7, 2009, pp. 30 – 31; Y. MCDERMOTT, The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis, in «Leiden Journal of International Law», Vol. 26, 2013, p. 979.

³⁴⁷ J. JACKSON, Finding the Best Epistemic Fit for International Criminal Tribunals, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 30.

substantially upon uncross-examined evidence, they are unlikely to fall foul of human rights law.”³⁴⁸

VII. CHALLENGES OF INTERNATIONAL CRIMINAL INVESTIGATIONS

A recurring issue which has plagued the *ad hoc* tribunals is the occurrence of discrepancies between the evidence given by a witness in the courtroom and evidence which was given to investigators during pre-trial interviews which was recorded in witness’ statements. Such inconsistencies are widespread. With regard to the prevalence of such inconsistencies in a number of international prosecutions, COMBS concluded that:

“Inconsistencies and omissions such as the ones I have described would be troubling if they occurred only once in a while, but in fact they are commonplace at all tribunals. I reviewed the testimony of prosecution witnesses in three of the four SCSL cases and in a number of Special Panels and ICTR cases. In some of these cases, the testimony of virtually every witness featured some inconsistencies or omissions between the witness’ statements and testimony. More importantly in all of these cases, a large proportion of witnesses testified in a way that was *seriously* inconsistent with their previous statements. At the SCSL, for instance, 54 percent of *AFRC* prosecution fact witnesses testified in a way that I considered seriously inconsistent with those witnesses’ pretrial statements. The proportion was 53 percent in the *RUF* case and 35 percent in the *CDF* case.”³⁴⁹

This raises pertinent questions as to the reliability of statements produced as a result of the questioning of witnesses during the investigation. COMBS, on the basis of her study of the fact-finding by the ICTR, SCSL and SPSC, concluded that international criminal courts and tribunals face similar educational, cultural and linguistic divergences between staff and

³⁴⁸ *Ibid.*, p. 31 (the author adds that “[t]his does not, however, dispose of the question whether the admission of large amounts of written evidence at trial which has not been subject to testing before or at trial creates the best foundation for enabling tribunals to make reliable findings of fact. One of the reasons why common law adversarial systems have been traditionally suspicious of written statements is because there are well-founded doubts about the reliability of statements taken by parties for the purpose of litigation”). It cannot be denied that a certain level of uncertainty surrounds the notions of ‘sole’ or ‘decisive’ as employed by the ECtHR. On this issue, consider J.D. JACKSON and S.J. SUMMERS, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*, Cambridge, Cambridge University Press, 2012, pp. 338 – 342.

³⁴⁹ N.A. COMBS, *Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge, Cambridge University Press, 2010, pp. 118-120.

witnesses.³⁵⁰ She argues that all of these factors explain the inconsistencies which arise between pre-trial witness statements and their testimony in court.³⁵¹ The same factors can be found in the jurisprudence of the *ad hoc* tribunals and were indicated to the author in interviews with staff of the ICTR and the ECCC.³⁵²

Doubtless, a major challenge to the conduct of pre-trial witness interviews relates to language and interpretation.³⁵³ In fact, witnesses themselves often attribute these inconsistencies to interpretation errors.³⁵⁴ They often seek to explain inconsistencies between earlier statements and their oral testimony by arguing that the earlier testimony had not been properly transcribed.³⁵⁵ Normally, questions are first translated from English to the native language of the witness by an interpreter.³⁵⁶ Subsequently, witnesses will respond in their native language to the OTP investigator, while an interpreter translates it into English or French. The

³⁵⁰ *Ibid.*, p. 5.

³⁵¹ *Ibid.*, p. 106.

³⁵² Consider e.g. Interview with Ms. Christine Graham of the OTP, ICTR-14, Arusha, 28 May 2008, p. 6 (“Q. What are, in your personal opinion, the main obstacles for the OTP in conducting investigations? A. “I think poor investigations are the main obstacle that we have, and not having a well-trained police force that you can send out and take proper statements that actually reflect what the witness said. Questions of interpretation, languages, questions of the investigator not understanding the background of the witness in terms of literacy and being able to account for what happened. All the things that are taken for granted in a functioning jurisdiction that has been up and running for the last couple of hundred years”). See the additional references in footnotes below.

³⁵³ See e.g. Interview with a member of the OTP, ICTR-13, Arusha, 21 May 2008, p. 4; Interview with Ms. Christine Graham of the OTP, ICTR-14, Arusha, 28 May 2008, p. 6 (“You have an endless stream of witnesses saying, “that’s not what I told them.” “But that’s what you signed.” “Yes, but it’s been translated into Kinyarwanda.” It is ridiculous. Then, of course, from the Defence point of view they will say that there are all these inconsistencies. This witness cannot be believed”); Interview with a member of the OTP, ICTR-15, Arusha, 29 May 2008, p. 6; Interview with Mr. Tom Moran, Defence counsel, ICTR-24, Arusha, 29 May 2008, p. 3; Interview with a member of the OTP, ICTR-09, Arusha, 20 May 2008, p. 4. Consider also J. JACKSON, Finding the Best Epistemic Fit for International Criminal Tribunals, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 31 (“there are grave dangers of errors creeping into the fact-finding process where different languages are at play”); A. ZAHAR, Witness Memory and the Manufacture of Evidence at the International Criminal Tribunals, in C. STAHN and L. VAN DEN HERIK (eds.), Future Perspectives on International Criminal Justice, Cambridge, Cambridge University Press, 2010, p. 602. For an account of the problems related to witness evidence and interpretation *at trial*, see R. CRYER, Witness Evidence Before International Criminal Tribunals, in «The Law and Practice of International Courts and Tribunals», Vol. 3, 2003, pp. 420-429.

³⁵⁴ N.A. COMBS, Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions, Cambridge, Cambridge University Press, 2010, pp. 66 – 79, 175; Consider also BUISMAN, who asserts that translations and interpretations may also be problematic for the ICC, which has to face a great number of different languages, including non-written local or tribal languages, such as Zaghawa, which is spoken by a tribe in Sudan. See C. BUISMAN, Ascertainment of the Truth in International Criminal Justice, 2012 (available at: <http://bura.brunel.ac.uk/handle/2438/6555>, last visited 18 November 2013), p. 334.

³⁵⁵ Consider e.g. ICTR, Trial Record, *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case Nos. ICTR-96-10-T and ICTR-96-17-T, 27 September 2001, pp. 112-113.

³⁵⁶ See e.g. SCSL, Transcript, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14, T. Ch. I, 2 March 2005, pp. 7-8 (a prosecution investigator testified that the questions were first translated from English to Krio by an interpreter. Subsequently, the response in Krio was translated back to English. At the end, the witness was asked if he or she had any questions for the investigator. Then, the statement was read back to the witness in Krio).

investigator will then take notes in his or her own language. Subsequently, the statement made by the witness is prepared in English and read back to the witness in English and translated orally in the witness' native language. In a next step, the witness is requested to sign the statement.³⁵⁷ Neither the interview nor the reading back of the statement is tape-recorded to ensure the accuracy of the oral translation.³⁵⁸ Hence, no record is available afterwards to check what the witness has said in his or her own language.³⁵⁹ Occasionally, interpretation may even be more complex. In some cases, double interpretation is required. For example, because of the lack of English-Kinyarwanda interpreters, ICTR interpretation happened from Kinyarwanda over French to English. Similarly, at the ICC, interpretation from Lingala and Swahili over French to English, by means of a French relay proved to be necessary. It is evident that a double round of interpretation considerably increases the risk of miscommunications.³⁶⁰

The problems regarding interpretation were addressed by an ICTR Trial Chamber in *Akayesu*. The Trial Chamber acknowledged that interpretation of oral evidence from Kinyarwanda into one of the official languages has been a great challenge to the trial proceedings "due to the fact that the syntax and everyday modes of expression in the Kinyarwanda language are complex and difficult to translate into French or English."³⁶¹ Important syntactical and grammatical differences exist between Kinyarwanda, English and French.³⁶² Other language difficulties add up to the problem of translations. These include the use of euphemistic language, cultural restraints to discuss certain issues, etc.³⁶³

Similar challenges arguably arise in the context of pre-trial interviews with investigators. For example, at the ECCC, investigators faced substantial problems in interviewing witnesses due

³⁵⁷ Defence counsel B. Gumpert criticizes this "atrocious methodology" and qualifies it as an "outrageously unreliable system for gathering evidence", see Interview with Mr. Gumpert, Defence Counsel, ICTR-20, Arusha, 22 May 2008, p. 13.

³⁵⁸ ICTY, Decision on Interlocutory Appeal Concerning Rule 92bis (C), *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, A. Ch., 7 June 2002, par. 30, fn. 56; ICTY, Decision on Appeal Regarding Statement of Deceased Witness, *Prosecutor v. Kordić and Čerkez*, A. Ch., 21 July 2000, par. 27.

³⁵⁹ Interview with Mr. Gumpert, Defence Counsel, ICTR-20, Arusha, 22 May 2008, p. 13; Interview with Mr. Peter Robinson, Defence Counsel, ICTR-18, Arusha, 22 May 2008, p. 5 (arguing that such recording is important as it allows to verify whether the witness really said something or whether the investigator wrongly noted it down in case of inconsistent prior statements).

³⁶⁰ N.A. COMBS, *Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge, Cambridge University Press, 2010, pp. 276 - 277.

³⁶¹ ICTR, Judgement, *Prosecutor v. Akayesu*, Case No. ICTR-94-6-T, T. Ch. I, 2 September 1998, par. 145.

³⁶² ICTR, Judgement, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, T. Ch. I, 27 January 2000, par. 102.

³⁶³ ICTR, Judgement, *Prosecutor v. Akayesu*, Case No. ICTR-94-6-T, 2 September 1998, par. 145-154.

to the absence of distinctions between singular/plural, feminine/masculine, and by the absence of any tense and conjugation of verbs in the Khmer language.³⁶⁴

In addition to the factors set out above, errors made by investigators should be added.³⁶⁵ Stories of incompetent or lazy investigators are common but difficult to verify.³⁶⁶ The involvement of third actors, lacking proper training, in early ICTR investigations, was discussed above.³⁶⁷ COMBS refers to two instances, before the ICTR and SPSC respectively, where an investigator submitted the same statement for two or more witnesses.³⁶⁸ In addition, she cites one senior trial attorney in the *CDF* case who reported that witness statements were of such bad quality as to necessitate the CDF trial team to re-interview nearly every witness.³⁶⁹ In the *Šešelj* case at the ICTY, following a motion by the Defence, an *amicus curiae* was even appointed with the mandate to “investigate possible intimidation or pressure, albeit indirect, exerted by certain investigators for the Prosecution in this case and to investigate techniques used by these investigators to obtain preliminary written statements from Witnesses.”³⁷⁰ The *amicus* concluded that there were no sufficient grounds to initiate

³⁶⁴ Interview with a member of the OCIJ, ECCC-03, Phnom-Penh, 16 November 2009, p. 13 (“The result is that if you ask a question, for example, “Do you know what happened here?” a person might say, “Yes, some people came and killed a group of people and we all saw that.” But the written sentence would be open to interpretation as “A person came and killed one person and I saw it” or any other possible interpretation of that. Which means that the investigator has to be conscious of that question, they have to come back and say, “How many of them were they? How many people were killed?” You have to know. If you do not speak Khmer, the interpreter has to choose one option when translating to English or French, plural or singular or whatever. And they will do that based on their own understanding of the context of what the person is talking about. But they might get it wrong. So you have to systematically go back and verify every single aspect of the question”).

³⁶⁵ N.A. COMBS, *Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge, Cambridge University Press, 2010, p. 125.

³⁶⁶ *Ibid.*, p. 126.

³⁶⁷ See *supra*, Chapter 2, VII.1.

³⁶⁸ See SPSC, Judgement, *Prosecutor v. Ena and Ena*, Case No. 5/2002, SPSC, 23 March 2004, par. 67 (“Statements taken in March 2002 from four key Prosecution witnesses do mention the involvement of Carlos Ena. However, the Court expresses its concern that two of the statements (the statement of Laurinda Oki and Maria Lafu Ulan, both dated 20 March 2002) are identical. Other than the name, age and time of interview, the text of the statements are identical- even the spacing and punctuation marks are replicated. The first five paragraphs of the statement of Terezinha Punef (also taken on 20 March 2002) are identical to these two statements, while the remaining paragraphs of the statement display striking similarities in terms of words, phrasing and contents”); ICTR, Judgement, *Prosecutor v. Akayesu*, Case No. ICTR-94-6-T, T. Ch. I, 2 September 1998, par. 443 (“The Chamber notes that the written statements of these two witnesses, prepared and submitted by the Defence, are identical”).

³⁶⁹ N.A. COMBS, *Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge, Cambridge University Press, 2010, p. 279.

³⁷⁰ ICTY, Redacted Version of the “Decision in Reconsideration of the Decision of 15 May 2007 on Vojislav Šešelj’s Motion for Contempt Against Carla del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon”, *Prosecutor v. Šešelj*, Case No. IT-03-67-T, T. Ch. III, 29 June 2010, p. 11.

contempt proceedings against any identifiable person.³⁷¹ This conclusion was adopted by the Trial Chamber. Hence, no contempt proceedings were initiated.³⁷²

Education and literacy may be major impediments with regard to the quality of pre-trial witness statements.³⁷³ For example, on the basis of witnesses' own responses when asked by defence counsel and prosecutors (in court) about their level of schooling, COMBS determined that in cases before the SCSL illiteracy rates of witnesses varied between 33 and 48 percent.³⁷⁴ It follows that many of the witnesses interviewed are unable to read the statements they made to investigators, preventing them from indicating any inaccuracies in the recording of the interview by the investigator.³⁷⁵ Overall, "many witnesses do not entirely understand what they are doing when they provide the prosecution with a statement."³⁷⁶

Also cultural divergences are one of the major causes of inconsistencies between pre-trial witness statements and witness testimony at trial.³⁷⁷ Cultural divergences are a major challenge in taking witness statements.³⁷⁸ For example, Western indications of time and space may have little meaning to the witnesses and therefore be the cause of many

³⁷¹ ICTY, Decision on Vojislav Šešelj's Motion for Contempt Against Carla del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon and on the Subsequent Requests of the Prosecution, *Prosecutor v. Šešelj*, Case No. IT-03-67-T, T. Ch. III, 22 December 2011, par. 23.

³⁷² Presiding Judge Antonetti attached a Separate Opinion, highly critical of the work of the *amicus* and questioning the method (not the outcome) of the *amicus curiae* report. See *ibid.*, Separate Opinion of Presiding Judge Jean-Claude Antonetti, p. 34 ("In conclusion, I delegated all my discretionary powers to the *amicus curiae*, insisting that he conduct a serious and thorough investigation. I expected a lot from him. We have to admit, unfortunately, that he failed to achieve his objective. I am sorry about that, but it is unfortunately too late to restart the machine and, at this important moment, it is also highly likely that after a full investigation, I would have arrived at the same conclusion as the *amicus curiae*, even though it should have been arrived at in accordance with the rules of the profession").

³⁷³ Interview with Ms. Christine Graham of the OTP, ICTR-14, Arusha, 28 May 2008, p. 6.

³⁷⁴ N.A. COMBS, *Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge, Cambridge University Press, 2010, pp. 64 -65.

³⁷⁵ *Ibid.*, p. 122.

³⁷⁶ *Ibid.*, p. 41.

³⁷⁷ *Ibid.*, pp. 79 - 100; A. ZAHAR, *Witness Memory and the Manufacture of Evidence at the International Criminal Tribunals*, in C. STAHN and L. VAN DEN HERIK (eds.), *Future Perspectives on International Criminal Justice*, Cambridge, Cambridge University Press, 2010, p. 602 (referring to the "cultural gulf" between the witnesses and the international judges); C. BUISMAN, *Ascertainment of the Truth in International Criminal Justice*, 2012 (available at: <http://bura.brunel.ac.uk/handle/2438/6555>, last visited 18 November 2013), p. 334. Consider also Interview with a member of the OTP, ICTR-13, Arusha, 21 May 2008, p. 4 (labelling language and cultural barriers two important challenges in the conduct of investigations by the ICTR); Interview with a member of the OTP, ICTR-09, Arusha, 20 May 2008, p. 4.

³⁷⁸ J. JACKSON and Y. M'BOGE, *The effect of Legal Culture on the Development of International Evidentiary Practice: From the "Robing Room" to the "Melting Pot"*, in «Leiden Journal of International Law», Vol. 26, 2013, p. 959.

inconsistencies.³⁷⁹ This may require creative solutions. One member of the ECCC Office of the Co-Investigating Judges observed how witnesses may not recall the exact date, but may remember the part of the rice planting process that was going on, or may recall that an event happened during the wheat picking process.³⁸⁰ Another example of a problem encountered by investigators of the ECCC is the fact that witnesses interviewed tended to agree with someone in a position of authority.³⁸¹ Witnesses may also be reluctant or uncomfortable to discuss certain issues during the initial interview.³⁸² It may often be impossible for fact-finders to discern when cultural divergences explain inconsistencies.³⁸³ One sensible solution to reduce the cultural (and linguistic) distance between investigators and witnesses, is to employ local investigators.³⁸⁴ In such cases, oversight by the court or tribunal investigator is necessary.³⁸⁵

Additional factors may be noted. Differences between pre-trial witness statements and testimony at trial can further be explained by the passage of time as the *human memory* erodes over time. Because trials of international crimes as well as the evidence gathering often take place considerable time after the events, they are especially vulnerable to this.³⁸⁶ Doubtless, the time interval has an influence on the memory of the witness.³⁸⁷ The witness will probably

³⁷⁹ N.A. COMBS, *Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge, Cambridge University Press, 2010, p. 122.

³⁸⁰ Interview with a member of the OCIJ, ECCC-03, Phnom-Penh, 16 November 2009, p. 13.

³⁸¹ Interview with a member of the OCIJ, ECCC-03, Phnom-Penh, 16 November 2009, p. 13.

³⁸² N.A. COMBS, *Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge, Cambridge University Press, 2010, p. 122; J. JACKSON and Y. M'BOGE, *The effect of Legal Culture on the Development of International Evidentiary Practice: From the "Robbing Room" to the "Melting Pot"*, in «*Leiden Journal of International Law*», Vol. 26, 2013, p. 959 (referring to problems caused by the absence of the word 'rape' in Kinyarwanda).

³⁸³ N.A. COMBS, *Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge, Cambridge University Press, 2010, p. 123.

³⁸⁴ This was acknowledged by a member of the ICTR OTP to the author: "Then of course you find there is very often a challenge of communication and understanding between our investigators and the people on the ground. Although many or even most of our investigators come from Africa, they come from different regions with different traditions and they speak different languages. It is not different from bringing someone from Europe to investigate a case in Rwanda. You can bring me from Gambia and still have the same difficulty of communication. What we have tried to do is to employ Rwandan investigators at the lower level, as assistant investigators. Of course, we need to make sure that they have not been involved in these offences." Interview with a member of the OTP, ICTR-09, Arusha, 20 May 2008, p. 4. See also Interview with a member of the OCIJ, ECCC-03, Phnom-Penh, 16 November 2009, p. 13.

³⁸⁵ J. JACKSON and Y. M'BOGE, *The effect of Legal Culture on the Development of International Evidentiary Practice: From the "Robbing Room" to the "Melting Pot"*, in «*Leiden Journal of International Law*», Vol. 26, 2013, p. 959 (the authors refer to the interview with an ICTR Defence Counsel. The interviewee noted that "You cannot just rely on a local investigator because...they're not very familiar with how it works on the court,...also how to take statements properly, which is very important").

³⁸⁶ The most extreme example in that regard is the ECCC, a tribunal whose temporal jurisdiction ends thirty years ago.

³⁸⁷ Consider e.g. Interview with a member of the OTP, ICTR-10, Arusha, 21 May 2008, p. 5 ("Some of the witnesses no longer remember all the details of what happened during the genocide" (when asked about the

have read or heard about some of the defendants, or could have been in touch with other witnesses.³⁸⁸ Talking about the events may change the details of the witness' recollection. The traumatic situation in which the witnesses found themselves during the events about which they testify and the subsequent therapy they may get is yet another factor which can negatively influence the witness' recollection.³⁸⁹ Discrepancies in the statements have also been explained by differences in the questions put to the witness by the investigator and at trial.³⁹⁰

Overall, the accumulated effect of these shortcomings should not be underestimated. As noted by COMBS, the practice of Trial Chambers is "to place little weight on witness statements and explain away all but the most serious discrepancies between their statements and subsequent testimony."³⁹¹ However, this "inclination to minimize the relevance of pre-trial statements given the shoddy nature of some statement taking" [...] "eliminate[s] a valuable mechanism for assessing witness credibility and" [...] "substantially disadvantage[s] defendants."³⁹² This suggests that it is important to improve the pre-trial statement taking process. In line with what was said previously, it is also important that witness interviews are transcribed (rather than summarised), and that this includes all questions asked and answers

major challenges in conducting investigations)). In a similar vein, consider Interview with a member of the OTP, ICTR-13, Arusha, 21 May 2008, p. 5.

³⁸⁸ P. WALD, *Dealing with Witnesses in War Crimes Trials*, in «Yale Human Rights and Development Law Journal», Vol. 5, 2002, pp. 227-228.

³⁸⁹ Interview with a member of the OTP, ICTR-12, Arusha, 21 May 2008, p. 4 ("The crimes were so heinous, and it is not uncommon that many witnesses were traumatized"); R. CRYER, *Witness Evidence Before International Criminal Tribunals*, in «The Law and Practice of International Courts and Tribunals», Vol. 3, 2003, p. 431 *et seq.* citing ICTY, Judgement, *Prosecutor v. Furundžija*, Case No. IT-95-17-T, 10 December 1998, par. 102 *et seq.* In that case, the question arose whether a witness, who was diagnosed as having Post Traumatic Stress Disorder (PTSD) can be a reliable witness; ICTY, Judgement, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, 26 February 2009, T. Ch., par. 49.

³⁹⁰ As acknowledged by the ICTY jurisprudence, see *e.g.* ICTY, Judgement, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, T. Ch., 26 February 2009, par. 49; ICTY, Judgement, *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, T. Ch. II, 29 November 2002, par. 20; ICTR, Judgement, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, 7 June 2001, par. 24, 411.

³⁹¹ N.A. COMBS, *Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge, Cambridge University Press, 2010, p. 280.

³⁹² *Ibid.*, pp. 280 – 281. Elsewhere, the author even seems to doubt whether investigations conducted by these international(ised) criminal courts and tribunals may live up to the expectations: "The Western trial form also creates the expectation that pretrial investigations will serve to narrow contested issues both by establishing background facts and by providing an efficacious means of testing witness accounts. Investigations are conducted largely by court officials in inquisitorial legal systems and by the parties in adversarial systems, but in either case investigations are presumed capable of providing fact finders with a degree of certainty about a wide range of issues surrounding those that are disputed at trial (*ibid.*, p. 178)." It may well be the case that "international criminal trials purport a fact-finding competence that they do not possess (*ibid.*, p. 180)."

given. An audio or video recording of the witness interview is preferable. Further, witness interviews should be carefully prepared and qualified investigators should be employed.³⁹³

On top of these problems associated with the collection of witness testimony come the many logistical and other obstacles in obtaining witness evidence on the ground. Many ICTR and SCSL defence counsels interviewed confirmed that getting access to witnesses was a major obstacle faced in conducting their investigations.³⁹⁴ In particular, many potential witnesses were afraid to be associated with the Defence.³⁹⁵ Consequently, a rapport first had to be established with these individuals, before they would agree to testify.³⁹⁶ More alarming, ICTR Defence counsel routinely referred to harassment or intimidation by the Rwandese authorities as an important challenge in collecting witness evidence.³⁹⁷ They refer to instances where witnesses who were contacted by or testified on behalf of the Defence (or their families) were

³⁹³ In this regard, consider BUISMAN, who seems to maintain that investigative deficits are rather caused by the poor quality of some persons working with these institutions, rather than to be explained by cultural differences. C. BUISMAN, *Ascertainment of the Truth in International Criminal Justice*, 2012, p. 358 (available at: <http://bura.brunel.ac.uk/handle/2438/6555>, last visited 18 November 2013).

³⁹⁴ Interview with Mr. Tom Moran, Defence counsel, ICTR-24, Arusha, 29 May 2008, p. 3 (“But finding the witnesses in the hills in Rwanda is tough. Just physically getting there, getting them to talk to you”); Interview with a Defence Counsel at the ICTR, ICTR-25, Arusha, 29 May 2008, p. 3; Interview with Mr. Gershom Otachi BW’Omanwa, Defence Counsel, ICTR-27, Arusha, 30 May 2008, p. 4 (naming the practical difficulties of getting witnesses the biggest challenge in conducting investigations); Interview with a Defence Counsel at the SCSL, SCSL-04, Freetown, 19-20 October 2009, pp. 11-12.

³⁹⁵ Consider e.g. Interview with a Defence counsel at the SCSL, SCSL-03, Freetown, 20 October 2009, p. 7 (“people being afraid to talk for one reason or another. They do not want to be seen associated with [name of defendant]”); Interview with Dr. O’Shea, Defence Counsel, ICTR-23, Arusha, 28 May 2008, p. 7 (“As defence counsel, you will find that actually getting witnesses is quite difficult within the context of this Tribunal. People are very fearful to come here. They are very fearful that the authorities know they have spoken to us. The procedure of bringing a witness here involves the Rwandan authorities. You cannot just bring a witness here. The Rwandan authorities know when a witness is brought here, unless you bring a witness here surreptitiously. So people are very fearful, and I think the authorities feed on that fear. It is not very tangible, you cannot put your finger on it sometimes, you know?”); Interview with Mr. Gershom Otachi BW’Omanwa, Defence Counsel, ICTR-27, Arusha, 30 May 2008, p. 4 (“In fact, we have had – many defence teams have had problems getting witnesses from Rwanda, because there is a background of the fact that the current system in Rwanda was a force that was fighting our clients. These were protagonists. And as things stand we feel that, you know, the side that won the war is in charge of everything. It is like there is a certain influence they have on who can come and what they can say. In such a way that also, sometimes defense witnesses say that they are apprehensive, you know, they really fear coming to testify”).

³⁹⁶ As a member of a defence team describes, it, “People who live through wars, the ones who did not flee, had particular skills at surviving, if they lived inside a conflict situation, and none of those skills involve trusting people who randomly show up and say they are there to help you out. So it took a long time to build trust with defence witnesses”). See Interview with a Defence Counsel at the SCSL, SCSL-04, Freetown, 19-20 October 2009, p. 24.

³⁹⁷ Consider e.g. Interview with a Defence Counsel of the ICTR, ICTR-26, Arusha, 29 May 2008, p. 8 (“it is very hard for us in general to be able to guarantee, to the degree that is necessary, the safety, security and the confidentiality of these witnesses. That, to me, is the biggest problem. There are countless examples of witnesses who have been harassed or their families have been harassed. Or after they testify, immigration in country X goes after them. No matter how private your discussions are with them, how careful you are, something happens with the information”).

later arrested or tried in proceedings by the *Gacaca* courts.³⁹⁸ In general, the capacity of the international courts and tribunals to protect these witnesses appears to be limited. One defence counsel of the SCSL likewise confirmed that similar problems existed at the SCSL, but described how these problems were being resolved, in particular with the change of government.³⁹⁹

Other shortcomings indicated by the Defence, including the absence of sufficient investigators or means of transportation relate to the general issue of the presence/lack of adequate resources.⁴⁰⁰ In this regard, it is important that the particularities of the case are taken into consideration. For example, because ICTR Defence witnesses are geographically spread out,

³⁹⁸ Interview with Peter Zaduk, Defence Counsel, ICTR-22, Arusha, 26 May 2008, p. 6 (“the government of Rwanda controls most of the witnesses who are still in the country, including the defense witnesses, many of whom are very fearful about testifying. We had a witness in our case, a very helpful witness to us, who came in November 2006 to testify from Rwanda, and did not testify at that session for one reason or another, and he was brought back in February of 2007 to give his evidence. In the meantime, he had been arrested on a murder that had occurred during the genocide in 1994, brought to a jurisdiction different than where the crime arose in Rwanda, tried before the Gacaca court in one day on the basis of the evidence of one witness who did not say anything against him until after he came here to Arusha to testify for the Defense, and then he was sentenced to 25 years. That was just intimidation of our witness and intimidation of other witnesses who would want to cooperate with the Defense. That has been a recurring problem all the way through this”); Interview with Mr. Tom Moran, Defence counsel, ICTR-24, Arusha, 29 May 2008, p. 3 (“there is pressure, either direct or indirect or felt, on witnesses”); Interview with a Defence Counsel of the ICTR, ICTR-26, Arusha, 29 May 2008, p. 8 (“If he goes back, not only is he followed by immigration, but if it is Rwanda, they also have these Gacaca proceedings. Now, can I show you a correlation between the charges there (in Rwanda) and having testified here? No, I have never made a study. But the empirical evidence is extremely distressing, especially for those who were penalized”); Interview with Mr. Taku, Defence counsel, ICTR-21, Arusha, 23 May 2008, p. 4 (“You know the Rwandan government keeps a list of alleged perpetrators of the genocide. And if you conduct a study of that list from 1996 to date, you will see in the variations and changes in the list people who have not at specific locations from the outset, but as soon as they accept to come to testify on behalf of the defendant, they became suspects in the alleged perpetration of crimes in those areas in which they never visited. You also find that most of our defense investigators are Rwandese citizens who have been of help to us, and many of them have had to withdraw or leave because the Rwandan government, as soon as it finds out that they are investigating for the Defense, accuses them of committing genocide. And there are many cases of people who were not in Rwanda at the time of the crimes, some of whom were still too young, but nevertheless, they still put their names on the list. This list is used as a sort of blackmail against Rwandan citizens who would like to assist the Defense” [...] “this Gacaca court procedure is used to intimidate potential witnesses, in the sense that in the Gacaca proceedings, anybody can come out and denounce you: “Yes, this person burned down my home”, or “This person intimidated me during the genocide”. Because of the nature of proceedings, the system uses it to intimidate and imprison any potential witnesses. As soon as somebody appears on your witness list, the next thing you hear is that this person is detained in the Gacaca proceedings”).

³⁹⁹ Interview with Mr. Jordash, Defence Counsel, SCSL-11, The Hague, 7 December 2009, p. 6 (“In the first few years from 2003 to 2006, there was a problem of witnesses being frightened of the government, being frightened of associating with the rebels which is an understandable fear. Once there was some distance between the end of the conflict and the trial process that became easier. It certainly became much easier when there was a change of government. There was a real noticeable change when the government changed, that was a big thing”).

⁴⁰⁰ Consider e.g. Interview with Mr. Taku, Defence counsel, ICTR-21, Arusha, 23 May 2008, p. 7; Interview with Dr. O’Shea, Defence Counsel, ICTR-23, Arusha, 28 May 2008, pp. 3-4.

more resources will be required.⁴⁰¹ Finally, some obstacles in collecting witness evidence are rather peculiar to particular investigations. For example, one issue which plagued investigations by the *Taylor* defence team were the UN sanctions, including a travel ban and frozen assets, which targeted persons associated with Charles Taylor and which had “a chilling effect” on the Defence’s ability to talk to and interview witnesses in Liberia. Witnesses were afraid to end on one of the lists maintained by the Security Council Sanctions Committee.⁴⁰²

VIII. COMPARATIVE ANALYSIS: SOME TENTATIVE CONCLUSIONS AND RECOMMENDATIONS

The preceding analysis allows us to draw some tentative conclusions on the questioning of witnesses in the course of the investigation. Only a few procedural provisions are commonly shared by all tribunals scrutinised and thus firmly established at the international level. Evidently, the procedural framework of all tribunals includes the prosecutorial power to question witnesses. At the ECCC, this power is limited in principle to the preliminary examination. In the course of the judicial investigation, the Co-Investigating Judges are empowered to interview witnesses. In the absence of an express power for the Defence to question witnesses, such a power derives from the accused’s right to examine witnesses, the principle of equality of arms, and the right of the accused to have adequate time and facilities for the preparation of his or her defence. At the ECCC, the Defence is prohibited from interviewing witnesses and can only undertake preliminary inquiries in order to exercise its right to request the Co-Investigating Judges to undertake investigative actions (and interview witnesses).

⁴⁰¹ C. BUISMAN, *Ascertainment of the Truth in International Criminal Justice*, 2012, (available at: <http://bura.brunel.ac.uk/handle/2438/6555>, last visited 18 November 2013), p. 159.

⁴⁰² Interview with a Defence counsel at the SCSL, SCSL-03, Freetown, 20 October 2009, p. 7 (“basically anyone associated with Charles Taylor, as determined by the Security Council, can be placed on one of those lists and they are not allowed to travel outside of Liberia or to use money or invest money outside of Liberia. Again it is one of the situations where there are no reasons given, you wake up one morning and find your name on the list and there is no reason given why you were put on the list and the procedure to delist yourself basically requires the intervention of another country writing to the Security Council on your behalf. It is a very long and convoluted process, so understandably people who are already on the list that we could approach [...] say, “Look, if I talk to you now, I may never come off this list – it will see me as continuing my links, whatever they be, with Charles Taylor and therefore I’m not willing to take that risk.” People who are not on the list say: “I’m not coming anywhere near the Taylor defence team because if I am seen to be showing up and testifying for the Defence, that would be seen as if I do have links to Charles Taylor and maybe next year I will wake up and there will be my name as well.” And that has been a problem that we have not really known how to deal with to be quite honest because it is not as if the Special Court has any power to tell the Security Council not to put witness names on the list or not to put people under a travel ban or assets freeze that come and testify before the Court”).

Furthermore, it can be concluded that all tribunals and courts under review allow for the admission of out-of-court witness statements resulting from pre-trial witness interviews into evidence at trial, albeit to varying extents.

Both the *ad hoc* tribunals and the SCSL can compel witnesses to be interviewed by the Prosecutor or the Defence during the investigation, under certain conditions. In turn, the ICC lacks the power to directly compel the appearance of individuals for questioning in the context of investigations. Also the ECCC and the STL recognise the possibility to compel witnesses to be interviewed by the Co-Investigating Judges (ECCC), or by the Defence, Prosecutor, or Pre-Trial Judge (STL).

Only the ICC and the ECCC contain a duty incumbent on the Prosecutor to compile a record of every interview. The procedural frameworks of the *ad hoc* tribunals, the SCSL and the STL do not provide for such obligation, and the ICTY jurisprudence dismissed the existence of such obligation. However, it was argued how such obligation should derive from disclosure obligations of the Prosecutor and is a prerequisite for the meaningful exercise of defence rights. Whereas none of the procedural frameworks of the tribunals under review require an audio or video recording, the ECCC and ICC procedural framework encourage such procedure, especially in relation to vulnerable witnesses. The STL only provides for the audio-visual recording of witness interviews when a deposition is taken by the Pre-Trial Judge or by the national state.

The importance of an audio or video recording lies where it enhances the transparency of the witness statement recording process and allows for *ex post* control over the conduct of the interview. It enables the Court to check what was said during the interview, the manner in which it was said and how it was perceived by the witness. In addition, it allows for any errors in the interpretation of questions and answers to be detected. The significance thereof should be understood in light of existing linguistic, cultural and other barriers in collecting witness evidence by international courts and tribunals. Hence, it is recommended that a duty to compile a record of witness statements as well as a duty to provide an audio or video recording of witness interviews, as far as practicably possible, are expressly provided for in international criminal procedure.

Only the procedural framework of the ICC and the ECCC provide for detailed procedural rules for taking witness statements. The case law of the *ad hoc* tribunals provides us with ‘guidelines’ as to the ideal standard for taking witness statements. It was discussed above how pre-trial witness statements are increasingly allowed in evidence at trial. In light of this evolution, clear, public and standardised guidelines or SOP’s should be provided for at all courts and tribunals. They should clearly outline the procedure for the witness statement taking process. Judges may assist in this process and draw the boundaries by setting out the principles which are to apply.⁴⁰³ These guidelines would enhance the transparency of the questioning and statement-recording processes. It is important that the transcript is a full witness statement and includes all questions which were put to the witness. Such guidelines would allow for Judges to *ex post* check whether these guidelines have in fact been upheld by the investigators. An additional need for such guidelines stems from the fact that the investigators come from different countries and have different legal backgrounds. As BERGSMO and KEEGAN put it:

“In a Prosecutor’s Office which includes personnel from more than thirty countries, all of whom are accustomed to conducting operations in accordance with the requirements of their respective state systems, even an apparently simple issue as how to take a statement or deciding what form the statement should take can prove challenging.”⁴⁰⁴

Only the ICC and the ECCC provide for an explicit privilege for the witness against self-incrimination. The status of the person interviewed may change. A person who is interviewed as a witness may later become a suspect. Providing witnesses with a privilege against self-incrimination takes this situation into account and ensures protection against self-incrimination at the early stages of the investigation. Hence, the model set by the ICC and the ECCC should be followed by other jurisdictions under review. At the ECCC, such privilege is unqualified during the questioning of the witness by the Prosecutor. In the course of the judicial investigation, this right is qualified and the witness may be compelled to answer a question after assurances of confidentiality and immunity from use are provided. Unlike the ECCC, the ICC Statute does not explicitly state that the witness should be informed about the

⁴⁰³ Interview with Mr. Jordash, Defence Counsel, SCSL-11, The Hague, 7 December 2009, p. 8.

⁴⁰⁴ M. BERGSMO and M.J.KEEGAN, Case Presentation for the International Criminal Tribunal for the Former Yugoslavia, in Manual on Human Rights Monitoring: An Introduction for Human Rights Field Officers, Oslo, Norwegian Centre for Human Rights, 2008, p.9.

existence of this privilege prior to the commencement of the interview. Such requirement is important to ensure the effective realisation of this right.

In line with the findings regarding the interrogation of suspects and accused persons, the use of oppressive conduct (including coercion, duress, threats, torture and other forms of cruel, inhuman or degrading treatment) during witness interviews is prohibited.

Finally, a right to the free assistance of an interpreter during witness questioning is only explicitly provided for before the ICC. The more seasoned tribunals do not explicitly mention it, but it may be assumed that witnesses are provided with an interpreter if language problems arise. The ICC Statute includes a stronger protection by requiring a 'competent' interpreter and interpretation if a witness is questioned in any other language than the accused or suspect fully understands and speaks. It also includes a welcome addition in the form of a right to such translations prior to questioning as are necessary to meet the requirements of fairness.

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INTRODUCTION

International criminal investigations necessarily encompass the use of coercive measures, like in national criminal investigations. At the international level, however, and in contrast with national criminal justice systems, these powers seem broadly formulated and their use seems unrestricted. A frequently heard argument justifying these extensive powers is that they are a necessary corollary of the fact that these international criminal courts and tribunals lack their own policing and enforcement powers. These broadly formulated powers are indispensable where the international criminal courts and tribunals necessarily depend on the cooperation by national states, for example in the arrest of suspects or the execution of search and seizures.¹ This chapter seeks to examine and to critically assess the nature and scope of these coercive measures in international criminal procedural law. Special attention will be given to the interplay between the domestic and the international level in the execution of these coercive (compulsory) measures. It is important to note at the outset that coercive measures that restrict liberty of individuals are excluded from this chapter and will be examined in the following chapter.

Part I of this chapter begins with the adoption of a working definition of ‘coercive measures’ in international criminal procedural law. Next, how coercive measures are executed under international criminal procedure (either by the Prosecutor through direct enforcement or by the domestic states following a request to that extent) will be assessed. The section then continues with a more general part inquiring into the existing thresholds, procedural requirements, and restrictions for the use of coercive measures. Firstly, it will be assessed whether the Prosecutor is obliged to obtain a judicial warrant under the law of international

* This chapter is an expanded and updated version of this author’s section ‘Non-Custodial Coercive Investigative Acts’ in K. DE MEESTER, K. PITCHER, R. RASTAN and G. SLUITER, *Investigation, Coercive Measures, Arrest and Surrender*, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, pp. 282 – 311.

¹ A view upheld by most OTP staff interviewed at the ICTR, see Interview with Dr. Alex Obote Odora of the OTP, ICTR-11, Arusha, 21 May 2008, p. 8 (discerning two distinct reasons why such broad formulation of powers is necessary: one reason is to give the Prosecutor greater prospects of getting reasonable access to member states, another reason is the type of criminality the international criminal tribunals are dealing with: complex investigations and participation at the highest level of state); Interview with Ms. Christine Graham of the OTP, ICTR-14, Arusha, 28 May 2008, p. 7 (arguing that while the investigative powers of the Prosecutor are broad, they ultimately are not sweeping as the OTP has to rely on states to execute. It would be difficult to draft a procedural framework which fits to all different situations, as the OTP has to cooperate with so many different states); Interview with a member of the OTP, ICTR-13, Arusha, 21 May 2008, p. 7; Interview with a member of the OTP, ICTR-12, Arusha, 21 May 2008, pp. 5-6; Interview with a member of the OTP, ICTR-10, Arusha, 21 May 2008, p. 6.

criminal procedure. Secondly, whether a general threshold exists for the use of coercive measures will be asked. Thirdly, an attempt will be made to construe other material conditions for the use of coercive measures, including the principle of proportionality, the principle of necessity, and the principle of subsidiarity. This general section concludes with a short, but necessary, detour into the law of evidence by discussing the possible consequences of irregularities to the use of the resulting evidence at trial.

In Part II of this chapter, specific coercive measures, including search and seizures or the interception of communications, will be examined. Again, measures encompassing the restriction or deprivation of liberty are excluded from this chapter.

I. GENERAL

I.1. Definition

It is striking that none of the international criminal courts or tribunals explicitly distinguish between coercive and non-coercive investigative measures.² None of the statutory documents of these jurisdictions contain a useful definition of what should be understood as constituting ‘coercive measures’. Nowhere does the jurisprudence of the international criminal courts and tribunals explicitly refer to the existence of this distinction. However, it may rightly be asked whether the specific nature of coercive measures does not warrant a specific procedural treatment.

Only two of the internationalised criminal tribunals, notably the ECCC and the SPSC, distinguish between non-coercive and coercive investigative measures. While none of these ‘hybrids’ expressly provide us with a ready-to-use definition, their statutory documents indicate some of these coercive measures’ distinctive features. According to the Extraordinary Chamber’s Internal Rules, firstly, these measures can only be conducted under the judicial

² Note that other distinctions have been made in the literature, e.g. between ‘simple investigative measures’ and ‘qualified investigative measures’. According to SAFFERLING, the former category refers to investigative acts which have no relevance to individuals’ rights and do not need specific authority. The latter category refers to those investigative acts which intrude into the rights of individuals and require special legitimacy. See C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, pp. 257 – 258. However, this distinction is grossly similar to the distinction between coercive and non-coercive investigative acts.

authorities' control.³ Secondly, it concerns powers which cannot be delegated to investigators, neither by the Co-Prosecutors during the preliminary investigation or by the Co-Investigating Judges in the context of a judicial investigation.⁴ Thirdly, they should be 'strictly limited to the needs of the proceedings'.⁵ This language is reminiscent of the 'necessity requirement', a requirement which, arguably, also exists in the procedural framework of the international criminal tribunals, as will be explained.⁶ Fourthly, all coercive measures taken should be 'proportionate to the gravity of the offence'.⁷ Lastly, whenever the Co-Prosecutors or Co-Investigating Judges resort to coercive measures, this should be done in full respect of human dignity.⁸

In turn, before the SPSC, a warrant or an order by the Investigating Judge was normally required for the adoption of coercive measures during the investigation.⁹ Furthermore, the Investigating Judge could only issue orders or warrants lawfully requested by the public Prosecutor when there were 'reasonable grounds to do so'.¹⁰

In order to provide a working definition of 'coercive measures' (intrusive investigative measures) what their nature is and what function they fulfil within criminal proceedings should be asked. It is clear that most coercive measures undertaken serve the broader goal of 'truth-finding' and support the administration of justice or are supportive of other measures which serve this goal. Furthermore, coercive measures may also be taken to safeguard the execution of sentences.¹¹ These measures may equally fulfil other functions, including specific prevention (by detaining the accused in order to prevent additional crimes from being committed or in the interest of protection against dangerous persons or goods).¹²

³ Rule 21 (2) ECCC IR.

⁴ Respectively Rules 13 (4) (a) and 14 (5) ECCC IR and Rule 62 (1) of the ECCC IR.

⁵ Rule 21 (2) ECCC IR.

⁶ See *infra*, Chapter 6, I.6.

⁷ Rule 21 (2) ECCC IR.

⁸ Rule 21 (2) ECCC IR.

⁹ Section 9 (3) TRCP.

¹⁰ Section 9 (2) TRCP.

¹¹ In that respect, it may be interesting to see in how far the Prosecutor can seize goods of a suspect or accused person to provide compensation to the victims, if such person were to be convicted. See in that respect Rule 105 of the ICTY and ICTR RPE and Rule 104 SCSL RPE on the restitution of property. See *infra* Chapter 6, II.3.

¹² See *e.g.* Article 58 (1) (b) (iii) ICC Statute, mentioning 'preventing a person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances' as one of the grounds on which the Pre-Trial Chamber may issue an arrest warrant.

Coercive measures are, by nature, investigative acts which infringe upon the rights and liberties of the suspect (accused) or third persons.¹³ These measures are applied in criminal investigations *in defiance of the will of the person*. In the domestic context, these measures infringe upon rights and liberties of individuals that are laid down in a Constitution. In the international arena, these rights and liberties primarily derive from international human rights law.

In every criminal justice system, the use of coercive measures is restricted, either by setting certain thresholds or by imposing certain substantive requirements for their use.¹⁴ It will be examined in this chapter in how far such thresholds or substantive requirements can be identified in international criminal procedural law.

I.2. Direct enforcement v. request for judicial assistance

It follows from the holding of the ICTY Trial Chamber in the *Kordić and Čerkez* case that the execution of coercive measures by the Prosecutor, encompassing the taking of enforcement action, directly on the territory of Bosnia Herzegovina, is “perfectly within the powers of the Prosecution provided for in the Statute.”¹⁵ Consequently, the direct enforcement of coercive acts, without directing a request for legal assistance to the national authorities concerned, is possible. Nevertheless, the ICTY Appeals Chamber clarified, in *Blaškić*, that *normally* the Prosecutor should rely on the cooperation of the competent judicial or prosecutorial authorities of the country concerned except when the Prosecutor is authorised by national law or special agreement to execute the coercive measures directly on the territory of the state.¹⁶

¹³ B. DE SMET, *Internationale Samenwerking in Strafzaken tussen Angelsaksische en continentale Landen, Intersentia Rechtswetenschappen, Antwerpen – Groningen, 1999, p. 85.*

¹⁴ *Ibid.*, p. 107.

¹⁵ ICTY, Decision Stating Reasons for Trial Chamber’s Ruling of 1 June 1999 Rejecting Defence Motion to Suppress Evidence, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, T. Ch. III, 25 June 1999, p. 6. *In casu*, no search warrant had been obtained from the authorities of Bosnia Herzegovina, but a search warrant had been issued by an ICTY Judge prior to the search operation. The Prosecutor relied on the assistance of the SFOR international forces. Consider also ICTY, Transcript, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, T. Ch. III, 31 May 1999, pp. 2975 – 3045 and ICTY, Judgement, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, A. Ch., 3 May 2006, par. 238.

¹⁶ ICTY, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v. Blaškić*, Case No. IT-95-14, A. Ch., 29 October 1997, par. 53 and 55. It should be noted that only few laws on the domestic implementation of the Statutes include the possibility for the Prosecutor to work independently on their territory. The German implementing law, for example, includes this possibility but explicitly prohibits the taking of coercive measures and states that “the initiation and execution of coercive measures shall remain the preserve of the competent German authorities and shall conform to German law.” See Section 4 (4) of the Law on Cooperation with the International Tribunal in respect of the Former

Furthermore, the Chamber has acknowledged the existence of a second exception regarding states or entities of the Former Yugoslavia against whom coercive measures can be executed directly by the tribunal as part of its inherent powers.¹⁷ While the holding of the Appeals Chamber in *Blaškić* may be interpreted as implying that normally, for the direct execution of coercive measures on the territory of a state, the Prosecutor “must” turn to the national authorities this reading would contradict Article 18 (2) of the ICTY Statute (Article 17 (2) ICTR Statute), which does not restrict the on-site investigation powers of the Prosecutor in this way (‘the Prosecutor may, *as appropriate*, seek the assistance of the State authorities concerned’).

The ICC Prosecutor lacks similar powers to directly undertake coercive actions on the territory of a state. The Prosecutor has to ensure the cooperation of the state concerned and will send a request for assistance before resorting to coercive measures.¹⁸ Only in the exceptional scenario of a ‘failed state’ can the ICC Prosecutor directly execute coercive

Yugoslavia (Law on the International Yugoslavia Tribunal) of 10 April 1995. The Norwegian implementing law allows the Prosecutor to work independently on its territory, but only upon permission to do so. See Section 3 *in fine* of ‘Act No. 38 of 24 June 1994 relating to the incorporation into Norwegian law of the United Nations Security Council Resolution on the establishment of international tribunals for crimes committed in the former Yugoslavia and Rwanda’. Also the Finnish implementing law provides for the possibility to operate independently on its territory. See Section 7 of the Act on the Jurisdiction of the International Tribunal for the Prosecution of Persons Responsible for Crimes Committed in the Territory of the Former Yugoslavia and on Legal Assistance to the International Tribunal, 15 January 1994.

¹⁷ ICTY, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v. Blaškić*, Case No. IT-95-14, A. Ch., 29 October 1997, par. 53, 55. According to the Appeals Chamber, this category includes states on the territory of which crimes may have been perpetrated and some authorities of which might be implicated in the commission of these crimes. Consider also ICTY, Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, T. Ch. I, 12 March 2010, par. 30. No further explanation for such distinction between the states or the entities of the former Yugoslavia and other UN member states is provided for. Consider A. ALAMUDDIN, Collection of Evidence, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), Principles of Evidence in International Criminal Justice, Oxford, Oxford University Press, 2010, p. 256 (the author argues that “[t]his distinction is perplexing.” “The reason for the distinction seems to be more pragmatic than judicial”) and p. 259 (arguing that such distinction limits the powers of the Prosecutor “on a clearly pragmatic but questionable legal basis”). Interesting in that regard is A. ZAHAR, International Court and Private Citizen, in «New Criminal Law Review», Vol. 12, 2009, pp. 576-577 (“I once had to prepare a judicial order authorizing a raid by UNMIK police and ICTY investigators on a ministerial building in Kosovo for the purpose of seizing evidence. The order was pursuant to rule 54. I remember thinking that we would never be issuing such an order to raid governmental offices located in, say, Switzerland, or, for that matter, Croatia or Serbia. However, in Kosovo, we could get away with it; and rule 54 provided plausible cover in the event of any protest—if, that is, one were prepared to overlook the circularity of the provision and the fact that it was judge-made”).

¹⁸ Consider Article 99 (4) of the ICC Statute: ‘Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed *without any compulsory measures*, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place...’ (emphasis added). Nothing seems to prevent States Parties or other states (on the basis of a written agreement or an *ad hoc* arrangement) to provide the ICC Prosecutor with broader powers to conduct on site investigations on its territory.

measures on the territory of a state and only then with the authorisation of the Pre-Trial Chamber.¹⁹ In this case, the discharge of the Court's mandate and effective prosecution might justify the power of the Prosecutor to exercise on-site investigations including forcible measures.²⁰ In cases where a state has been requested to execute coercive measures, the request must be executed in accordance with national law and in accordance with procedures which have been prescribed in the request.²¹ This offers leeway to the Prosecution to request the participation of OTP staff in the execution of the request.

Where coercive action is undertaken by the national authorities, a further distinction should be drawn between (i) situations in which the evidence has been gathered pursuant to a request and (ii) situations in which the evidence is gathered prior to, or independent from, the issuance of a request. Evidence may already have been gathered by national authorities without a request being issued to that effect by the international criminal tribunals. Often, this evidence has been gathered for non-judicial purposes. Here, for example, the important role evidence obtained through the interception of communications has played in the proceedings before the ICTY can be mentioned.²² Most likely, these communications have been gathered during the war outside the existing national procedural framework concerning the interception of communications. The extent to which these intercepts can be used in international

¹⁹ Article 57 (3) (d) of the ICC Statute. While the formulation of the provision seems to limit this possibility to States Parties, this possibility arguably extends to non states parties in case of a referral of the situation by the Security Council (in which case such power derives directly from Chapter VII of the United Nations Charter) and in case of the acceptance by a state of the jurisdiction of the Court in relation to a particular crime under Article 12 (3) ICC Statute *juncto* Rule 44 ICC RPE.

²⁰ G. SLUITER, *International Criminal Adjudication and the Collection of Evidence*, Antwerp, Intersentia, 2002, p. 309; F. GUARIGLIA, K. HARRIS and G. HOCHMAYR, Article 57, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, München, Verlag C.H. Beck, 2008, pp. 1128-1129.

²¹ Article 99 (1) ICC Statute. With regard to the Situation in the DRC, it may be noted that the Memorandum of Understanding between the ICC and MONUC allows MONUC to provide assistance in the execution of requests for cooperation involving coercive powers, at the request of the authorities of the DRC. See Memorandum of Understanding between the United Nations and the International Criminal Court Concerning Cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court, 8 November 2005. Consider R. RASTAN, *The Responsibility to Enforce – Connecting Justice with Unity*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, pp. 173 -174.

²² C. DEL PONTE, *Investigation and Prosecution of Large-Scale Crimes at the International Level*, in «Journal of International Criminal Justice», Vol. 4, 2006, pp. 554-555; S. SWOBODA, *Admitting Relevant and Reliable Evidence*, in T. KRUESSMANN, *ICTY: Towards a Fair Trial?*, Antwerp, Intersentia, 2008, p. 389. See *infra*, Chapter 6, II.4.

proceedings is important as these intercepts can be of invaluable importance to the Prosecution.²³

I.3. Necessity of a judicial warrant

The execution of coercive powers by the Prosecutor, under international criminal procedural law, does not expressly require any form of judicial authorisation. Nevertheless, it has been argued that the statutory documents of the *ad hoc* tribunals and the SCSL can be interpreted as including an obligation to obtain a judicial warrant. Indeed, from the combined reading of Rule 39 (iv) and Rule 54 of the RPE of the *ad hoc* tribunals and the SCSL, one may conclude that a warrant by a Judge or Trial Chamber ‘is necessary for the conduct of the investigation’.²⁴ In a similar vein, Article 57 (3) (a) of the ICC Statute could be interpreted as providing the legal basis for the obligation, for the Prosecutor, to request a warrant from the Pre-Trial Chamber before executing coercive measures. Nevertheless, it has rightly been argued that this latter provision of the ICC Statute leaves the issue at the discretion of the Court.²⁵

Nevertheless, this interpretation is not upheld in practice. The following holding by the ICTY Trial Chamber in *Stakić* is illustrative in this regard:

“[...] there appears to be no identifiable rule of public international law according to which it is mandatory to request a judge’s warrant before conducting a search and seizure”²⁶

²³ Consider, for example, the following interception of a radio conversation between Obrenović and Krstić over an open channel after the fall of Srebrenica: O: “we’ve managed to catch a few more, either with guns or mines.” K: “Kill them all. God damn it.” O: “Everything, everything is going according to plan. Yes.” K: “[Not a] single one must be left alive.” O: “Everything is going according to plan. Everything.” ICTY, Transcript, *Prosecutor v. Krstić*, Case No. IT-98-33, T. Ch., 1 November 2000, pp. 6506-6507.

²⁴ Consider C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, pp. 261, 277 – 278; K. DE MEESTER, *Coercive Measures, Privacy Rights and Judicial Supervision in International Criminal Investigations: in Need of Further Regulation?*, in G. SLUITER and S. VASILIEV (eds.), London, Cameron May, 2009, p. 281; C.J.M. SAFFERLING, *Towards an International Criminal Procedure*, Oxford, Oxford University Press, 2001, p. 159.

²⁵ F. GUARIGLIA, K. HARRIS and G. HOCHMAYR, Article 57, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes*, München, Verlag C.H. Beck, 2008, p. 1123.

²⁶ ICTY, Decision on Defence Request to Exclude Evidence as Inadmissible, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch. II, 31 July 2002, p. 2.

The scarcely accessible jurisprudence of the *ad hoc* tribunals reveals that a distinction should be drawn; usually, no request for a judicial warrant or order is addressed to a Chamber or Judge of the *ad hoc* tribunals. A request to take or execute lawful coercive measures is directed to the national authorities concerned.²⁷ Whether a judicial authorisation needs to be obtained by the national authorities before this coercive action is initiated depends upon national law, including special agreements which may have been concluded with the international criminal tribunal concerned.²⁸

Exceptionally, in cases where cooperation by the national authorities could not be ascertained, the ICTY Prosecutor first obtained a judicial warrant before resorting to its coercive powers. For example, in the *Karadžić* case, the Prosecutor sought and obtained a judicial warrant from the tribunal for a search operation at the premises of the Public Security Center (CJB) on the territory of Bosnia and Herzegovina.²⁹ The ICTY Manual on Developed Practices also confirms the practice of requesting judicial authorisation to execute a search and seizure operation only “in areas protected by uncooperative local authorities.”³⁰ According to MCINTYRE, at the ICTY, search and seizure operations are mostly conducted on the basis of informal arrangements with the authorities. In case this is not possible, an authorisation for a search and seizure is obtained from the tribunal.³¹ It was explained above how the Appeals Chamber in *Blaškić* recognised that in relation to states or entities of the Former Yugoslavia coercive measures can be executed directly by the tribunal.³² In this case, it seems to be the Prosecutor’s general practice first to obtain the authorisation from a Judge of the ICTY before executing the measure.

²⁷ For an example, see SCSL, Transcript, *Prosecutor v. Taylor*, Case No. SCSL-03-1-T, T. Ch. II, 19 January 2009, pp. 22998 *et seq.* (referring to a request by the SCSL Prosecutor to the Liberian authorities to conduct lawful searches at a former residency of Charles Taylor (White Flower)).

²⁸ See *supra* Chapter 6, I.2, fn. 16.

²⁹ ICTY, Search Warrant for the Public Security Center (CJB) Srpsko Sarajevo, *Prosecutor v. Karadžić*, Case No. IT-95-05/18, Duty Judge, 11 September 2003.

³⁰ ICTY Manual on Developed Practices, Turin, UNICRI Publisher, 2009, p. 18. Apparently, ‘lengthy internal guidelines’ cover the legal procedures for search warrant applications.

³¹ G. MCINTYRE, Equality of Arms – Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, in «Leiden Journal of International Law», Vol. 16, 2003, p. 279 (“more often than not the prosecution accesses much of its material through informal arrangements with the authorities. Teams of investigators will travel where the documents are held and spend as much time as necessary perusing the documents and identifying and taking into their custody those documents which will benefit the prosecution. [...] Alternatively, the prosecution will be assisted in the gathering of material by search and seizure warrants granted by the Tribunal pursuant to Rule 54. These warrants authorize investigators to go into various government and military offices of the former Yugoslavia and seize evidence of interest”).

³² See *supra*, Chapter 6, I.2.

Interviews conducted at the ICTR with OTP staff confirm these views. When asked whether an obligation exists, at present, to obtain judicial authorisation from a Judge or Trial Chamber of the ICTR before coercive measures can be initiated (with the exception of an arrest warrant), the majority of interviewees responded negatively.³³ It was noted by the interviewees that Rule 54 is sometimes resorted to (and a judicial warrant or order is requested) in order to seize certain pieces of evidence or to freeze accounts.³⁴

Interviews with Judges and senior legal officers further corroborate these views. Normally the Prosecutor does not require judicial authorisation to initiate non-custodial coercive measures.³⁵ Some interviewees noted that the possibility of the parties to request the Trial Chamber or Judge pursuant to Rule 54 to obtain an order or warrant is generally understood as a subsidiary means for obtaining judicial cooperation, in case one of the parties has tried every means of obtaining cooperation and it did not work.³⁶ The Judges, thus, only intervene in cases where voluntary cooperation is not possible. However, also in other instances judicial authorisation is sometimes obtained. For example, indictments that are presented to the Judge by the Prosecutor are normally accompanied by a request for an arrest warrant and can also include a request for the adoption of coercive measures in the form of a seizure of documents and a search in the premises where the person was arrested.³⁷

Consequently, it can be concluded that the Prosecutor only resorts to the procedural vehicle of Rule 54 (in the form of the issuance of an order or warrant) in case the execution of a request by the national authorities is unlikely. In the instances in which a request for an order or

³³ Interview with a member of the OTP, ICTR-16, Arusha, 4 June 2008, p. 10; Interview with a member of the OTP, ICTR-10, Arusha, 21 May 2008, p. 6; Interview with a member of the OTP, ICTR-13, Arusha, 21 May 2008, p. 7; Interview with a member of the OTP, ICTR-09, Arusha, 20 May 2008, p. 5; Interview with Dr. Alex Obote Odora of the OTP, ICTR-11, Arusha, 21 May 2008, p. 9.

³⁴ Interview with a member of the OTP, ICTR-16, Arusha, 4 June 2008, p. 9.

³⁵ Interview with a Judge of the ICTR, ICTR-07, Arusha, 16 May 2008, p. 5 (“the Prosecutor does not need judicial authorization to request a state to carry out a search and seizure operation. Now, if he requests a state to do it, and the state refuses, then he has to apply to the Chamber, and the Court may formally request the state to cooperate. If the Chamber issues a formal request, and the state still refuses to cooperate, then it becomes a further justiciable issue, and the Chamber would have to decide whether, under the circumstances, it would request the President to report the matter to the Security Council. So the ultimate method of enforcement is a Security Council action against the state”); Interview with Judge Short of the ICTR, ICTR-04, Arusha, 23 May 2008, p. 5; Interview with a Legal Officer of the ICTR, ICTR-08, Arusha, 19 May 2008, p. 5; Interview with Judge Møse, ICTR-03, Arusha, 20 May 2008, p. 6; Interview with a Legal Officer of the ICTR, ICTR-28, Arusha, 30 May 2008, p. 6; Interview with a Judge of the ICTR, ICTR-05, Arusha, 2 June 2008, p. 6.

³⁶ Interview with a Legal Officer of the ICTR, ICTR-28, Arusha, 30 May 2008, p. 6; Interview with a Legal Officer of the ICTR, ICTR-08, Arusha, 19 May 2008, p. 5.

³⁷ Interview with Judge Egorov of the ICTR, ICTR-39, Arusha, 20 May 2008, p. 5, see the discussion of this exception, *infra*, Chapter 6, II.2.1.

warrant has been directed to the Trial Chamber or a Judge, such is not based on an understanding that a form of judicial authorisation is required for the adoption of non-custodial coercive measures. The interpretation of Rule 39 (iv) and Rule 54 as encompassing an obligation of prior judicial authorisation is not upheld in practice. Rule 54 is seen as a subsidiary means to execute coercive measures. The interpretation provided for Rule 54 *juncto* Article 29 (ICTY Statute) and Article 28 (ICTR Statute), in the case law of the tribunals, includes a requirement that efforts have been made to obtain cooperation by the state requested and that these efforts were unsuccessful ('reasonable efforts' requirement) which may explain this interpretation.³⁸

In the following paragraphs, the argument will be made that a formal condition to obtain judicial authorisation *should* be read into the law of international criminal procedure. How this requirement (1) derives from international human rights law, (2) while not amounting to a general principle, is in line with domestic procedural practices, (3) on one reading, derives from the statutory documents of the *international* criminal tribunals, and (4) follows from a functional analysis of the judicial role at the pre-trial stage in international criminal proceedings will be established. Subsequently, it will be asked whether this requirement for judicial authorisation should exist at the national level, the international level or at both levels.

I.3.1. The requirement of a judicial authorisation derives from international human rights law

By definition, non-custodial coercive measures do infringe upon the rights and liberties of suspects (accused persons) or third persons.³⁹ They infringe upon such rights as the right to privacy or the right to property. These rights are, to varying degrees, provided for under international human rights law.⁴⁰ Human rights law allows only for interferences with the

³⁸ See *e.g.* ICTR, Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana, *Prosecutor v. Bagosora*, Case No. 98-41-T, T. Ch. I, 25 May 2004; ICTR, Decision on Nzuwonemeye's Motion Requesting Cooperation from the Government of Belgium Pursuant to Article 28 of the Statute, *Prosecutor v. Bizimungu et al.*, Case No. 00-56-T, T. Ch. II, 7 June 2006; ICTR, Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance, *Prosecutor v. Bagosora*, Case No. 98-41-T, T. Ch. I, 7 February 2005, par. 5.

³⁹ See the definition given, *supra*, Chapter 6, I.1.

⁴⁰ The right the privacy can be found in Article 17 ICCPR, Article 8 ECHR and Article 11 of the ACHR as well as Article 12 of the UDHR and Article 67 of the EU Charter of Fundamental Rights. The right is not included in

aforementioned rights as long as these are ‘in accordance with the law’. This *legal basis* for non-custodial coercive measures seems conspicuously absent in international criminal procedure. The extremely broadly formulated powers ‘to collect evidence’ and ‘to conduct on-site investigations’ constitute the only legal basis in the Statutes of most jurisdictions under review for the prosecutorial power to conduct non-custodial coercive measures (the ECCC and SPSC being exceptions).⁴¹

Under human rights law the lawfulness requirement implies that there should be legislation fulfilling certain conditions and an interference in accordance with this legislation. More precisely, it includes a qualitative element requiring a regulation which is sufficiently detailed and precise (foreseeable) as well as adequately accessible.⁴² The Court’s case law requires the existence of sufficient procedural safeguards, either through the requirement of legality (internal quality of the law) or through the requirement of proportionality.⁴³ The HRC has also stressed the importance of procedural safeguards in order to avoid arbitrary interference.⁴⁴

the ACHPR. The right to property has been laid down in Article 21 ACHR and Article 14 ACHPR, Article 17 UDHR as well as in Protocol 1, Article 1 ECHR and Article 17 (1) EU Charter of Fundamental Rights. It is not included in the ICCPR.

⁴¹ Article 18 (2) ICTY Statute; Article 17 (2) ICTR Statute. See also Rule 39 (i) of the ICTY, ICTR and SCSL RPE; Article 54 (3) (a) ICC Statute.

⁴² ECtHR, *Sunday Times v. United Kingdom*, Application No. 13166/87, Judgment of 26 April 1979, par. 49 (‘accessible’ implies that “the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case”; in turn, ‘foreseeable’ implies that the law is “formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”); ECtHR, *Malone v. United Kingdom*, Judgement, Application No. 8691/79, Judgment of 2 August 1984, par. 67 (holding that foreseeability implies that citizens should have “an adequate indication as to the circumstances in which and the conditions on which” the authorities may resort to coercive investigative measures); ECtHR, *James and Others v. The United Kingdom*, Application No. 8793/79, Series A, No. 98, Judgment of 12 July 1984, par. 67 (“The Court has consistently held that the terms “law” or “lawful” in the Convention “[do] not merely refer back to domestic law but also [relate] to the quality of the law, requiring it to be compatible with the rule of law”).

⁴³ E.g. ECtHR, *Huwig v. France*, Application No. 11105/84, Judgment of 24 April 1990, par. 34 (“Above all, the system does not for the time being afford adequate safeguards against various possible abuses. For example, the categories of people liable to have their telephones tapped by judicial order and the nature of the offences which may give rise to such an order are nowhere defined. ... Similarly unspecified are the procedure for drawing up the summary reports containing intercepted conversations; the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge (who can hardly verify the number and length of the original tapes on the spot) and by the defence; and the circumstances in which recordings may or must be erased or the tapes be destroyed, in particular where an accused has been discharged by an investigating judge or acquitted by a court”).

⁴⁴ CCPR General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Article 17), U.N. Doc. HRI/GEN/1/Rev.6, 8 April 1988, par. 4, 8; HRC, *Pinkney v. Canada*, Communication No. 27/1978, U.N. Doc. CCPR/C/OP/1, 29 October 1981, par. 34 (establishing that the lawful interference with privacy must be sufficiently circumscribed to be in accordance with Article 17 of the ICCPR: “A legislative provision in the very general terms of this section did not ... in itself provide satisfactory legal safeguards against arbitrary application”).

The absence of detailed, statutory norms may be more striking to someone coming from the ‘civil law’ tradition, where all law should be statutory in principle, than it would be to someone coming from a ‘common law’ background. It follows from the case law of the ECtHR that the requirement of lawfulness should be interpreted in a *substantive*, rather than in a formal, sense.⁴⁵ However, international criminal tribunals may lack a sufficient number of judicial precedents, rendering the prospects of a ‘settled case law’ unlikely.⁴⁶ It will be illustrated in the following sections of this chapter that the scarce jurisprudence of the different international criminal tribunals is not helpful in clarifying the boundaries and content of the coercive powers which are at the Prosecutor’s disposal during a criminal investigation. Indeed, in those cases where a judicial warrant was sought by the Prosecutor from the tribunal, this was done on an *ex parte* basis and without rendering these judicial warrants public in most cases.⁴⁷ As a result, the prospect of the existence of a ‘settled case law’ which would render the infringement lawful in a substantive sense is highly dubious.

The importance of a judicial warrant for the execution of coercive measures has been underscored in the jurisprudence of both the ECtHR and the HRC. The ECtHR has emphasised its importance in the assessment of the *proportionality* of domestic laws providing coercive measures and has stated that the absence of the requirement of a judicial warrant may be problematic in cases for which the conditions and restrictions provided by law are “too lax and full of loopholes.”⁴⁸ The ECtHR has underlined that vigilance should be

⁴⁵ ECtHR, *Chappell v. United Kingdom*, Application No. 10461/83, Judgment of 30 March 1989, par. 52; ECtHR, *Malone v. United Kingdom*, Application No. 8691/79, Judgment of 2 August 1984, par. 66; ECtHR, *Sunday Times v. United Kingdom*, Application No. 13166/87, Judgment of 26 April 1979, par. 47. Whereas the aforementioned examples concern a ‘common law’ country, the Court repeated its holding also in relation to French settled case law, see ECtHR, *Kruslin v. France*, Application No. 11801/85, Series A, No. 176-A, Judgment of 24 April 1990, par. 29. Consider also the discussion on the procedural principle of legality, *supra*, Chapter 2, VI.

⁴⁶ The notion of ‘settled case-law’ was referred to by the ECtHR, see ECtHR, *Kruslin v. France*, Application No. 11801/85, Series A, No. 176-A, Judgment of 24 April 1990, par. 29.

⁴⁷ For an exception, see ICTY, Search Warrant for the Public Security Center (CJB) Srpsko Sarajevo, *Prosecutor v. Karadžić*, Case No. IT-95-05/18, Duty Judge, 11 September 2003.

⁴⁸ ECtHR, *Funke v. France*, Application No. 10828/84, Judgment of 25 February 1993, par. 57; ECtHR, *Crémieux v. France*, Application No. 11471/85, Series A, No. 256-B, Judgment of 25 February 1993, par. 40 and ECtHR, *Mialhe v. France (no. 1)*, Application No. 12661/87, Series A, No. 256-C, Judgment of 25 February 1993, par. 38. Also in other cases, the Court underlined the importance of judicial oversight over the use coercive measures. See *e.g.* ECtHR, *Teixeira de Castro v. Portugal*, Application No. 25829/94, Judgment of 9 June 1998, par. 37 - 38 (“The Court notes, firstly, that the present dispute is distinguishable from the case of *Lüdi v. Switzerland*, in which the police officer concerned had been sworn in, *the investigating judge had not been unaware of his mission* and the Swiss authorities, informed by the German police, had opened a preliminary investigation. The police officers’ role had been confined to acting as an undercover agent. [...] The Court notes that the Government have not contended that the officers’ intervention took place as part of an anti-drug-trafficking operation *ordered and supervised by a judge*” (emphasis added)).

exercised in cases where the executive authorities can resort to coercive action without a judicial warrant.⁴⁹ Likewise, the HRC has underscored the importance of a judicial warrant.⁵⁰ Human rights law should thus be interpreted as providing an obligation for the Prosecutor to obtain a judicial authorisation before resorting to coercive action when the statutory documents are overly broad and vague concerning the use of coercive powers by the Prosecutor of the international criminal tribunals.

Two conclusions can now be drawn; Firstly, (i) no clear-cut obligation to obtain judicial authorisation, prior to authorities resorting to coercive action, can be discerned. Secondly, (ii) when the law (the statutory documents of the international criminal tribunals) is overly broad and vague concerning the use of coercive powers by the Prosecutor, human rights law should be interpreted as providing for an obligation incumbent on the Prosecutor to obtain judicial authorisation before resorting to coercive action.

I.3.2. The requirement of a judicial warrant as a general principle of law

The existence of a general principle of law requiring judicial authorisation before adopting coercive measures, is important insofar that the statutory documents of the international criminal tribunals keep silent on this matter and a *lacuna* exists. As explained above, the *ad hoc* tribunals have eschewed the interpretation of Rule 54 and Rule 39 (iv) ICTY, ICTR and SCSL RPE as entailing an explicit requirement to obtain judicial authorisation for the use of coercive measures.⁵¹ Likewise, Article 57 (3) (a) ICC Statute is not clear on the existence of an obligation of judicial authorisation. The existence of a general principle of law could make this requirement binding on the tribunals, given the lack of an explicit requirement to that effect in the statutory documents.⁵² Importantly, it follows from Article 21 (1) (c) ICC Statute that, in order to identify general principles, no systematic comparison of all legal systems in

⁴⁹ See ECtHR, *Camenzind v. Switzerland*, Application No. 21353/93, Judgment of 16 December 1997, par. 45.

⁵⁰ HRC, Concluding Observations on Poland, U.N. Doc. CCPR/C/79/Add.110, 29 July 1999, par. 22 (“as regards phone tapping, the Committee is concerned (a) that the Prosecutor (without judicial consent) may permit telephone tapping; and (b) that there is no independent monitoring of the use of the entire system of tapping telephones”); NOWAK notes that while there is no express judicial requirement, Article 17 (2) requires that searches only ensue on the basis of a decision by a state authority expressly authorised to do so (usually a court). See M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR commentary (2nd edition), Kehl am Rein, Engel, 2005, p. 400.

⁵¹ See *supra*, Chapter 6, I.3.

⁵² See *supra*, Chapter 2, II.

the world is necessary. It suffices that these principles can be found in the ‘principal legal systems of the world’.

Proof of the existence of the Prosecutor’s obligation to obtain judicial authorisation before resorting to coercive action can certainly be found in domestic criminal justice systems. Both common law and inquisitorial criminal justice systems will, normally, require the issuance of a judicial warrant before the Prosecutor can resort to the use of coercive measures.⁵³ An analysis of 33 national reports by AMBOS confirmed that “[i]n general, the Prosecutor may not initiate compulsory measures without judicial authorisation,” and that this requirement was shared by most of the national systems surveyed.⁵⁴

In common law criminal justice systems, the judicial role during the investigation stage of proceedings is traditionally limited as it will be for the parties to conduct their own investigations. Judicial intervention is limited to situations in which the interests of the person cannot be guaranteed in another way.⁵⁵ Consequently, it should come as no surprise that AMBOS’ analysis reveals that in all common law countries surveyed, the authorisation of coercive measures is “the most exclusive judicial competence” during the pre-trial phase.⁵⁶ However, that said, the police have wide-ranging coercive powers and they can initiate coercive investigative acts without judicial or prosecutorial authorisation. For example, while in principle English law requires a judicial authorisation for searches of premises to be carried out there are many exceptions to that rule authorising the police to conduct searches without a warrant.⁵⁷ Personal searches can also be conducted without a judicial warrant.⁵⁸ Furthermore,

⁵³ B. DE SMET, *Internationale Samenwerking in Strafzaken tussen Angelsaksische en continentale Landen*, Intersentia Rechtswetenschappen, Antwerpen – Groningen, 1999, p. 108.

⁵⁴ K. AMBOS, *The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports*, in «European Journal of Crime, Criminal Law and Criminal Justice», Vol. 8/2, 2000, p. 107 *et seq.*

⁵⁵ M.R. DAMAŠKA, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, New Haven and London, Yale University Press, 1986, p. 345.

⁵⁶ K. AMBOS, *The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports*, in «European Journal of Crime, Criminal Law and Criminal Justice», Vol. 8/2, 2000, p. 108.

⁵⁷ The requirement of a judicial authorisation for the execution of searches of premises is laid down in Section 8 PACE 1984. However, there are many exceptions to that rule, allowing the police to conduct searches without a warrant, for example Section 17 PACE 1984 (arrestable offences), Section 18 PACE 1984 or Section 32 (2) (b) PACE 1984 (search of property a person under arrest was in at the time of arrest or immediately before, or property that they occupy or control, may be searched for evidence in respect of the offence for which they are under arrest and, in some cases, other offences as well). See *e.g.* J.R. SPENCER, *The English System*, in M. DELMAS-MARTY and J.R. SPENCER (eds.), *European Criminal Procedure*, Cambridge, Cambridge University Press, 2002, pp. 190-191; E. CAPE and J. HODGSON, *The Investigative Stage of the Criminal*

DNA samples can be taken by the police without judicial authorisation.⁵⁹ On the other hand, under English law, the interception of communication now requires a prior judicial authorisation by a Judge acting as a commissioner.⁶⁰ In the US or Canada, the Prosecutor normally lacks compulsory powers and should obtain a judicial authorisation.⁶¹ However, while the U.S. Fourth amendment requires a judicial warrant for the execution of searches, several exceptions exist, including for cases in which the search is executed in the hot pursuit of a suspect⁶² or for further searches of the premises, in the form of a protective sweep, based on the reasonable suspicion that confederates are hiding there.⁶³

In inquisitorial criminal justice systems, judicial intervention is usually required for the purpose of protecting against undue infringements of the rights of the persons concerned.⁶⁴ While criminal justice systems which have a judge-led investigation, like France or Belgium, traditionally require judicial authorisation,⁶⁵ the Prosecutor still has limited compulsory

Process in England and Wales, in E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN (eds.), *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, Intersentia, Oxford, 2007, pp. 66-67 (explaining that these wide powers are remainders of the common law tradition which historically allowed the police in England and Wales to do anything unless prohibited by law).

⁵⁸ Sections 54 and 55 PACE.

⁵⁹ M. L. WADE, United Kingdom: England and Wales, in «Revue internationale de droit pénal», Vol. 80, 2009, p. 334 (CD-Rom Annex). Consider in that regard ECtHR, *S. and Marper v. The United Kingdom*, Application Nos. 30562/04 and 30566/04, Judgment (Grand Chamber) of 4 December 2008, par. 26.

⁶⁰ Regulation of Investigatory Powers Act (RIPA 2000), ss26 and following. See *ibid.*, p. 332

⁶¹ J. MICHELICH, National Report, in L. ARBOUR, A. ESER, K. AMBOS and A. SANDERS (eds.), *The Prosecutor of an International Criminal Court: International Workshop in Co-Operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, Freiburg im Breisgau, Max-Planck Institut für ausländisches und internationales Strafrecht, 2000, p. 484; P. HEALY, Canada, in L. ARBOUR, A. ESER, K. AMBOS and A. SANDERS (eds.), *The Prosecutor of an International Criminal Court: International Workshop in Co-Operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, Freiburg im Breisgau, Max-Planck Institut für ausländisches und internationales Strafrecht, 2000, p. 248. For example, the U.S. Supreme court requires a written search warrant issued by a judicial officer for the search of 'structures', including premises. The search of cars will not require a warrant. See C. M. BRADLEY, *United States*, in C. M. BRADLEY, *Criminal Procedure: A Worldwide Study*, Durham, Carolina Academic Press, 1999, pp. 402-404. Also the Canadian criminal justice system normally requires a warrant for the search of buildings, receptacles or places, see Section 487 of the Canadian Criminal Code.

⁶² Unless a minor crime has been committed and the suspect is in his home, see S. SLOBOGIN, *An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation*, in «Michigan Journal of International Law», Vol. 22, 2001, p. 425.

⁶³ *Maryland v. Buie*, 494 U.S. 325, p. 327 (1990).

⁶⁴ S. GLESS, *Functions and Constitution of the Court at the Pre-Trial and Trial Phase*, in ESER and RABENSTEIN (eds.), *Strafjustiz im Spannungsfeld von Effizienz und Fairness*, Berlin, Duncker & Humblot, 2004, p. 344.

⁶⁵ For example, in Belgium, judicial authorisation is normally required for coercive measures (*e.g.* searches, wiretaps or the taking of DNA samples without consent). See J. FERMON, F. VERBRUGGEN and S. DE DECKER, *The investigative Stage of the Criminal Process in Belgium*, in E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN (eds.), *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, Intersentia, Oxford, 2007, p. 41.

powers.⁶⁶ The picture is more diverse in those civil law criminal justice systems characterised by a Prosecutor-led investigation. In Germany, for example, an authorisation by a judge is normally required, except when this would delay the proceedings.⁶⁷ In the Netherlands, the police and the Prosecutor can initiate certain coercive measures, which do not require a prior warrant; only the more intrusive or far-reaching coercive powers require prior judicial authorisation.⁶⁸

The limited comparative exercise above shows rather a diverse picture. The line between which investigative acts presuppose judicial authorisation, and which acts do not, is not identical in every state.⁶⁹ Therefore, it cannot be safely concluded whether the requirement for prior judicial authorisation constitutes a general principle of law.

1.3.3. The requirement can be derived from the statutory texts

It has been noted that the ECCC Internal Rules make the execution of coercive measures conditional upon judicial authorisation.⁷⁰ Similarly, the procedural framework of the SPSC

⁶⁶ In case of inquiries *en flagrant délit*, the Prosecutor has certain compulsory powers. For example, he or she can conduct searches without judicial warrant: see Article 36 of the Belgian Code of Criminal Procedure and Article 56 of the French Code of Criminal Procedure; C. VAN DEN WYNGAERT, *Criminal Procedures in the European Community*, Brussels, Butterworths, 1993, p. 125.

⁶⁷ In Germany, the public Prosecutor who conducts the pre-trial investigation normally needs judicial authorisation for the initiation of coercive measures (few exceptions exist). In particular, Article 13 (2) of the Constitution (*Grundgesetz für die Bundesrepublik Deutschland*) requires a judicial warrant. See K. AMBOS, *The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports*, in «*European Journal of Crime, Criminal Law and Criminal Justice*», Vol. 8/2, 2000, p. 108. The German Prosecutor or police may search premises without previously obtaining a judicial warrant in urgent cases where there is ‘danger in delay’ (*Gefahr in Verzuge*). See T. WEIGEND and F. SALDITT, *The Investigative Process of the Criminal Process in Germany*, in E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN (eds.), *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, Intersentia, Oxford, 2007, p. 85. The authors add that the vast majority of searches and seizures are conducted where this ‘danger in delay’ clause is invoked, without prior judicial authorisation.

⁶⁸ For example, searches can normally be authorised by the prosecutor, but the search of a private dwelling requires a judicial warrant, see T. PRAKKEN and T. SPRONKEN, *Criminal Defence during the pre-trial Stage in the Netherlands* in E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN (eds.), *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, Intersentia, Oxford, 2007, p. 162. Also the interception of telecommunication requires a judicial authorization. In contrast, the taking of DNA for analysis does not require judicial intervention. See C.J.M. CORSTENS, *Het Nederlands Strafrechtsrecht*, Deventer, Kluwer, 2008, p. 357. In the latter case, the DNA sample is taken by the public Prosecutor (*Officier van Justitie*), who is bound by a principle of objectivity.

⁶⁹ Regarding searches, see C. M. BRADLEY, *Criminal Procedure: A Worldwide Study*, Durham, Carolina Academic Press, 1999, p. 427.

⁷⁰ Rule 21 (2) ECCC IR. See *supra* Chapter 6, I.1.

normally requires judicial authorisation when coercive measures are adopted in the course of the investigation.⁷¹ The procedural frameworks of the other tribunals are less clear. It has been noted that Rule 39 (iv) and Rule 54 of the ICTY, ICTR and SCSL RPE *could*, nonetheless, be interpreted as encompassing an obligation on the Prosecutor to obtain judicial authorisation prior to initiating coercive measures. Likewise, the ICC Statute *could* be interpreted as presupposing an authorisation from the Pre-Trial Chamber or Pre-Trial Judge for the adoption of coercive measures.⁷² The Statute and the RPE of the STL also do not expressly require the Prosecutor to request a warrant or an order for the execution of coercive measures in the investigation.⁷³ Rule 77(B) of the STL RPE prescribes that whenever a party wants to conduct investigative measures independently on the territory of Lebanon, it ‘may’ seek the Pre-Trial Chamber’s authorisation, when this party deems this authorisation to be ‘appropriate and necessary’.⁷⁴ However, this provision falls short of a general obligation to obtain a warrant for the execution of coercive measures on the territory of Lebanon.

One other provision may also point in the direction of the existence of a requirement for the Prosecutor of the *ad hoc* tribunals and the SCSL to obtain a form of judicial authorisation before resorting to coercive measures (through state cooperation or by means of on-site investigations), at least as far as the seizure of evidence is concerned. It follows from Rule 40 (ii) ICTY RPE and Rule 40 (A) (ii) of the ICTR and SCSL RPE that in cases of urgency, the Prosecutor can request a state to seize evidence.⁷⁵ It could be argued that this provision would be redundant and meaningless were there no obligation to obtain judicial authorisation *in the absence of* the existence of an urgency to seize evidence. Clearly, it follows from the general cooperation obligations of States (or of Sierra Leone as far as the SCSL is concerned) *vis-à-vis* the *ad hoc* tribunals (and the SCSL) that the Prosecutor can address requests for the

⁷¹ Section 9 (3) of UNTAET Regulation 2000/30. More precisely, a judicial authorisation from an Investigating Judge is required for the following measures: (a) arrest of a suspect; (b) detention or continued detention of a suspect; (c) exhumation; (d) forensic examination; (e) search of locations and buildings; (f) seizure of goods or items, including seizure or opening of mail; (g) intrusive body search; (h) physical examination, including the taking and examination of blood, DNA, samples, and other bodily specimens; (i) interception of telecommunication and electronic data transfer; (j) other warrants involving measures of a coercive character in accordance with the applicable law.

⁷² Article 57 (3) (a) ICC Statute.

⁷³ Article 18 (2) STL Statute; Rule 77 (A), (B) and 88 (A) STL RPE.

⁷⁴ Article 77 (B) STL RPE. STL, Annual Report, 2009-2010, par. 51.

⁷⁵ A detailed overview of the prosecutorial power to resort to search and seizures will be given, see *infra*, Chapter 6, II.2.

collection of evidence to states.⁷⁶ Furthermore, the broad formulation of prosecutorial powers clearly allows the Prosecutor to seize evidence outside a context of urgency.

A comparison in that sense can be made with Rule 40 (i) of the ICTY RPE and Rule 40 (A) (i) of the ICTR and SCSL RPE on provisional arrest. Whereas, under normal circumstances, the arrest would be preceded by the issuance of an arrest warrant by the tribunal, exceptionally, and in cases of urgency, the RPE provide that a suspect can provisionally be detained without prior judicial intervention by the tribunal. These urgency exceptions are reminiscent of domestic practices which do away with the requirement of obtaining a prior judicial authorisation in situations of urgency.⁷⁷ Hence, if the *purpose* of Rule 40 ICTY, ICTR and SCSL is to allow for some flexibility in the procedural requirements to respond to the urgencies of a situation, it could be held that the requirements should be lower in this situation. However, it is evident that a purposive interpretation of Rule 40 does not allow us to conclude to the general existence of a requirement to obtain a judicial authorisation for the conduct of a seizure operation in the absence of a situation of urgency.

It is clear that neither a literal nor a contextual interpretation of the relevant provisions of the Statutes and RPE of the jurisdictions under review are able to remove all ambiguities. It is also unclear what the intentions of the drafters were. It follows, then, that uncertainty remains whether or not the existence of a formal requirement to obtain a judicial authorisation can be held to derive from the statutory frameworks of all jurisdictions under review.

I.3.4. The requirement follows from a theoretical perspective on the judicial role

At the national level, judicial involvement in criminal investigations by means of authorising the use of coercive measures is inextricably linked with the protection of the individual rights and liberties of the suspect or other persons implicated in the investigation.⁷⁸ Consequently, these judicial interventions highlight the function of the Judge as the '*guarantor of the*

⁷⁶ Article 29 (ICTY Statute) and Article 28 (ICTR Statute); Rule 39 (iii) ICTY, ICTR and SCSL RPE ('In the conduct of an investigation, the Prosecutor may: (iii) seek, to that end, the assistance of any State authority concerned, as well as of any relevant international body including the International Criminal Police Organization (INTERPOL)').

⁷⁷ See *infra*, Chapter 7, III.1.

⁷⁸ As explained above, *supra*, Chapter 6, I.3.1 and I.3.2.

individual rights and liberties’ during the investigation.⁷⁹ Notably, the ICC Pre-Trial Chamber has confirmed its function as the “ultimate guarantor” of the rights of suspects at the pre-trial stage of proceedings.⁸⁰ This function necessitates the ability for the Judge to exercise control over the Prosecutor’s use of these investigative powers.

At the international level, the fragmented character of the investigation may hamper the international Judge’s fulfilment of this function. Indeed, it may be difficult for the Judges to properly exercise the function of guaranteeing the rights and liberties of suspects and other persons in cases when the investigation is spread over different jurisdictions and when coercive measures are executed by national law enforcement officials.⁸¹ Only by requiring the Prosecutor to obtain judicial authorisation, before initiating coercive measures or requesting national states to execute these measures, can this judicial function be safeguarded. Judicial intervention is explicitly provided for in cases where the right to liberty is at stake.⁸² It is argued here that, from the functional perspective, in case other rights of the accused or of a third person are at stake, that this judicial intervention should equally be required.

Through the requirement of a warrant, Judges can effectively safeguard the rights of suspects and third persons by checking whether the different thresholds and requirements for the issuance of coercive measure have been met. In case this function were to be delegated to or left with the national Judge, the control would be rendered less effective as the national Judge lacks the overview over the investigation required.⁸³ Furthermore, the scope of the supervisory role of the national Judge may differ amongst jurisdictions. Relying solely, or to a large extent on national law, may not be sufficient to guarantee the rights of suspects or third persons.

⁷⁹ D. SALAS, *The Role of the Judge*, in M. DELMAS-MARTY and J.R. SPENCER (eds.), *European Criminal Procedure*, Cambridge, Cambridge University Press, 2002, pp. 517-518. Such judicial function can be found in common law and civil law criminal justice systems (prosecutorial systems and systems based on the involvement of an investigating judge).

⁸⁰ ICC, Decision on the Powers of the Pre-Trial Chamber to Review *proprio motu* the Pre-Trial Detention of Germain Katanga, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-330, PTC I, 18 March 2008, p. 8; ICC, Decision on the “Prosecution’s Request for a Review of Potentially Privileged Material”, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-67, PTC I, 4 March 2011, p. 6.

⁸¹ On the fragmented character of investigations conducted by international criminal courts and tribunals, see *supra*, Chapter 2, VII.2.

⁸² *Inter alia* Article 58 ICC Statute (see also Article 60 (5) ICC Statute; Rule 40*bis* and Rule 55 of the ICTY, ICTR and SCSL RPE).

⁸³ G. SLUITER, *International Criminal Adjudication and the Collection of Evidence*, Antwerp, Intersentia, 2002, p. 126.

If no requirement of judicial authorisation were to be read in the statutory documents of the different international criminal tribunals, the powers of the international Judges would be limited to the decision on the admissibility of the resulting pieces of evidence, once the matter has been brought before them.⁸⁴ Only at that moment in time would the international Judges be able to play their role in guaranteeing human rights by maintaining certain legal standards. This judicial control is *ex post* by nature. Besides, the low (flexible) threshold for the admission of evidence at the international level, even where evidence would be inadmissible at the national level, makes the effective realisation of this judicial function even more problematic.⁸⁵

1.3.5. Judicial authorisation by an international Judge

While it was found that an obligation exists for the Prosecutor to obtain judicial authorisation before coercive measures can be initiated, the question as to whom should deliver such authorisation remains. The interaction between the international level and domestic jurisdictions may lead to confusion as to the level at which this judicial authorisation should be sought. This question is not without its relevance. One could argue that because of the reliance on state cooperation necessary in international criminal proceedings, the requirements of lawfulness and proportionality deriving from human rights law (from which the requirement of judicial authorisation was also derived) should be assessed at the national level. Besides, a sufficiently detailed procedural framework may exist at the national level (in which case a judicial authorisation may not be required under international human rights law). It may be argued that requiring a search warrant from the Trial Chamber or a Judge of the international criminal tribunal may even lead to a ‘duplication of efforts’.

Moreover, it has been argued that reading a requirement of authorisation by the international criminal tribunal in the statutory documents may prove to be problematic as “pre-authorisation may not be possible or time-consuming and post-authorisation could be sensitive if it involves international judicial supervision of domestic measures, including the

⁸⁴ Compare, X, Judicial Control of Illegal Search and Seizure, in «Yale Law Journal», Vol. 58, 1948, pp. 148-150 (on the exclusion of illegally seized evidence in US criminal proceedings).

⁸⁵ Pursuant to Rule 89 (A) ICTY, ICTR and SCSL RPE, the *ad hoc* tribunals and the SCSL are not bound by national rules of evidence. According to Rule 63 (5) of the ICC RPE, ‘[t]he Chambers shall not apply national laws governing evidence, other than in accordance with article 21’. See also, *infra*, Chapter 6, 1.7.

application of national law and perhaps even its compliance with international human rights standards.⁸⁶

The ICTR Prosecution staff interviewed acknowledge the existence of a requirement for judicial authorisation within most domestic systems but they expressed scepticism about the translation of such requirement into the international arena.⁸⁷ One member of the OTP stated that this authorisation is not necessary because the Prosecution has discretion in terms of what to look for, as long as he or she gets the national authorities to proceed in accordance with the law.⁸⁸ The international Prosecutor has to rely on states to execute the coercive measures and states have to comply in accordance with their own procedural laws.⁸⁹ Consequently, even if this requirement were to be inserted, the Prosecutor would still have to go through the national agencies.⁹⁰ One member of the OTP called such additional requirement, encompassing authorisation by a Trial chamber or a Judge of the ICTR, a “waste of time”.⁹¹ Only one interviewee agreed that a judicial authorisation should, ideally, be required to protect the integrity of the process and to protect the rights of the suspects.⁹²

It is beyond a shadow of a doubt that it is difficult for the Prosecutor to assess in how far the domestic procedures have been upheld in the execution of the requests by national law enforcement officials. Several interviewees referred, in that regard, to the expectation that whenever a state is requested to execute coercive measures that they are undertaken within its laws.⁹³ This trust is also reflected in the jurisprudence. For example, in the *Ntabakuze* case,

⁸⁶ R. CRYER, H. FRIMAN, D. ROBINSON and E. WILMSHURST, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2010, p. 526, fn. 138.

⁸⁷ Interview with a member of the OTP, ICTR-12, Arusha, 21 May 2008, p. 6 (expressing hesitation as to whether the requirement of a judicial authorisation can be translated wholesale to the international echelon).

⁸⁸ Interview with a member of the OTP, ICTR-09, Arusha, 20 May 2008, p. 5.

⁸⁹ Interview with a member of the OTP, ICTR-13, Arusha, 21 May 2008, p. 6; Interview with a member of the OTP, ICTR-16, Arusha, 4 June 2008, p. 9.

⁹⁰ Interview with a member of the OTP, ICTR-16, Arusha, 4 June 2008, p. 9 (“You have to get cooperation from another person, and that person will apply the cooperation with due regard to their own laws”); Interview with Ms. Christine Graham of the OTP, ICTR-14, Arusha, 28 May 2008, p. 8 (“If you did not go through national procedures, how would you get it, in the end? We are not allowed to operate on the territory of a state without the state knowing or approving what is done. Normally, the investigation on foreign territory is conducted by the police force in the foreign territory in cooperation with the Tribunal. We cannot run around and do our own thing. [...] Their obligation is to do something. It does not have to be done in a way we say it should be done. It obviously has to follow the criteria, otherwise it is outside the law”).

⁹¹ Interview with a member of the OTP, ICTR-13, Arusha, 21 May 2008, p. 7.

⁹² Interview with Dr. Alex Obote Odora of the OTP, ICTR-11, Arusha, 21 May 2008, p. 9 (“In principle, I agree we should have judicial authorization. My problem is the practicality of it”).

⁹³ Interview with a member of the OTP, ICTR-13, Arusha, 21 May 2008, p. 6 (“Our expectation is that whatever we ask a country to do, it does it within its laws. That is a standard expectation. I do not think your fears are

the ICTR Trial Chamber noted, in relation to a search and seizure, that “the Trial Chamber takes cognizance of the fact that most countries maintain a police code of ethics for the members of their police forces for search and seizure.”⁹⁴ In a similar vein, the ICC Pre-Trial Chamber held that “it may be presumed that the investigative activities carried out by national judicial and executive authorities in pursuance of domestic investigations or further to a request for co-operation by the Court have been carried out in accordance with the legal provisions applicable in that State.”⁹⁵

The OTP staff interviewed also raised other objections to the inclusion of this requirement in the tribunal’s procedural framework. Notably, several interviewees referred to the problems of situations where some urgency exists, for example when evidence runs the risk of being destroyed.⁹⁶ In that regard, it will be illustrated that these concerns are not justified, regarding search and seizures in particular, because the possibility to provisionally seize evidence on the territory of a state without judicial authorisation is explicitly provided for in the RPE of the *ad hoc* tribunals and the SCSL.⁹⁷ Another concern raised relates to the public character of an application for authorisation. While normally the adoption of coercive measures would entail an application in open court, there should be a possibility for the Prosecutor to file a motion confidentially, and under seal to a Judge.⁹⁸ In some cases, an application in open court may put sources, including victims, at risk and may allow individuals or other entities to interfere.

justified. Even if we got an order from the Chamber here first, the country would still have to do it within its law. Last week we had the assets frozen of a key suspect in neighboring Kenya. We asked the Kenyans to do it, under their law. They went to court and did it. Similarly, if we had first gone to our Chamber here, the Chamber would have issued an order directing the Kenyan government to sequester or freeze ‘asset x’ belonging to the accused. That order, we found out, because we discussed this with the Kenyan authorities, would have to be filed before their national courts, because this is not a direction to the judiciary in Kenya, it is a direction to the executive of the Republic of Kenya. So the Kenyans would have attached the ICTR order and an affidavit to the application. So it is a waste of time. If the Kenyans can go directly to their courts to get a freezing order, why first go to our courts?”; Interview with a member of the OTP, ICTR-09, Arusha, 20 May 2008, p. 6.

⁹⁴ ICTR, Decision on Defence Motion for Annulment of Proceedings, Release and Return of Personal Items and Documents, *Prosecutor v. Ntabakuze*, Case No. ICTR-97-34-T, T. Ch. II, 25 September 1998, p. 7.

⁹⁵ ICC, Decision on the Confirmation of Charges, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-465-Red, PTC II, 16 December 2011, par. 58.

⁹⁶ Interview with a member of the OTP, ICTR-12, Arusha, 21 May 2008, p. 6 (“If someone is going to burn some documents, do you have to run to the Tribunal to make an application to the Judges, to say “can you please allow me to stop the burning of the evidence and seize the documents?”).

⁹⁷ Rule 40 (ii) of the RPE of the ICTY and Rule 40 (A) (ii) of the RPE of the ICTR and SCSL, see *supra* Chapter 6, I.3.3 and *infra*, Chapter 6, II.2.

⁹⁸ Interview with Dr. Alex Obote Odora of the OTP, ICTR-11, Arusha, 21 May 2008, p. 9.

Judicial authorisation by a tribunal Judge or Chamber was generally not felt to be necessary by *Judges and senior legal officers*.⁹⁹ The lack of this requirement was not considered problematic by most Judges and staff interviewed. It was noted, by one ICTR Judge, that this requirement would amount to an intervention in the proceedings in another jurisdiction which falls outside the jurisdiction of the tribunal.¹⁰⁰ Consequently, the tribunal cannot intervene to protect the rights of citizens in proceedings which are held in another state.¹⁰¹ It would be tricky to have a Trial Chamber sit in review of a state practice.¹⁰² It would not be practicable and may be problematic insofar that the tribunal is not familiar with the procedural laws of the state in which this measure is going to be executed.

A minority of SCSL and ICTR Judges and staff interviewed would prefer greater judicial supervision over coercive measures.¹⁰³ One ICTR Judge remarked that some control over the procedure is necessary when coercive measures are adopted but adds that in these cases, the tribunal would have to rely on the cooperation of a domestic judge.¹⁰⁴ It was further noted by one ICTR Judge that the different standards that exist in African states may be a sufficient

⁹⁹ Interview with a Legal Officer of the ICTR, ICTR-28, Arusha, 30 May 2008, p. 6: (“Il faut être aussi pragmatique que possible. Si le Procureur demande aux Rwandais si les Rwandais sont prêts à coopérer, pourquoi requérir une décision judiciaire ?”); Interview with a Judge of the SCSL, SCSL-09, The Hague, 16 December 2009, p. 5. One Judge opined that the Prosecutor should request judicial authorisation when resorting to coercive measures for the taking of evidence, Interview with a Judge of the ICTR, ICTR-02, Arusha, 16 May 2008, pp. 3-4.

¹⁰⁰ Interview with Judge Short of the ICTR, ICTR-04, Arusha, 23 May 2008, p. 4 (“Q: The problem may arise that the provisions under national law might be not in accordance with international human rights law or the Prosecutor might not respect national procedures. Therefore it could be argued that it is important that the Trial Chamber be able to control the whole procedure and intervene as an essential guarantee for certain human rights” A: The Tribunal’s jurisdiction does not extend to intervention in proceedings in another country. I do not see how the Trial Chamber can intervene to protect the rights of citizens in proceedings in another country”).

¹⁰¹ Interview with Judge Short of the ICTR, ICTR-04, Arusha, 23 May 2008, p. 5.

¹⁰² Interview with a Legal Officer of the ICTR, ICTR-34, Arusha, 3 June 2008, p. 6.

¹⁰³ Interview with a Judge of the SCSL, SCSL-10, The Hague, 16 December 2009, p. 7 (“I have had experience in the past both as a lawyer and as judge in the issuance of search warrants. I would have preferred to see greater control over the powers to search. I have noted for example that during one trial, not mine, documents were seized in what appeared to be a raid on a house, apparently, without any authority. But the court does have powers not to admit evidence that would bring the administration of justice into serious disrepute, Rule 95”); Interview with a Legal Officer of the SCSL, SCSL-12, The Hague, 4 February 2010, p. 8 (“I would be in favour of that as a way providing checks and balances on the investigation and the powers of the Prosecution, because especially in the Special Court there were problems with the investigation, which came to light later. [...] [I]t seems that during these investigations, there were some problems, there was very little judicial oversight. For example, in the Sesay *voir dire* about the admission of his previous statements, it became obvious that there were many infringements on his rights, and that the investigators had not always acted properly. So at that point, there was a remedy in respect to the admission of the evidence, but this all came to light only many years after the investigation and only in one particular case”); Interview with a Legal Officer of the SCSL, SCSL-13, The Hague, 16 December 2009, p. 7.

¹⁰⁴ Interview with Judge Weinberg de Roca of the ICTR, ICTR-01, Arusha, 19 May 2008, p. 2.

reason to strengthen the role of the Judges in the initiation and execution of coercive measures.¹⁰⁵

§ Duplication of efforts

There is, doubtless, some truth in the argument that the requirement of a warrant by a Judge or Trial Chamber of the international tribunal may be cumbersome and can sometimes be duplicative.¹⁰⁶ Indeed, under domestic law, national states normally require judicial authorisation for the execution of coercive measures.¹⁰⁷ However, there is no guarantee that this judicial authorisation is required for the specific measure sought or that this authorisation will in practice be sought.¹⁰⁸ Furthermore, there is no guarantee that domestic law will not depart from the requirements under international human rights law, or that the domestic law will not be circumvented.¹⁰⁹

Generally, the international criminal tribunals scrutinised contain no binding obligations for states to adopt certain procedural requirements or thresholds for the adoption of non-custodial coercive measures.¹¹⁰ No express minimum standards for domestic procedures on non-custodial coercive measures can be discerned in the statutory documents of the international criminal tribunals. If one of the objectives of international criminal procedural law is to

¹⁰⁵ Interview with a Judge of the ICTR, ICTR-05, Arusha, 2 June 2008, p. 6 (“In Europe which is much more unified than some other places, we have some conventions trying to introduce some standards. Even there we have big problems using evidence gathered by other countries because of procedural differences. I am afraid that would be even worse here because, for example, in Africa there are really different national standards on the gathering of evidence, and that is why maybe there should be a strengthening of the Role of the Tribunal Judges”).

¹⁰⁶ In practice, authorisation is sometimes obtained at both the national and international level. For an example, consider ICC, Decision on the Confirmation of Charges, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-465-Red, PTC II, 16 December 2011, par. 56 (the Prosecution asserts that the seizure of items at the house of the suspect had not only been authorised by a French Judge, but also followed upon a request for cooperation upon an order by the Pre-Trial Chamber).

¹⁰⁷ See *supra*, Chapter 6, I.3.2.

¹⁰⁸ It should be reiterated that, while human rights law jurisprudence considers the necessity of obtaining judicial authorisation as ‘highly relevant’, there is no clear-cut obligation to obtain judicial authorisation for coercive measures under human rights law.

¹⁰⁹ R. CRYER, H. FRIMAN, D. ROBINSON and E. WILMSHURST, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2010, p. 526.

¹¹⁰ While Article 88 of the ICC Statute only obliges states to ensure that there are procedures available under their domestic laws for all forms of cooperation under Part 9, some provisions do contain binding obligations. One notable exception is Article 59 on arrest proceedings in the custodial state, which prescribes that the person arrested should be brought promptly before a Judge and should have the right to apply for interim release. This provision will be discussed in the Chapter on arrest and deprivation of liberty, *infra*, Chapter 7; other exceptions include Article 55 (2) of the ICC Statute (on the rights of persons questioned by national authorities following a request made under Part 9).

protect the due process rights of the defendant, it could be argued that a judicial warrant by an international Judge is indispensable to the use of non-custodial coercive measures by the Prosecutor, as the national judge is not the best placed to assess the merit of a request for coercive measures and lacks both the overview and information necessary.¹¹¹ However, admittedly, it can be doubted whether these problems would be fully resolved if the international Judge or Trial Chamber were to authorise the request. In cases where a judicial warrant is requested, this will be done on an *ex parte* basis. The international Judge can only rely on the information which is handed over by the Prosecutor and cannot rely on a *dossier* to assess the proportionality, necessity and other restrictions of the Prosecutor's power to rely on coercive measures in the conduct of the investigation. Therefore, the Judge or Trial chamber may naturally be inclined to attach credence to the information presented to them by the Prosecutor. Consequently, it is unlikely that this request would be denied. However, similar objections can be made regarding the efficiency of judicial overview at the national level.¹¹² It may equally be doubted whether the international Judge would be better placed to assess situations in which the individual rights of 'third persons', rather than the suspect or the accused, are at stake.

However, it is clear that in the absence of any international supervision, a *lacuna* may exist in the protection of the defendant.¹¹³ The national authorities may demonstrate restraint in exercising control over the coercive measures that are executed following a request by an international tribunal. The compulsory action was undertaken at the request of an international tribunal or the national authorities were compelled to do so by an international tribunal. As a

¹¹¹ G. SLUITER, *International Criminal Adjudication and the Collection of Evidence*, Antwerp, Intersentia, 2002, pp. 125 - 126. Consequently, the national Judge would most likely assume the request to be lawful. However, it can be doubted whether the situation would be appreciably different if the international Judge or Trial Chamber were to authorise the request. In case a judicial warrant is requested, this will be done on an *ex parte* basis. The international Judge can only rely on the information which is handed over by the Prosecutor and cannot rely on a *dossier* to assess the proportionality, necessity and other restrictions of the Prosecutor's power to rely on coercive measures in the conduct of the investigation. Therefore, the Judge or Trial chamber may naturally be inclined to attach credence to the information presented by the Prosecutor. Consequently, it is unlikely that such request would be denied. However, similar arguments can be made regarding the efficiency of judicial overview at the national level.

¹¹² See e.g. E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN, *Procedural Rights at the Investigative Stage: Towards a Real Commitment to Minimum Standards*, in E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN (eds.), *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, Oxford, Intersentia, 2007, pp. 21-22 (arguing that such calls into question the efficacy of judicial oversight that is often regarded as a sufficient protection in respect of investigative methods).

¹¹³ See the discussion above, *supra*, Chapter 2, VII.2; A.M.M. ORIE, *De verdachte tussen wal en schip of de systeem-breuk in de kleine rechtshulp*, in E.A. DE LA PORTE et al., *Bij deze stand van zaken - bundel opstellen aangeboden aan A. L. Melai, Gouda, Quint, 1983.*

result, the state whose assistance has been requested may be reluctant to accept responsibility for irregularities that occur.¹¹⁴ At the moment that a remedy is sought at the national level, the evidence obtained as a result of the violation of the rights of a suspect, accused person or third person may already have been transmitted to the international tribunal. The state may also request the tribunal not to make use of the evidence when the evidence has been transferred. However, the requested state may be reluctant to formulate such a request.¹¹⁵

§ *Ex post judicial intervention*

The preference human rights law expresses for a judicial review, especially in cases where the restrictions and conditions for the adoption of coercive measures are vague, has previously been shown.¹¹⁶ However, the extent to which *ex post* judicial control may compensate for the absence of any *ex ante* control by a tribunal Judge or Chamber remains to be examined.

The ECtHR held in the *Smirnov* case that the lack of the requirement of a judicial warrant can be remedied by providing an *ex post* judicial review.¹¹⁷ Consequently, if the (Pre-) Trial Chamber can *ex post* review both the lawfulness and the justification for the adoption of the coercive measure taken, no prior judicial authorisation by the international criminal tribunal would be required.¹¹⁸ One occasion in the proceedings when an assessment of the coercive measures which were initiated could occur is when the Trial Chamber has to decide on the admission of the fruits of these measures into evidence.

¹¹⁴ M. INAZUMI, Commentary, in A. KLIP and G. SLUITER (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 2000-2001*, Vol. VI, Antwerp, Intersentia, 2003, p. 441.

¹¹⁵ G. SLUITER, *International Criminal Adjudication and the Collection of Evidence*, Antwerp, Intersentia, 2002, p. 223.

¹¹⁶ See *supra*, Chapter 6, I.3.1.

¹¹⁷ Importantly, the judicial review included both the lawfulness and the justification of the coercive measure (search warrant), see ECtHR, *Smirnov v. Russia*, Application No. 71362/01, Judgment of 12 November 2007, par. 45 (“In the cases of *Funke*, *Crémieux* and *Mialhe v. France* the Court found that owing, above all, to the lack of a judicial warrant, “the restrictions and conditions provided for in law... appear[ed] too lax and full of loopholes for the interferences with the applicant’s rights to have been strictly proportionate to the legitimate aim pursued” and held that there had been a violation of Article 8 of the Convention. [...] In the present case, however, the absence of a prior judicial warrant was, to a certain extent, counterbalanced by the availability of an *ex post factum* judicial review. The applicant could, and did, make a complaint to a court which was called upon to review both the lawfulness of, and justification for, the search warrant. The efficiency of the actual review carried out by the domestic courts will be taken into account in the following analysis of the necessity of the interference”); ECtHR, *Heino v. Finland*, Application No. 56720/09, Judgment of 15 February 2011, par. 45.

¹¹⁸ *Ibid.*, par. 45.

Where a prior judicial authorisation has been obtained from a Trial Chamber or Judge, the *ad hoc* tribunals allow for the review of such authorisation. Notably, in the *Prosecutor v. Naletilić and Martinović* case, one of the accused argued on appeal that the Trial Chamber had erred and abused its discretion in denying him the opportunity to review and challenge the evidence (in the form of affidavits, transcripts or any sworn testimony) on which the Judge relied to support the issuance of a search warrant.¹¹⁹ While the Appeals Chamber seemed to agree that access to these materials may be of ‘material assistance’ to the accused, it subsequently found that the Trial Chamber had not erred in denying access to the materials sought where this access “could jeopardise [...] other investigations or trials.”¹²⁰

More problematic is the review when no prior authorisation has been obtained. International criminal tribunals have expressed a reluctance to determine whether a coercive measure has been lawfully executed under the laws of the requested state. Most notably, an ICTR Trial Chamber previously held that it lacked the competence to review the legality of coercive measures that had been executed by the national state. In *Nyiramasuhuko*, the Chamber held that:

“it is a sovereign state that executes the request and against whom the person arrested may seek a remedy against the arrest, custody, search, and seizure under the laws of the requested state.”¹²¹

The tribunal thus declined to supervise the legality of coercive measures which were executed by a state and argued that the sovereignty of the state concerned prevented it from supervising the lawfulness of coercive measures executed by national law enforcement

¹¹⁹ ICTY, Judgement, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, A. Ch., 3 May 2006, par. 232, 238.

¹²⁰ *Ibid.*, par 233.

¹²¹ ICTR, Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized, *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, T. Ch. II, 12 October 2000, par. 26; ICTR, Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items, *Prosecutor v. Ngirumpatse*, Case No. ICTR-97-44-I, T. Ch. II, 10 December 1999, par. 56; ICTR, Decision on the Defence Motion for the Restitution of Documents and other Personal or Family Belongings Seized (Rule 40 (C) of the Rules of Procedure and Evidence), and the Exclusion of such Evidence which may be Used by the Prosecutor in Preparing an Indictment against the Applicant, *Prosecutor v. Karemera*, Case No. ICTR-98-44-I, T. Ch. II, 10 December 1999, par. 4.2; ICTR, Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized, *Prosecutor v. Nzirorera*, T. Ch. II, 7 September 2000, par. 27; ICTR, Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44-I, T. Ch. II, 8 May 2000, par. 34-35.

personnel under national law. The international criminal tribunal cannot review the execution of the coercive measures under national law or even assess its compliance with international human rights norms. The accused or third person should seek a remedy from the requested state that executed the coercive measure.

Nevertheless, it will be shown in Part II of the present chapter how other case law from the international criminal tribunals reveals a willingness to assess the lawfulness of coercive measures which were adopted and their compliance with international human rights law, even in the absence of express provisions in the statutory documents.¹²² Even where the irregularities are attributable to the requested state, this does not prevent the tribunal from addressing these violations and providing remedies.

Overall, as will be illustrated, it will be difficult for the international tribunal to enforce the national laws that govern the execution of the coercive measures undertaken and to provide an effective remedy. Only where irregularities amount to gross human rights violations, the practice of the international criminal tribunals reveals a willingness to provide a remedy in the form of the exclusion of the resulting pieces of evidence from the proceedings.¹²³

Hence, while a formal requirement for prior authorisation by a Judge or Trial Chamber of the international criminal tribunal may be time-consuming or may sometimes even be considered a duplication of efforts (where national criminal justice systems often require judicial authorisation before coercive measures can be executed)¹²⁴, pre-authorisation offers the best protection for the suspect or accused person. The additional benefits of *ex ante* control over *ex post* judicial control have also been acknowledged by the ECtHR. The Court occasionally underlined, in relation to intrusive investigative measures, that unlike *ex post* control, *ex ante*

¹²² See *infra*, Chapter 6, II. Compare with the *Delalić et al.* case, on the interrogation of the accused in the absence of counsel. In that case, an express provision granting the right to be assisted by counsel could be found in the statutory framework (Rule 42 ICTY RPE). See ICTY, Decision on Zrdavko Mucić Motion for the Exclusion of Evidence, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, T. Ch., 2 September 1997, par. 43-44.

¹²³ See *infra* Chapter 6, I.7.

¹²⁴ However, there is no guarantee that such judicial authorisation is required for the specific measure sought or that such authorisation will in practice be sought. It should be reiterated that, while human rights law jurisprudence considers the necessity of obtaining judicial authorisation as ‘highly relevant’, there is no clear-cut obligation to obtain judicial authorisation for coercive measures under human rights law. Besides, there is no guarantee that domestic law will not depart from the requirements under international human rights law, or that the domestic law will not be circumvented. See: R. CRYER, H. FRIMAN, D. ROBINSON and E. WILMSHURST, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2007, p. 419.

supervision may *prevent* violations of human rights, including the right to privacy.¹²⁵ In a similar vein, the U.S. Supreme court views an *ex ante* judicial authorisation as being an important safeguard for searches falling within the scope of the Fourth Amendment.¹²⁶ There is a “clear preference” for an *ex ante* review, because of its potential to prevent unreasonable searches, not because an *ex ante* review is considered to be an “inherently better” form of review compared to an *ex post* review.¹²⁷

§ *Uncertainty regarding the necessity of a judicial review*

The requirement seems equally problematic when the Prosecutor seeks to obtain certain evidence from a particular state and it is uncertain at the outset whether a resort to coercive measures will be necessary. Should the Prosecutor be required to obtain judicial authorisation before requesting the state to seek that evidence in this case? It has been argued that the Trial Chamber should consider whether the use of coercive measures was ‘reasonably expected’, in which case a prior warrant would be necessary.¹²⁸

I.4. General threshold for the use of non-custodial coercive measures

In addition to the *formal* condition of a judicial authorisation, national criminal justice systems often provide for certain *material* conditions for the use of non-custodial coercive measures. Most importantly, the coercive measures taken should be proportionate. Moreover,

¹²⁵ The ECtHR held in relation to the privilege of confidentiality of journalistic sources, that an *post factum* review by the regional court could not cure shortcomings, where such review was “powerless to prevent the public Prosecutor and the police from examining the photographs stored on the CD-ROM the moment it was in their possession”). See ECtHR, *Sanoma Uitgevers BV v. The Netherlands*, Application No. 38224/03, Judgment (Grand Chamber) of 14 September 2010, par. 99. See M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, pp. 245 – 246.

¹²⁶ See *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), p. 357 (“Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes, [...] and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment —subject only to a few specifically established and well-delineated exceptions” (emphasis added)). Consider also M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, pp. 469 - 470 (arguing that since 9/11, the protective function of this requirement has declined).

¹²⁷ *Ibid.*, p. 472.

¹²⁸ G. SLUITER, *International Criminal Adjudication and the Collection of Evidence*, Antwerp, Intersentia, 2002, p. 128 (giving the example where the Prosecutor requests the seizure of evidence without knowing the exact location of such evidence. Where the evidence were to be found in a private premise, the seizure would infringe on the right to the inviolability of the house of the person concerned).

national criminal justice systems often require that the coercive measures are necessary or fulfil the requirement of subsidiarity, this requirement often being linked to the degree of invasiveness of the measure. Lastly, national criminal justice systems often set a minimum threshold and provide for a triggering mechanism for the use of coercive measures in the course of criminal investigations.¹²⁹ The following paragraphs will inquire as to whether these material conditions can be found in international criminal procedural law.

A comparative study by VERVAELE on the basis of reports received by 17 states concluded that most countries seem to adhere to the *principle of reasonable suspicion* for the use of coercive measures.¹³⁰ An often cited example is the Fourth Amendment to the US Constitution which requires the showing of a ‘probable cause’ before a search warrant will be issued.¹³¹ Normally, English law requires the existence of ‘reasonable grounds for believing that an indictable offence has been committed’, before an entry and search of premises can be authorised.¹³² Under Canadian law, the search of premises presupposes that a judicial official has been satisfied by information on oath that there are reasonable grounds to believe that the prescribed items would be found at the place to be searched, and would provide evidence of an offence, or the whereabouts of the person believed to have committed an offence, or anything reasonably believed to have been used to commit any serious offence against a person.¹³³ Belgian law requires the existence of serious indications that a crime has been committed.¹³⁴ These thresholds ultimately protect the presumption of innocence, by preventing innocent people from being unnecessarily subjected to intrusive investigative

¹²⁹ Meanwhile, some authors have noticed a trend of lowering such thresholds and triggering mechanisms, especially in relation to the pro-active investigation of serious crimes, see e.g. J.A.E. VERVAELE, *Mesures de procédure spéciales et respect des droits de l’homme – Rapport général*, in «Utrecht Law Review», Vol. 5, 2009, pp. 129-130.

¹³⁰ J.A.E. VERVAELE, *Special Procedural Measures and the Protection of Human Rights*, in «Utrecht Law Review», Vol. 5, 2009, p. 96.

¹³¹ The Fourth Amendment provides that “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

¹³² Section 8 PACE; Where such material condition is not always explicitly provided by law, such requirement may follow from jurisprudence.

¹³³ Section 487.01 (1) (a) of the Canadian Code of Criminal Procedure; K.W. ROACH, *Canada*, in C. M. BRADLEY, *Criminal Procedure: A Worldwide Study*, Durham, Carolina Academic Press, 1999, p. 61.

¹³⁴ While the law does not expressly stipulate it, the existence of such material condition has been recognised in practice, see e.g. R. VERSTRAETEN, *Handboek Strafvordering*, Antwerpen – Apeldoorn, Maklu, 2003, p. 347; C. VAN DEN WYNGAERT, *Strafrecht en Strafprocesrecht*, Maklu, Antwerpen-Apeldoorn, 2009, p. 1023.

acts.¹³⁵ In addition, they protect against arbitrary interferences with human rights, including the right to privacy and the right to property.

These triggering mechanisms or minimum thresholds are remarkably absent in international criminal procedure. Nowhere do the statutory documents of the *ad hoc* tribunals require a threshold, or an underlying justification or basis for the adoption of coercive measures, such as ‘probable cause’, the existence of ‘concrete indications’ or ‘reasonable grounds’.¹³⁶ The only applicable threshold is the general ‘sufficient basis to proceed’ assessment made by the Prosecutor to start an investigation, which barely constitutes a useful criterion.¹³⁷ Whether or not the Trial Chamber Judges apply a minimum threshold in practice, when authorising requests made to execute coercive measures, remains unclear.¹³⁸ In the case of a request to the national state concerned, the applicable threshold will depend on the respective national legislation. Under the current regime, it does not seem necessary that any indication of guilt (concrete or not) has been demonstrated before the Prosecutor can resort to the use of coercive measures.

A more robust threshold is provided for under the ICC Statute, which includes the requirement that the information in the Prosecutor’s possession reveals a ‘reasonable basis to believe that a crime within the jurisdiction of the Court has been committed’, before the investigation is triggered.¹³⁹ While the Prosecutor can already use some of his investigative powers during the preliminary inquiry, no coercive measures may be used before the determination of a reasonable basis.¹⁴⁰

¹³⁵ M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, p. 150.

¹³⁶ Consider Article 17 (2) of the ICTR Statute, Article 18 (2) ICTY Statute, Rule 39 (i) and (iv) of the ICTY, ICTR and SCSL RPE.

¹³⁷ Article 17 (1) ICTR Statute, Article 18 (1) ICTY Statute. No comparable threshold can be found in the SCSL Statute. On this threshold, see *supra*, Chapter 3, I.1.

¹³⁸ Consider in this regard ICTY, Mladen Naletelić’s Revised Appeals Brief – Redacted, *Prosecutor v. Naletelić and Martinović*, Case No. IT-98-34-A, A. Ch., 6 October 2005, par. 23 (the Defence “seeks the establishment of some standard of review for search warrants in order to protect against prosecutorial capriciousness and zeal. Probable cause should be a minimum. If a search warrant affidavit does not state probable cause, the warrant should fail. If a warrant fails, the evidence derived thereby should not be a basis of guilt”).

¹³⁹ Article 53 (1) (a) ICC Statute; Article 15 (3) ICC Statute, requiring the authorisation by the Pre-Trial Chamber that there is a reasonable basis to proceed.

¹⁴⁰ See Rule 104 (2) ICC RPE, *supra*, Chapter 3, I.2.

I.5. Principle of proportionality

It follows from international human rights law that coercive measures should respect the principle of proportionality. As acknowledged by the ICTY Appeals Chamber in *Milosević*, some principle of proportionality for restrictions of fundamental rights is honoured by most national criminal justice systems, which entails that coercive measures which restrict fundamental rights should be in service of “a sufficiently important objective” and should impair that right no further than necessary to accomplish the objective.¹⁴¹ Nevertheless, only occasionally do the international criminal tribunals refer to the existence of a material condition of proportionality for the adoption of coercive measures. Notwithstanding some examples to the contrary, this requirement restricting the Prosecutor’s power to initiate coercive measures seems to lead a rather obscure life in international criminal proceedings.¹⁴²

For example, the principle of proportionality was referred to by the Trial Chamber in *Stakić* in relation to a request by the Prosecution to *inter alia* order UNDU to identify, seal, and transfer materials in the possession of Stakić upon his arrival at the tribunal’s detention unit.¹⁴³ In its decision, the Trial Chamber held that the legality of a search of these materials largely depended on its proportionality.¹⁴⁴ In that context, it referred to what it identified as ‘the general principle of proportionality’, which entails that a measure in public international law is proportional only when it is (1) suitable, (2) necessary, and (3) its degree and scope are in a

¹⁴¹ ICTY, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, *Prosecutor v. Milošević*, Case No. IT-02-54-AR.73.7, A. Ch., 1 November 2004, par. 17. For example, according to the French *code de procédure pénale*, coercive measures to which a person suspected or prosecuted is subjected should be strictly limited to “what is necessary for the process, proportionate to the gravity of the offence and should not infringe human dignity” (Article préliminaire (III) du Code de Procédure Pénale). In Dutch criminal procedure, the principles of proportionality (and subsidiarity) constitute *principles of due administration of law* (‘beginselen van behoorlijke procesorde’), which are “unwritten principles that aim to guarantee, supplementary to the statutory conditions, the legitimacy of the criminal process where the law affords discretion, including the criminal investigation.” See M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, p. 59; The principle of proportionality of coercive measures equally governs the German *Vorverfahren* or *Ermittlungsverfahren*, see R. JUY-BIRMANN, *The German System*, in M. DELMAS-MARTY and J.R. SPENCER (eds.), *European Criminal Procedure*, Cambridge, Cambridge University Press, 2002, p. 313.

¹⁴² Only the Internal Rules of the ECCC explicitly provides for this principle. See Rule 21 (2) IR ECCC and *supra*, Chapter 6, I.2.

¹⁴³ ICTY, Order to the Registry of the Tribunal to Provide Documents, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T.Ch. II, 5 July 2002.

¹⁴⁴ *Ibid.*, p. 4; S. SWOBODA, *Admitting Relevant and Reliable Evidence: The ICTY’s Flexible Approach Towards the Admission of Evidence under Rule 89 (C) ICTY RPE*, in T. KRUESMANN (ed.), *ICTY: Towards a Fair Trial?*, Antwerp, Intersentia, 2009, p. 391.

reasonable relationship to the envisaged target (proportionality in the narrowest sense).¹⁴⁵ Moreover, procedural measures should not be capricious or excessive. Lastly, it includes a notion of subsidiarity, by requiring that if a more lenient measure would be sufficient, it should be applied. In the *Stakić* case the Trial chamber considered that the requirements, of necessity and proportionality *sensu stricto* especially, entail that in some cases the accused's right to privacy may be predominant, for example as far as medical records or diaries are concerned.¹⁴⁶ In relation to restrictions to another fundamental right (at stake was Milošević's right to self-representation) the ICTY Appeals Chamber held that the Trial Chamber made an error of law by failing to recognise that any restrictions to the fundamental rights of the accused should be proportionate and underscored that the ICTY has been guided by "a general principle of proportionality".¹⁴⁷

The proportionality criteria, identified above, were first established by the Trial Chamber in the *Hadžihasanović et al.* case in relation to a request for provisional release and were later confirmed by the ICTY Appeals Chamber in *Limaj*.¹⁴⁸ The origin of these criteria remains dubious. The tribunal never provided any source for these criteria. This test is reminiscent of the interpretation given by the German Constitutional Court to the '*Rechtstaatsprinzip*' as containing three elements, to know suitability, necessity, and proportionality *sensu stricto*.¹⁴⁹ It follows from this three-pronged test that state measures should (i) be suitable for the purpose of facilitating or achieving the objective pursued, (ii) must also be necessary in that

¹⁴⁵ ICTY, Order to the Registry of the Tribunal to Provide Documents, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T.Ch. II, 5 July 2002.

¹⁴⁶ *Ibid.*, p. 4.

¹⁴⁷ ICTY, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, *Prosecutor v. Milošević*, Case No. IT-02-54-AR.73.7, A. Ch., 1 November 2004, par. 17. Consider also: ICTY, Decision on Momčilo Krajišnik's Request to Self-Represent, on Counsel's Motion in Relation to Appointment of *Amicus Curiae*, and on the Prosecution Motion of 16 February 2007, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, A. Ch., 11 May 2007, par. 69.

¹⁴⁸ ICTY, Decision Granting Provisional Release to Enver Hadžihasanović, *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, T. Ch. II, 19 December 2001; ICTY, Decision Granting Provisional Release to Mehmed Alagić, *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, T. Ch. II, 19 December 2001; ICTY, Decision Granting Provisional Release to Amir Kubura, *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, T. Ch. II, 19 December 2001; ICTY, Decision on Vidoje Blagojević's and Dragan Obrenović's Application of Provisional Release, *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-PT, T. Ch. II, 22 July 2002. In relation to a change in the conditions of detention, see SCSL, Motion for Modification of the Conditions of Detention, *Prosecutor v. Norman*, Case No. SCSL-2003-08-PT, President, 23 July 2003; ICTY, Decision on Darko Mrda's Request for Provisional Release, *Prosecutor v. Mrda*, Case No. IT-02-59-PT, T. Ch. II, 15 April 2002, par. 31. The Appeals Chamber confirmed this 'principle of proportionality' in ICTY, Decision on Fatmir Limaj's Request for Provisional Release, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-AR65, A. Ch., 31 October 2003, par. 13.

¹⁴⁹ It may be noted that the same German Judge was presiding the Trial Chamber bench that rendered the Hadžihasanović decision and the Appeals Chamber bench that confirmed the holding of Hadžihasanović in the *Limaj* case.

no other instrument be at the authority's disposal, which is less restrictive of freedom, and (iii) the state measures may not be disproportionate to the restrictions which they involve (Is the disadvantage created in a proportional relationship with the benefits created by the measure?).¹⁵⁰ The two latter prongs could also be referred to as 'means-proportionality' or 'alternative-means' and 'ends-proportionality' or 'end-benefits proportionality'.¹⁵¹

The ICC Pre-Trial Chamber has also referred to the 'principle of proportionality' in the *Lubanga* case, in connection to the assessment of the legality of a search that had been conducted on the private premises of the accused in the DRC. Rather than referring to the aforementioned *Rechtstaatsprinzip*, the Pre-Trial Chamber derived this principle from the case law of the ECtHR in relation to infringements of the right to privacy.¹⁵² The Pre-Trial Chamber concluded that the search operation was of an indiscriminate nature and was not proportionate to the objective sought by the national authorities.¹⁵³ Consequently, the operation was conducted in disrespect of the principle of proportionality and thus violated internationally protected human rights.¹⁵⁴ This finding was later confirmed by Trial Chamber I.¹⁵⁵ However, the ICC Trial Chamber added that the violation of the principle of proportionality will not lead to the automatic exclusion of the resulting evidence.¹⁵⁶

¹⁵⁰ W. VAN GERVEN, *The Effect of Proportionality on the Actions of the Member States*, in E. ELLIS, *The Principle of Proportionality in the Laws of Europe*, Oxford – Portland Oregon, Hart Publishing, 1999, pp. 44-45.

¹⁵¹ E.T. SULLIVAN and R.S. FRASE, *Proportionality Principles in American Law: Controlling Excessive Government Actions*, Oxford, Oxford University Press, 2009, p. 7 (according to the author, 'Means-proportionality' is about the availability of less intrusive ways of achieving the government's asserted purposes: it involves a comparison of the costs and burdens imposed by equally effective alternative measures designed to achieve the same benefits. 'Ends-proportionality' refers to the balancing of the asserted law enforcement or other government interests against the nature and degree of the resulting intrusion into privacy, liberty or property. It is about the comparison of a single measure to its expected benefits.

¹⁵² ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-803-tEN, PTC I, 29 January 2007, par. 79. Consider Article 21 (3) ICC Statute.

¹⁵³ *Ibid.*, par. 80-81 ("it is clear from the list of documents and items seized by the Congolese authorities and handed over to the Prosecution's investigators that hundreds of documents were confiscated... There is no means of determining the relevance, if any, of the documents and items seized from [redacted]'s home to the Congolese authorities. However, the information before the Chamber suggests that the Prosecution seemed just as interested, perhaps even more interested, in the items in question and it appear that the Prosecution's presence influenced the conduct of the search and seizure"). The Pre-Trial Chamber additionally noted that only 70 out of hundreds items seized were listed in the Prosecutor's Amended List of Evidence.

¹⁵⁴ *Ibid.*, par. 82.

¹⁵⁵ ICC, Decision on the Admission of Material from the "Bar Table", *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-1981, T. Ch. I, 24 June 2009, par. 38 ("There is no reason for this Chamber to reach a different conclusion on these issues, and in particular that an unjustified violation of the individual's right to privacy occurred").

¹⁵⁶ ICC, Decision on "Prosecution's Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)", *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-2589, TC I, 21 October 2010, par. 29-30; ICC, Decision on the Admission of Material from the "Bar Table", *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-1981, T. Ch. I, 24 June 2009, par. 39; ICC, Decision

Indeed, while human rights texts do not explicitly mention it, it follows from human rights law that coercive measures, as they interfere with human rights, should be proportionate to the legitimate aim that they pursue. This principle of proportionality has been viewed in the jurisprudence of the ECtHR as a corollary to the ‘necessary in a democratic society’ requirement and the requirement of a ‘pressing social need’ read into this requirement by the Court.¹⁵⁷ The requirement of proportionality follows from the need to balance different competing interests of the right at stake (right to privacy, right to property) and the limiting interest in a particular case.¹⁵⁸ The Court has emphasised that insofar that the proportionality requirement is derived from the ‘necessary in a democratic society’ provision, the word ‘necessity’ is not synonymous with ‘indispensable’, ‘strictly necessary’ or ‘absolutely necessary’ but means more than ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’. While there is a certain margin of appreciation for the states, the ultimate control lies with the Court.¹⁵⁹ The broadness of the powers restricting certain rights or freedoms is one aspect which will be considered when the Court looks into the proportionality of a coercive power restricting human rights. In that regard, the ECtHR has always been highly critical of giving powers too wide and too discretionary to the executive.¹⁶⁰ A notion of reasonableness or proportionality is equally inherent in Article 17 of the ICCPR concerning the right to privacy.¹⁶¹

on the Confirmation of Charges, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-803-tEN, PTC I, 29 January 2007, par. 84. See the discussion *infra*, Chapter 7, I.7.3.

¹⁵⁷ In general, see M.A. EISSEN, *The Principle of Proportionality in the Case-Law of the European Court of Human Rights*, in R.S.T.J MACDONALD, F. MATSCHER and H. PETZOLD (eds.), *The European System for the Protection of Human Rights*, Dordrecht – Boston – London, Martinus Nijhoff Publishers, 1993, pp. 125-146.

¹⁵⁸ J. MCBRIDE, *Proportionality and the European Convention on Human Rights*, in E. ELLIS, *The Principle of Proportionality in the Laws of Europe*, Oxford – Portland Oregon, Hart Publishing, 1999, p. 24.

¹⁵⁹ See ECtHR, *Handyside v. The United Kingdom*, Application No. 5493/72, Series A, No. 24, Judgment of 7 December 1976, par. 48-49; ECtHR, *Silver and Others v. The United Kingdom*, Application Nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Series A, No. 83, Judgment of 25 March 1983, par. 97. On coercive measures infringing on the right to privacy, consider *e.g.* ECtHR, *Niemietz v. Germany*, Application No. 13710/88, Judgment of 16 December 1992 or ECtHR, *Mialhe v. France (no. 1)*, Application No. 12661/87, Series A, No. 256-C, Judgment of 25 February 1993, par. 37 – 39. The requirement of proportionality has also been read in Article 1 of Protocol 1 ECHR; on coercive measures infringing upon the right to property, consider *e.g.* ECtHR, *Raimondo v. Italy*, Application No. 12954/87, Judgment of 22 February 1994, par. 36.

¹⁶⁰ ECtHR, *Crémieux v. France*, Application No. 11471/85, Judgment of 25 February 1993, par. 40; ECtHR, *Funke v. France*, Application No. 10828/84, Judgment of 25 February 1993, par. 57; *Mialhe v. France (no. 1)*, Application No. 12661/87, Series A, No. 256-C, Judgment of 25 February 1993, par. 38.

¹⁶¹ M. NOWAK, *U.N. Covenant on Civil and Political Rights: CCPR commentary (2nd edition)*, Kehl am Rein, Engel, 2005, p. 383 (noting that “whether interference with privacy is permissible requires a precise balancing of the circumstances in a given case, paying regard to the principle of *proportionality*”); CCPR General Comment No. 16: *The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Article 17)*, U.N. Doc. HRI/GEN/1/Rev.6, 8 April 1988, par. 4 (“The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances”).

From the above, it can be concluded that references to the proportionality principle in relation to the use of non-custodial coercive measures can be found in the jurisprudence of the *ad hoc* tribunals and the ICC. It is beyond the scope of this study to entertain on the similarities and differences between these concepts where different concepts are relied upon by these jurisdictions.

I.6. (Subsidiarity) - necessity - specificity

It has been illustrated, above, how the principle of proportionality, as interpreted by the international criminal tribunals and as deriving from international human rights law is broad enough to include a notion of necessity in the sense of subsidiarity.¹⁶² This principle of subsidiarity means that coercive measures can only be relied upon when less intrusive measures would not suffice.¹⁶³ While it is difficult to construe this principle as a general principle of law, the principle has been recognised in human rights law and has been recognised in the jurisprudence of the different international criminal tribunals under the principle of proportionality (*sensu lato*).¹⁶⁴

Another obligation of necessity applies indirectly in cases where coercive measures are relied upon. It was argued above that the adoption of coercive measures by the Prosecutor presupposes judicial authorisation. A request to that extent should be made by the Prosecutor pursuant to Rule 54 of the ICTY, ICTR, and SCSL RPE. It follows from Rule 54 that a request for a warrant should be necessary for the Prosecutor for the purposes of the investigation and, thus, to obtain evidence (*requirement of necessity*).¹⁶⁵ In addition, the

¹⁶² ICTY, Order to the Registry of the Tribunal to Provide Documents, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T.Ch. II, 5 July 2002, p. 4.

¹⁶³ B. DE SMET, *Internationale Samenwerking in Strafzaken tussen Angelsaksische en continentale Landen*, Intersentia Rechtswetenschappen, Antwerpen – Groningen, 1999, p. 108.

¹⁶⁴ Some countries recognise a general principle of subsidiarity. Consider *e.g.* The Netherlands, where the principle of subsidiarity forms part of 'het beginsel van redelijke en behoorlijke belangenafweging'. See G.J.M. Corstens, *Het Nederlands Strafprocesrecht*, Deventer, Kluwer, 2008, p. 70; M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, p. 59. Other countries seem to reserve a more limited role to the principle of subsidiarity. The Belgian code of criminal procedure, for example, only provides for a requirement of subsidiarity for the more intrusive coercive measures, including the interception of the content of private telecommunications (Art. 90ter Sv.), systematic observation (47sexies, §2 Sv.) or infiltration (47octies, §2 Sv.). These coercive measures can only be employed where other investigative measures have proven insufficient to discover the truth.

¹⁶⁵ Rule 54 of the ICTY, ICTR and SCSL RPE; See also ICTY, Decision of the President on the Prosecutor's Motion for the Production of Notes Exchanged between Zejnir Delalić and Zdravko Mucić, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, President, 11 November 1996, par. 38-39.

material being sought must be relevant to an investigation or prosecution or for the conduct of trial (*requirement of relevancy*) and not entail a ‘fishing expedition’ (*requirement of specificity*).

In a similar vein, the ICC Prosecutor should file a request with the Pre-Trial Chamber pursuant to Article 57 (3) (a) ICC Statute. Article 57 (3) (a) and (b) “allude to the existence of a necessity requirement” which will govern requests for coercive measures.¹⁶⁶ Indeed, the reference to orders and warrants ‘as may be required for the purposes of an investigation’ or ‘as may be necessary to assist the person in the preparation of his or her defence’ are reminiscent of a requirement of necessity. These provisions seem equally to allude to the existence of a requirement of specificity. Article 57 (3) (b) is complemented by Rule 116 ICC RPE on the collection of evidence at the request of the Defence, encompassing a requirement of relevancy as well as a requirement of specificity for requests to seek cooperation from States.¹⁶⁷ Trial Chamber IV, in responding to a defence request to issue cooperation orders under Article 57 (3) (b), has held that requests for assistance must be based on the requirements of (i) specificity, (ii) relevance, and (iii) necessity.¹⁶⁸ Hence, Chambers of the ICC have started to adopt a similar position as the *ad hoc* tribunals and the SCSL and read these requirements into Article 57 (3) (a) in order to avoid ‘fishing expeditions’.¹⁶⁹

Hence, the requirements of necessity and specificity for requests for judicial authorisation concerning the adoption of coercive measures constitute material conditions restricting the power of the international Prosecutor (or the Defence) to use coercive measures.

¹⁶⁶ K. KRESS, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, in «Journal of International Criminal Justice», Vol. 1, 2003, p. 615.

¹⁶⁷ Rule 116 (1) (a) and (b) ICC Statute respectively.

¹⁶⁸ ICC, Decision on “Defence Application Pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an Order for the Preparation and Transmission of a Cooperation Request to the Government of the Republic of the Sudan”, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan*, ICC-02/05-03/09-169, T. Ch. IV, 1 July 2011, par. 17; ICC, Decision on the “Defence Application Pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)”, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-444, PTC I, 25 April 2008, p. 5.

¹⁶⁹ Consider also F. GUARIGLIA, K. HARRIS and G. HOCHMAYR, Article 57, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1123.

I.7. Admissibility of evidence obtained through illegal coercive measures

I.7.1. The question of a proper remedy

Irregularities in the initiation and execution of coercive measures may result in breaches of the right to privacy (or to the peaceful enjoyment of property) of the suspect, accused person or a third person. It has been addressed, above, how the ICTR has sometimes declined to supervise the legality of coercive measures if these coercive measures are executed by national states. In the *Ngirumpatse* case, the ICTR Trial Chamber held that it lacked the competence to overview the legality of a search that had been executed by the national authorities of Mali.¹⁷⁰ This holding was reiterated in a number of decisions by the ICTR about search and seizures executed by a national state following a request.¹⁷¹ It was shown how this approach deviated from other case law, indicating that the fact that the violations were committed by a state executing a request does not prevent the tribunal from addressing these violations or providing remedies.¹⁷²

It was also illustrated how it would be difficult for a suspect, accused person, or third person whose rights have been violated as a consequence of irregularities in the execution of coercive measures by national law enforcement officials to obtain a suitable remedy. The requested state may be reluctant to accept responsibility for irregularities that occur insofar that the compulsory action was undertaken at the request of an international court or tribunal or

¹⁷⁰ ICTR, Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items, *Prosecutor v. Ngirumpatse*, Case No. ICTR-97-44-I, T. Ch. II, 10 December 1999, par. 56 (“it is a sovereign state that executes the request and against whom the person arrested may seek a remedy against the arrest, custody, search, and seizure under the laws of the requested state”).

¹⁷¹ ICTR, Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized, *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, T. Ch. II, 12 October 2000, par. 26; ICTR, Decision on the Defence Motion for the Restitution of Documents and other Personal or Family Belongings Seized (Rule 40 (C) of the Rules of Procedure and Evidence), and the Exclusion of such Evidence which may be Used by the Prosecutor in Preparing an Indictment against the Applicant, *Prosecutor v. Karemera*, Case No. ICTR-98-44-I, T. Ch. II, 10 December 1999, par. 4.2; ICTR, Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized, *Prosecutor v. Nzirorera*, T. Ch. II, 7 September 2000, par. 27; ICTR, Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44-I, T. Ch. II, 8 May 2000, par. 34-35.

¹⁷² ICTY, Decision on Zdravko Mucić Motion for the Exclusion of Evidence, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, T. Ch., 2 September 1997, par. 43-44.

because the state was compelled to do so by an international court or tribunal.¹⁷³ At the moment that a remedy is sought at the national level, the evidence obtained as a result of the violation of the rights of a suspect, accused or third person may already have been transmitted to the international tribunal. In this case, the state may request that the tribunal not make use of the evidence. However, the tribunal may be reluctant to honour such a request.¹⁷⁴ A last resort may be the existing international human rights supervisory mechanisms. Overall, the chances for the individual to get redress from the requested state following irregularities in the execution of a request are limited. Moreover, it can be difficult for the state that executed the coercive measure to offer the remedy sought by the suspect or accused – be that the exclusion of the evidence, mitigation of the sentence or dismissal of the case – insofar as the proceedings take place in another forum.

Consequently, it may be more realistic that breaches of fundamental rights as a consequence of coercive measures be addressed by the international criminal tribunal directly. The normal remedy would then be the exclusion of the fruits of the irregular intrusive action, the evidentiary items that have been obtained unlawfully. Nevertheless, it will be illustrated below that evidence gathered through coercive measures in violation of the right to privacy (or the right to the peaceful enjoyment of property) is generally admissible before the different international criminal tribunals.

1.7.2. The *ad hoc* tribunals and the SCSL

§ Illegal interception of communications

Constant jurisprudence has held that the illegality of interceptions under national law will not automatically and necessarily lead to its *mandatory* exclusion under Rule 95 ICTY, ICTR and SCSL RPE.¹⁷⁵ Such illegality does not necessarily rise to the level where it would ‘seriously

¹⁷³ M. INAZUMI, Commentary, in A. KLIP and G. SLUITER (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 2000-2001*, Vol. VI, Antwerp, Intersentia, 2003, p. 437.

¹⁷⁴ G. SLUITER, *International Criminal Adjudication and the Collection of Evidence*, Antwerp, Intersentia, 2002, p. 223.

¹⁷⁵ Rule 89 (A) ICTY, ICTR and SCSL RPE. ICTY, Transcript, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, T. Ch., 2 February 2000, pp. 13684-13685 (Judge Robinson states that there are forms of illegality which call for the exclusion under Rule 95 but not every illegality), p. 13695 (Judge May subsequently rendered an oral decision stating that “We have come to the conclusion that the evidence obtained, as put before us in this

damage the integrity of the proceedings'.¹⁷⁶ It was rightly noted by the Trial Chamber in *Brđanin* that:

“the drafters of the Rules chose not to set out a rule providing for the automatic exclusion of evidence illegally or unlawfully obtained and instead to leave the matter of admissibility of evidence irrespective of its provenance to be dealt with under and in accordance with Rules 89 and 95.”¹⁷⁷

In casu, the Defence objected to the tendering into evidence of transcripts resulting from the interception of communications, and argued that they were illegally obtained and that the interception was not properly authorised under the laws of the Republic of Bosnia and Herzegovina. Consequently, the illegally obtained evidence should be excluded pursuant to Rules 89 and 95 of the ICTY RPE.¹⁷⁸

way evidence obtained by eavesdropping on an enemy's telephone calls during the course of a war is certainly not within the conduct which is referred to in Rule 95. It's not antithetical to and certainly would not seriously damage the integrity of the proceedings"); ICTY, Preliminary Decision on the Admissibility of Intercepted Communications, *Prosecutor v. Milošević*, Case No. IT-02-54-T, T. Ch., 16 December 2003, p. 3 (“whether the process of recording the intercepts is in accordance with domestic law of BiH does not necessarily determine whether the intercepts are admissible; but rather it is the law relating to the admissibility of evidence under the Statute and Rules of this Tribunal and international law which must be applied”); ICTY, Decision on the Defence “Objection to Intercept Evidence”, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, T. Ch. II, 3 October 2003, par. 51, 61 (“admitting illegally obtained intercepts into evidence does not, in and of itself, necessarily amount to seriously damaging the integrity of the proceedings”); ICTR, Decision on Exclusion of Testimony and Admission of Exhibit, *Prosecutor v. Renzaho*, Case No. ICTR-97-37-T, T. Ch. I, 20 March 2007, par. 15 (on the question of the admission into evidence of recordings, resulting from the RPF's eavesdropping on Rwandese authorities' telephone calls in April 1994 and on the question whether such admission would be in contravention of Rule 95, Trial Chamber I followed the *Brđanin* decision); ICTY, Judgement, *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, T. Ch. I, 27 September 2006, par. 1189 (the Chamber adopted the position that even if, *arguendo*, the intercepts were not obtained strictly in accordance with state legislation applicable at the time, the intercepted evidence would not be inadmissible *per se* under Rule 95); ICTY, Decision Denying the Stanišić Motion for Exclusion of Recorded Intercepts, *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, T. Ch. II, 16 December 2009, par. 21; ICTY, Decision on the Accused's Motion to Exclude Intercepted Conversations, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, T. Ch., 30 September 2010, par. 10 (the Trial Chamber noted that Rule 95 does not serve to exclude evidence based on violations of procedural safeguards set forth in domestic law. The accused failed to demonstrate how the admission of evidence allegedly obtained in contravention of Bosnian domestic law by Bosnian authorities would be so grave as to result in damaging the integrity of the proceedings before the Chamber).

¹⁷⁶ E.g. ICTY, Decision Denying the Stanišić Motion for Exclusion of Recorded Intercepts, *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, T. Ch. II, 16 December 2009, par. 21.

¹⁷⁷ ICTY, Decision on the Defence ‘Objection to Intercept Evidence’, *Prosecutor v. Brđanin*, Case No. IT- 99-36-T, T. Ch. II, 3 October 2003, par. 54.

¹⁷⁸ *Ibid.*, par. 11.

The Trial Chamber confirmed that communications that were intercepted during an armed conflict are not *a priori* inadmissible under Rule 95.¹⁷⁹ Rather, “the manner and surrounding circumstances in which evidence is obtained, as well as its reliability and effect on the integrity of proceedings, will determine its admissibility.”¹⁸⁰ According to the Trial Chamber, there may be exceptional circumstances when it is neither realistic nor practical to request permission to conduct covert interceptions.¹⁸¹ This decision has been criticised as it applies the wrong test: the Court should have asked whether there is a consistent rule *permitting* the admission of this evidence.¹⁸² However, it has been explained in Chapter 2 how, in the absence of a clear principle of procedural legality in the law of international criminal procedure, the practice of the *ad hoc* tribunals is rather to look for a *prohibitive* rule.¹⁸³

Rather than automatically excluding the evidence pursuant to Rule 95, the Court applied the *balancing test* provided for under Rule 89 (D) of the ICTY RPE, providing for the exclusion of evidence “if its probative value is substantially outweighed by the need to ensure a fair trial.” According to the Trial Chamber, a correct balance must be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.¹⁸⁴ In the Chamber’s opinion, the truth-finding function of the Court may necessitate the admission of intelligence which is the result of illegal activity, this is all the more so when the evidence is not available from other sources.¹⁸⁵ In exercising this balancing power, the Court considered several circumstances which favoured the admission of the evidence, including the

¹⁷⁹ *Ibid.*, par. 55; ICTY, Transcript, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, T. Ch., 2 February 2000, pp. 13684-13685; ICTY, Decision on the Accused’s Motion to Exclude Intercepted Conversations, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, T. Ch., 30 September 2010, par. 8.

¹⁸⁰ Decision on the Defence ‘Objection to Intercept Evidence’, *Prosecutor v. Brdanin*, Case No. IT-99-36-T, T. Ch. II, 3 October 2003, par. 55.

¹⁸¹ *Ibid.*, par. 56.

¹⁸² G.-J.A. KNOOPS, *Theory and Practice of International and Internationalized Criminal Proceedings*, The Hague, Kluwer Law International, 2005, p. 237 (“Despite the impressive array of jurisprudence cited in the decision, it is hard not to suspect that it was a selective, self-justifying approach. In this regard, one could argue that rather than reviewing domestic jurisprudence to ascertain whether there is a consistent injunction against the admission of such evidence, the inquiry of the Trial Chamber should have been whether there is a consistent rule *permitting* the admission of such evidence. Indeed, the outdated approach of the Permanent Court of Justice in the *Lotus* Case (Judgement of 7 September 1927) that whatever is not strictly prohibited by international law is permissible as far as sovereign states are concerned, is hardly an appropriate evidential standard to incorporate into a criminal trial. Thus rather than embodying the highest standards of human rights, the court appears to have gone for the lowest common denominator”).

¹⁸³ See *supra*, Chapter 2, VI.

¹⁸⁴ ICTY, Decision on the Defence “Objection to Intercept Evidence”, *Prosecutor v. Brdanin*, Case No. IT-99-36-T, T. Ch. II, 3 October 2003, par. 62.

¹⁸⁵ *Ibid.*, par. 61.

fact that a formal request for the interception was made and approved, the high level target and the need for secrecy, the fact that the state was at the brink of a civil war, the fact that the evidence could not have been available through another source and the gravity of the crimes.¹⁸⁶ Consequently, the Trial Chamber was satisfied that the intercepted communications were relevant and that they had probative value.¹⁸⁷

When balancing interests under Rule 89 (D), the Trial Chamber in *Brđanin* considered the deterrent function of exclusionary rules.¹⁸⁸ The Chamber noted that it is not in a position to discourage further abuses. It is not capable of discouraging the use or interception of communications in times of crisis or times of armed conflict.¹⁸⁹

“Domestic exclusionary rules are based, in part, on the principle of discouraging and punishing overreaching law enforcement. The Trial Chamber does not think for a moment that by taking a different approach to the one it is taking, it would in any event discourage the use of interception of communications in times of crisis or in time of armed conflict. ... The function of this Tribunal is not to deter and punish illegal conduct by domestic law enforcement authorities by excluding illegally obtained evidence.”¹⁹⁰

¹⁸⁶ *Ibid.*, par. 63.

¹⁸⁷ *Ibid.*, par. 64-68. At the admissibility stage, there should be sufficient indicia of reliability to admit on the intercept on a *prima facie* basis ('*prima facie* indication of reliability'): see e.g. ICTY, Preliminary Decision on the Admissibility of Intercepted Communications, *Prosecutor v. Milošević*, Case No. IT-02-54-T, T. Ch., 16 December 2003, p. 3; ICTY, Decision Denying the Stanišić Motion for Exclusion of Recorded Intercepts, *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, T. Ch. II, 16 December 2009, par. 14; ICTY, Decision on Admissibility of Intercepted Communications, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. Ch. II, 7 December 2007, par. 32; ICTY, Decision on the Admission into Evidence of Intercept-Related Materials, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, T. Ch. I, Section A, 18 December 2003, par. 26.

¹⁸⁸ Exclusionary rules have two different functions, an adjudicative function and a deterrent function. Zuckerman explained the difference between these two functions: the first function is to vindicate the accused for the occurred violation of his right (take the example of a search operation or an interception of communication that violated the privacy rights of the accused). The second – deterrent – function deters the Prosecutor and the police officers from future abuses. Zuckerman analyses both theories and concludes that the justification for excluding illegally obtained evidence in criminal proceedings shifts to the 'deterrence' theory. He also doubts the effectiveness of this deterrent effect. He concludes that a principle of judicial integrity or legitimacy is to be preferred, a principle avoiding automatic exclusion and automatic inclusion and putting the emphasis on the balancing exercise. To the criticism that this is a very vague principle, he responds that 'it is a mistake to assume that because individual decisions cannot be easily derived from a principle, the principle has no guiding force'. See A.A.S. Zuckerman, *The Principles of Criminal Evidence*, Oxford, Oxford University Press, 1989, pp. 343-345.

¹⁸⁹ ICTY, Decision on the Defence "Objection to Intercept Evidence", *Prosecutor v. Brđanin*, Case No. IT-99-36-T, T. Ch. II, 3 October 2003, par. 63.

¹⁹⁰ *Ibid.*, par. 63.

The Trial Chamber stated that the admission of the intercepts should not be interpreted as implying the tribunal tacitly approving of this behaviour.¹⁹¹ Indeed, it might be asked what the deterrent effect of the exclusion of a certain piece of evidence, following an irregularity in the execution of a request, will be for local police officers. Consequently, the ICTY refuses to be guided by prospects of deterring similar behaviour by national authorities.¹⁹² Nevertheless, as argued elsewhere, the consequence of this attitude may well be a change in attitude of the international Prosecutor. Where evidence, illegally obtained by national authorities is admitted at trial, there is no incentive for the Prosecutor to monitor, to the extent possible, the actions by national authorities to prevent violations of individual rights as a consequence of coercive measures taken.¹⁹³ It may even encourage further abuses.¹⁹⁴ Moreover, the focus by the Trial Chamber on deterrence ignores that exclusionary rules may also serve additional purposes. Exclusionary rules also serve an adjudicative function, which aims at vindicating the accused for the violation of his or her rights.¹⁹⁵ Furthermore, they ensure the integrity of the proceedings.

Also in the *Krajišnik* case, the Defence objected to the admission of allegedly illegally intercepted communications.¹⁹⁶ The Defence argued, in line with the reasoning above, that by admitting the fruits of “lawless invasions”, the tribunals would be made party to these invasions of the human rights of individuals. “A ruling admitting evidence in a criminal trial has the necessary effect of legitimizing the conduct which produced that evidence, while an application of an exclusionary ruling withholds the judicial imprimatur.”¹⁹⁷ The Chamber reiterated its previous holding and stated that if “*arguendo*, the intercepts were not obtained

¹⁹¹ *Ibid.*, par. 64.

¹⁹² S. SWOBODA, Admitting Relevant and Reliable Evidence, in T. KRUESSMANN, *ICTY: Towards a Fair Trial?*, Antwerp, Intersentia, 2008, p. 391.

¹⁹³ K. DE MEESTER, Coercive Measures, Privacy Rights and Judicial Supervision in International Criminal Investigations: in Need of Further Regulation?, in G. SLUITER and S. VASILIEV (eds.), London, Cameron May, 2009, p. 299.

¹⁹⁴ See A.A.S. ZUCKERMAN, *The Principles of Criminal Evidence*, Oxford, Oxford University Press, 1989, p. 344 (“The willingness of the public to accept the authority of the criminal court as a dispenser of punishment depends on the extent to which the public believes in the moral legitimacy of the system. The morality of fairness of a system of adjudication hinges on many factors... Amongst these must also be numbered a publicly acceptable judicial attitude towards breaches of the law. A judicial community that is seen to condone, or even encourage, violations of the law can hardly demand compliance with its own edicts”).

¹⁹⁵ *Ibid.*, pp. 343-352.

¹⁹⁶ ICTY, *The Krajišnik Defence Motion for an Order Suppressing Illegally Intercepted Communications, Prosecutor v. Krajišnik*, Case No. IT-00-39 & 40-PT, T. Ch. III, 13 September 2002. A decision was issued by the Trial Chamber as late as 29 January 2004 (Decision on Defence Motion to Exclude Certain Intercepted Communications). Nevertheless, this decision is not publicly available.

¹⁹⁷ *Ibid.*, par. 22.

strictly in accordance with state legislation applicable at the time, the intercepted evidence would not be inadmissible *per se* under Rule 95.” The Chamber added that “there is no indication that the methods by which the intercepts were obtained amounted to a violation of human rights, such that the proceedings would be tainted through association with those methods.”¹⁹⁸

§ *Illegal searches*

The case law on the admission of the fruits of unlawful searches further confirms this picture. Rather than excluding illegally obtained evidence, the *ad hoc* tribunals engage in a balancing exercise as envisaged under Rule 89 (D) ICTY, ICTR, and SCSL RPE. In the *Delalić et al.* case, the ICTY was first confronted with the question of the admissibility of evidence that had been gathered through a search operation that had violated national (Austrian) procedures.¹⁹⁹ The search had been conducted by the Austrian police and the Prosecution tried to tender into evidence some pieces of evidence (two passports and an identity card) which had been obtained in violation of Austrian law.²⁰⁰ In its decision, the Trial Chamber first reiterated that it is not bound by national laws of evidence (Rule 89 (A) of the ICTY RPE), and that the general rule regarding the admission of evidence is the ‘flexibility rule’, as laid down in Article 89 (C) of the ICTY RPE, according to which all evidence which is relevant and has probative value should be allowed into evidence.²⁰¹

The Chamber then referred to the exception to this general rule as laid down in Rule 95, which states that evidence casting serious doubt on its reliability or ‘evidence antithetical to, and that would seriously damage the integrity of the proceedings’ is not admissible and allows for the exclusion of evidence because of the way that it was obtained.²⁰² Nevertheless, the Trial Chamber determined that the search operations only implied “a minor breach of a procedural rule which the Trial Chamber is not bound to apply.”²⁰³ Consequently, the items

¹⁹⁸ ICTY, Judgement, *Prosecutor v. Krajišnik*, Case No IT-00-39-T, T. Ch. I, 27 September 2006, par. 1189.

¹⁹⁹ ICTY, Decision on the Tendering of Prosecution Exhibits 104–108, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, T. Ch., 9 February 1998. It should be noted that the search was conducted pursuant to a search warrant that had been ordered by an investigating magistrate.

²⁰⁰ *Ibid.*, par. 18.

²⁰¹ *Ibid.*, par. 13.

²⁰² *Ibid.*, par. 19.

²⁰³ *Ibid.*, par. 20.

should be admitted “in the interests of justice.”²⁰⁴ Therefore, the Defence argumentation that a number of irregularities occurred in the conduct of the search of Mucić’s apartment and that the actions taken were unlawful according to Austrian law is not sufficient to necessitate the exclusion of the resulting evidence.

Importantly, the Chamber added that “if at any stage there is evidence to satisfy the Trial Chamber that rules of international recognised human rights have been violated, we reserve the right to exercise our *discretion* to exclude them.”²⁰⁵ Therefore, if irregularities relating to the issuance or execution of a search and seizure amount to a violation of internationally recognised human rights (including the right to privacy or the right to the peaceful enjoyment of property), the exclusion of the evidence may well be the consequence.

In the aforementioned *Stakić* case, ICTY Appeals Chamber had to decide on the admissibility of evidence obtained during the search and seizure of the accused’s bag during his transfer to the tribunal’s detention facility. According to the Defence, documents had been seized “illegally, improperly, and unethically” from the accused following his arrest.²⁰⁶ The Chamber held that it first has to decide whether the search operation was lawful or unlawful. If the Chamber considers the search operation was unlawful, the Chamber has to consider whether the admission of the documents would violate Rule 95 ICTY RPE or the accused’s privilege against self-incrimination (Article 21 (4) (g) ICTY Statute).²⁰⁷ *In casu*, the Appeals Chamber found that the Defence failed to establish that the search and seizure “was illegal in terms of the rules or international law.”²⁰⁸

²⁰⁴ *Ibid.*, par. 21. The Chamber added “that it would constitute a dangerous obstacle to the administration of justice if evidence which is relevant and of probative value could not be admitted merely because of a minor breach of procedural rules which the Trial Chamber is not bound to apply.”

²⁰⁵ ICTY, Transcript, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, T. Ch., 11 June 1997, p. 3927 (emphasis added). The reference to the ‘discretion’ of the Trial Chamber seems to indicate that the Trial Chamber would rather rely on Rule 89 (D) (which offers a certain discretion to the Trial Chamber to exclude evidence) than on Rule 95 of the RPE (mandatory exclusion). ICTY, Decision on the Tendering of Prosecution Exhibits 104–108, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, T. Ch., 9 February 1998, par. 23.

²⁰⁶ ICTY, Decision, *Prosecutor v. Stakić*, Case No. IT-97-24-AR73.5, A. Ch., 10 October 2002, p. 3.

²⁰⁷ *Ibid.*, p. 3. The Trial Chamber hinted at the possibility that the search of Stakić bag may be in violation of his privilege from self-incrimination. However, the Trial Chamber did not elaborate this argument further.

²⁰⁸ *Ibid.*, p. 4. Similarly, the Trial Chamber had previously held that the documents had been legally seized and that it did not have to consider the question whether illegally obtained evidence is inadmissible *per se*, see ICTY, Decision on Defence Request to Exclude Evidence as Inadmissible, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch. II, 31 July 2002, p. 3.

I.7.3. The International Criminal Court

A similar approach to the matter of evidence, illegally obtained through coercive measures, is taken by the ICC. It was discussed previously how in the *Lubanga* case, the Defence, both at the confirmation stage and at the trial stage of proceedings, raised the issue of the illegality of a search and seizure operation that had been conducted at a private residence.²⁰⁹ The Defence requested the exclusion of the items resulting from the unlawful search and seizure pursuant to Article 69 (7) ICC Statute.²¹⁰ While the search and seizure was executed by the DRC authorities, an OTP investigator was also present. A domestic court (the Kisangani Court of Appeals) had previously affirmed that the search and seizure operation was in violation of Congolese criminal procedure.²¹¹ The latter procedure seemed to be conceived in order to safeguard privacy rights.

Similar to the *ad hoc* tribunals, Pre-Trial Chamber I confirmed that it was not bound by decisions of national courts on evidentiary matters.²¹² The Chamber then examined whether the evidence was obtained in violation of ‘internationally recognised human rights’ and could, thus, be excluded pursuant to Article 69 (7) of the ICC Statute.²¹³ In a first step, the Chamber held that the right to privacy and the protection against unlawful interference and

²⁰⁹ See *supra*, Chapter 6, I.3.5.

²¹⁰ ICC, Public Redacted Version of Request to Exclude Evidence Obtained in Violation of Article 69 (7) of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-683, PTC I, 7 November 2006; ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04 01/06-803-tEN, PTC I, 29 January 2007, par. 62-90; ICC, Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-915, PTC I, 24 May 2007, par. 72-74.

²¹¹ See the Kisangani Court of Appeals Decision as cited in ICC, Public Redacted Version of Request to Exclude Evidence Obtained in Violation of Article 69 (7) of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-683, PTC I, 7 November 2006, par. 6 (« La Cour estime que ce moyen de défense est pertinent et fondé. En effet, l’article 333 du Code de Procédure Pénale dispose que “les visites et perquisitions se font en présence de l’auteur présumé de l’infraction et de la personne au domicile ou à la résidence de laquelle elles ont lieu, à moins qu’ils ne soient pas présents ou qu’ils refusent d’y assister” et la jurisprudence a clarifié cette disposition en décidant dans une situation analogue que “devant les protestations légitimes du prévenu, le juge ne peut prendre en considération une pièce à conviction prétendument trouvée au bureau (ici résidence) lorsque la saisie de la pièce litigieuse a été opérée en l’absence de l’intéressé alors que, mis en état d’arrestation, celui-ci se trouvait entièrement à la disposition du Parquet et pouvait donc être conduit à tout moment sur les lieux de la saisie... »).

²¹² Article 69 (8) ICC Statute; ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04 01/06-803-tEN, PTC I, 29 January 2007, par. 69; confirming, ICC, Decision on the Admission of Material from the “Bar Table”, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-1981, T. Ch. I, 24 June 2009, par. 18.

²¹³ MIRAGLIA notes that this procedural issue is particularly noteworthy as it represents the first interpretation of Article 69 and the choices made by the drafters of the ICC on the rules of evidence, see M. MIRAGLIA, Admissibility of Evidence, Standard of Proof, and Nature of the Decision in the ICC Confirmation of Charges in *Lubanga*, in «Journal of International Criminal Justice», Vol. 6, 2008, p. 492.

infringement of privacy is a fundamental internationally recognised right under the terms of Article 69 (7) of the ICC Statute.²¹⁴ The Chamber held that the violation of national criminal procedure does not, in itself, amount to a human rights violation but, as discussed above, concluded that in the case at hand the search and seizure operation entailing the search and seizure of hundreds of documents and items was indiscriminate in nature and not proportionate to the objectives sought by the authorities. Hence, it violated the principle of proportionality under human rights law.²¹⁵

Article 69 (7) of the ICC Statute falls short of an exclusionary rule for *all* human rights violations.²¹⁶ Rather, it provides for the mandatory exclusion of evidence if this evidence is obtained by means of a violation of the Statute or of internationally recognised human rights if (a) the violation casts serious doubt on the reliability of the evidence or (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.²¹⁷ Evidence obtained through irregular coercive measures (for example a search and seizure operation without a judicial authorisation) may only be excluded when the requirements of one of the two limbs of the second prong of the test are fulfilled (‘the dual test’).²¹⁸ Whereas the Pre-Trial Chamber in *Lubanga* logically concluded that the human rights violation did not ‘cast serious doubt on the reliability of the evidence’, the second limb of the second prong proved to be more problematic. When examining whether the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings, the Chamber underscored the delicate *balancing exercise* that should be undertaken by the Court between the rights of the accused and the need to respond to the

²¹⁴ Article 69 (8) ICC Statute; ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04 01/06-803-tEN, PTC I, 29 January 2007, par. 75.

²¹⁵ As discussed above, *supra*, Chapter 6, I.3.5; ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04 01/06-803-tEN, PTC I, 29 January 2007, par. 80 – 81. Regarding the breach of the national procedural law, the Court noted that “the unlawfulness of the search and seizure conducted in [redacted]’s absence was a breach of a procedural rule, but cannot be considered so serious as to amount to a violation of internationally recognised human rights” (*ibid.*, par. 78).

²¹⁶ *Ibid.*, par. 84. Notably, ICC Trial Chamber I stressed that Article 69 (7) ICC Statute, dealing with illegally obtained evidence is *lex specialis* to the general admissibility provisions of the Statute. See ICC, Decision on the Admission of Material from the “Bar Table”, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-1981, T. Ch. I, 24 June 2009, par. 34, 43. Consider also ICC, Decision on the Confirmation of Charges, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-465-Red, PTC II, 16 December 2011, par. 61.

²¹⁷ Compared to the exclusionary rule of both *ad hoc* tribunals, Article 69 (7) of the ICC Statute contains no reference to the severity of the human rights violations. Consequently, this provision seems more broadly formulated, but the scope may be limited indirectly through the definition of the ‘internationally recognised human rights’.

²¹⁸ ICC, Decision on the Admission of Material from the “Bar Table”, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-1981, T. Ch. I, 24 June 2009, par. 39 – 41.

expectations of the victim community and the international community.²¹⁹ The Pre-Trial Chamber concluded on the basis of a comparative study of various European countries that “the issue of the admissibility of illegally obtained evidence raises contradictory and complex matters of principle”.²²⁰ The Pre-Trial Chamber further argued that “[a]lthough no consensus has emerged on this issue in international human rights jurisprudence, the majority view is that only a serious human rights violation can lead to the exclusion of evidence”.²²¹ The Chamber then looked at the practice of the other international criminal tribunals, in particular to the *Brđanin* Objection to Intercept Evidence Decision, and concluded that human rights and the ICTY jurisprudence focus on the balance between the seriousness of the violation and the overall fairness of the trial.²²² The evidence obtained through the illegal search and seizure was subsequently allowed for the purposes of the confirmation hearing.²²³

The Prosecutor sought the admission of documents obtained during the aforementioned search and seizure operation at several instances during the trial proceedings. Therefore, Trial Chamber I also had the opportunity to consider the admissibility of the illegally obtained evidence. The Trial Chamber clarified that the second prong of Article 67 (7) (b) ICC Statute should be interpreted in light of the core values of the ICC Statute, including “respect for the sovereignty of States, respect for the rights of the person, the protection of victims and witnesses and the effective punishment of those guilty of grave crimes.”²²⁴ The Chamber, in line with the Pre-Trial Chamber, referred to the *Brđanin* Objection to Intercept Evidence Decision to hold that the exclusion of evidence that is otherwise admissible due to procedural considerations would be “utterly inappropriate”, as long as the fairness of the trial remains guaranteed.²²⁵ Factors considered by the Court included (i) the fact that the violation was not of a particularly grave kind, (ii) the lesser impact on the integrity of the proceedings where the

²¹⁹ Article 69 (8) ICC Statute; ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04 01/06-803-tEN, PTC I, 29 January 2007, par. 86.

²²⁰ The comparative study relied upon by the Court was M. DELMAS-MARTY and J.R. SPENCER (eds.), *European Criminal Procedure*, Cambridge, Cambridge University Press, 2002.

²²¹ *Ibid.*, par. 86.

²²² *Ibid.*, par. 89; See *supra*, Chapter 6, I.7.2.

²²³ *Ibid.*, par. 90.

²²⁴ ICC, Decision on the Admission of Material from the “Bar Table”, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-1981, T. Ch. I, 24 June 2009, par. 42. The Trial Chamber referred to D.K. PIRAGOFF, Article 69, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1335.

²²⁵ ICC, Decision on the Admission of Material from the “Bar Table”, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-1981, T. Ch. I, 24 June 2009, par. 42. See also ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04 01/06-803, PTC I, 29 January 2007, par. 88.

rights of a third person were violated, rather than the rights of the accused, and (iii) the fact that the illegal acts were committed by the Congolese authorities, albeit in the presence of an OTP investigator.²²⁶ The Trial Chamber concluded that the evidence, notwithstanding the breach of the right to privacy, was not to be excluded pursuant to Article 69 (7) ICC Statute.²²⁷ The clarification offered by the Trial Chamber that the “public interest in [the] prosecution and punishment [of crimes and cases of high seriousness] cannot influence a decision on admissibility under this statutory provision” is, laudable.²²⁸

The Trial Chamber is also to be lauded for not disregarding the fact that the search and seizure operation, even though it was executed by the Congolese authorities, was attended by an investigator from the Prosecution. It follows that the Prosecution was not but the “fortunate recipient” of the evidence gathered by the national authorities.²²⁹ The Trial Chamber I considered that “mere presence at an event of this kind does not serve to engage this exclusionary rule.”²³⁰ The investigator could only assist. Deterrence and discipline, “if they are to be given any sustainable meaning and purpose within the framework of exclusionary rules, should be directed at those in authority – the individuals who control the process or who have the power, at least, to prevent improper or illegal activity.”²³¹ Hence, the Trial Chamber adopted the same approach as the ICTY Trial Chamber in the *Brđanin* case.²³² While there is truth in the Trial Chamber’s argumentation, it is to be recalled that deterrence is one, but just one, of the purposes served by exclusionary rules. Moreover, it was previously argued that turning a blind eye to violations committed by domestic law enforcement authorities may, especially in a context where the participation of these authorities in the collection of evidence is normally a prerequisite, bear with it ‘perverse effects’.²³³

²²⁶ ICC, Decision on the Admission of Material from the “Bar Table”, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-1981, T. Ch. I, 24 June 2009, par. 47; ICC, Decision on “Prosecution’s Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)”, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-2589, TC I, 21 October 2010, par. 30. As noted by TURNER, the factors considered by the Trial Chamber were somewhat different from those considered by the Pre-Trial Chamber. See J.I. TURNER, *Policing International Prosecutors*, in «International Law and Politics», Vol. 45, 2013, p. 201.

²²⁷ ICC, Decision on the Admission of Material from the “Bar Table”, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-1981, T. Ch. I, 24 June 2009, par. 48.

²²⁸ *Ibid.*, par. 44.

²²⁹ *Ibid.*, par. 45.

²³⁰ *Ibid.*, par. 46.

²³¹ *Ibid.*, par. 46.

²³² See *supra*, Chapter 6, I.7.2.

²³³ See *supra*, Chapter 6, I.7.2. *Contra*, consider M. KLAMBERG, *Law of Evidence: General Requirements for the Admission of Evidence*, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILJEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 1034 (“If the

§ Conclusion

The different international criminal tribunals seem less strict regarding the admission of evidence gathered through coercive measures that are in violation of individual rights (the right to privacy or the right to the peaceful enjoyment of property) which are not explicitly covered by the tribunals' statutory documents.²³⁴ Irregularities in the adoption and execution of coercive measures, which amount to human rights violations, *may* lead to the exclusion of the resulting items of evidence. Since breaches of the right to privacy do not necessarily influence the reliability of the evidence, it seems that international criminal tribunals favour admission.²³⁵ Evidence which has been unlawfully obtained will not automatically be excluded under Rule 95 ICTY, ICTR, and SCSL RPE. Rather than resorting to the mandatory exclusion mechanism of Rule 95, the *ad hoc* tribunals engage in a balancing test of different interests under Rule 89 (D).²³⁶ In a similar vein, the ICC jurisprudence does not hold that any violation of internationally recognised human rights should lead to the exclusion of the resulting evidence.²³⁷ This approach is in line with the approach of the majority of national criminal justice systems towards the use of illegally obtained evidence, in cases where the credibility of the evidence obtained is not in doubt.²³⁸

It is important to note the contrast between the jurisprudence of the international criminal tribunals concerning the admission of evidence obtained by coercive measures in violation of

Court would exclude evidence improperly collected by a national police force in an effort to educate and discipline law enforcement agencies, this could be seen as a violation of state sovereignty. Although several values should be considered, it is submitted that the assessment should be focused on the reliability of the evidence and the seriousness of the specific violation, and that evidence should not be excluded in an effort to educate and discipline national law enforcement agencies²³⁹).

²³⁴ Compare for example with the jurisprudence of the *ad hoc* tribunals on the admission of evidence gathered in violation of the right to counsel (Article 18 (3) ICTY Statute and Article 17 (3) ICTR Statute; Rule 42 ICTY RPE, ICTR RPE and SCSL RPE).

²³⁵ S. SWOBODA, Admitting Relevant and Reliable Evidence, in T. KRUESSMANN, ICTY: Towards a Fair Trial?, Antwerp, Intersentia, 2008, p. 392. It should be noted that the case law has consistently held that reliability of the evidence is not only relevant to the weight given to the evidence, but also to its admissibility (the requirement that evidence should have sufficient indicia of reliability is read into Rule 89 (C) ICTY, ICTR and SCSL RPE). See e.g. ICTY, Decision on Appeal Regarding Statement of a Deceased Witness, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-AR73.5, A. Ch., 21 July 2000, par. III.5, III.7.

²³⁶ See *infra*, Chapter 6, II.2.

²³⁷ As was suggested by ZAPPALÀ. Consider S. ZAPPALÀ, Human rights in International Criminal Proceedings, Oxford, Oxford University Press, 2003, p. 152 ("it seems correct to argue that any violation of internationally recognized human rights *ipso facto* meets the requirement that the integrity of the proceedings should not be impaired").

²³⁸ M. DAMAŠKA, Reflections on Fairness in International Criminal Justice, in «Journal of International Criminal Justice», Vol. 10, 2012, p. 618 (noting that most national criminal justice systems authorise judges to weigh the seriousness of the crime in question against the seriousness of the rights violated in acquiring evidence, rather than to require its automatic exclusion).

individual rights and the case law on the admission of evidence obtained in violation of procedural rights of the accused (or suspect) explicitly provided for under the statutory documents. It was discussed at length how evidence obtained in violation of these procedural safeguards (e.g. the right to counsel) is usually excluded.²³⁹ The ICTY Appeals Chamber confirmed that a pre-requisite for the admission of evidence is the compliance by the moving party with any relevant safeguards and procedural protections and that it has been shown that the evidence is reliable.²⁴⁰ In the absence of relevant safeguards the tribunals widely admit evidence that has been obtained illegally through coercive measures, in violation of individual rights, provided that the evidence is reliable. One commentator notes that “it is more likely than not that where clear human rights guidelines are missing, judges might tend to widen the scope of admissibility to the detriment of human rights.”²⁴¹ Since the international criminal tribunals have to resort to broad and vaguely formulated international human rights norms (such as the right to privacy or the right to the peaceful enjoyment of property), some exceptions notwithstanding, the tribunals “rather argue around them by establishing either that no violation of human rights has occurred or that, even if there has been a violation, admitting the evidence would, on balance not seem overly unfair.”²⁴²

It may be noted that a certain tension exists between the general right of the accused to a fair hearing and the provisions on the admissibility of evidence which guarantee much less, to know “a hearing consisting of evidence that is not ‘antithetical’ to fairness, or that simply ‘takes account of any unfairness’.”²⁴³ However, from a human rights point of view, it should be noted that the admission of evidence obtained by coercive measures that breached privacy rights or other individual rights is not *per se* incompatible with the right to a fair trial. The ECtHR held that the assessment of evidence is in the first place a matter for the national

²³⁹ See *supra*, Chapter 5.

²⁴⁰ ICTY, Appeal Judgement, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 533; ICTY, Judgement, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, A. Ch., 28 February 2005, par. 128.

²⁴¹ S. SWOBODA, Admitting Relevant and Reliable Evidence, in T. KRUESSMANN, *ICTY: Towards a Fair Trial?*, Antwerp, Intersentia, 2008, p. 393; M. KLAMBERG, *Law of Evidence: General Requirements for the Admission of Evidence*, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 1033 (the author notes, with regard to the ICTY, ICTR and SCSL, that “[i]n cases where the tribunals’ own Statutes and Rules or internationally protected human rights are violated, the standard for admissible evidence may be stricter”).

²⁴² S. SWOBODA, Admitting Relevant and Reliable Evidence, in T. KRUESSMANN, *ICTY: Towards a Fair Trial?*, Antwerp, Intersentia, 2008, p. 393.

²⁴³ C. GOSNELL, Admissibility of Evidence, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), *Principles of Evidence in International Criminal Justice*, Oxford, Oxford University Press, 2010, p. 422. Rule 95 ICTY, ICTR, and SCSL RPE, Article 69 (4) and (7) ICC Statute.

courts. Indeed, in a number of cases the Court had to rule on the admission of unlawfully obtained evidence at trial (evidence gathered in breach of the right to privacy (Article 8)).²⁴⁴ The Court consistently held that its task is limited to a consideration of whether the proceedings *as a whole* were fair (some dissenting opinions notwithstanding²⁴⁵).²⁴⁶ The ECtHR considers whether the illegally obtained evidence was the sole or the main evidence upon which the conviction was based, whether the accused's defence rights were respected and whether he or she had the possibility to challenge the authenticity and the use of the evidence.²⁴⁷

²⁴⁴ In *Khan*, the Court concluded to a breach of Article 8 where evidence was obtained through a secret surveillance by means of a listening device in the absence of a statutory framework regulating the use of covert listening devices. ECtHR, *Khan v. the United Kingdom*, Application No. 35394/97, Reports of Judgments and Decisions 2000-V, Judgment of 12 May 2000, par. 27-28. In the *P.G. and J.H.* case, the recording of the voices of persons while they were charged and in their police cells (par. 60) was found to be a breach of Article 8 (2) in the absence of a regulatory framework on the concerning covert surveillance of police premises. ECtHR, *P.G. and J.H. v. The United Kingdom*, Application No. 44787/98, Judgment of 25 September 2001, par. 63; In the *Bykov* case, the Court concluded that use of surveillance in the absence of specific and detailed regulations was in breach of Article 8 (2): ECtHR, *Bykov v. Russia*, Application No. 4378/02, Judgment (Grand chamber) of 10 March 2009, par. 81-82.

²⁴⁵ Notably, a partly dissenting opinion was attached to both the *Khan v. The United Kingdom* and *P.G. and J.H. v. The United Kingdom* judgements, from Judge Loucaides and Judge Tulkens respectively. Judge Loucaides argued that the requirement of a "fair" trial under Article 6 cannot be fulfilled where the guilt of an offence is established through evidence obtained in breach of the ECHR (the evidence gathered in breach of Article 8 was the only piece of evidence). The partly dissenting opinion of Judge Tulkens is worded in even stronger language where she considers that a trial cannot be "fair" in the meaning of Article 6 if evidence obtained in breach of the Convention has been admitted during trial (the evidence in breach of Article 8 was not the only piece of evidence). In her opinion, fairness presupposes compliance with the law and *a fortiori* respect of the rights of the convention. The fairness requirement of Article 6 ECHR entails an element of lawfulness: a trial conducted in breach of domestic law or the ECHR can never be fair.

²⁴⁶ The principle was first established in *Schenk v. Switzerland*: ECtHR, *Schenk v. Switzerland*, Application No. 10862/84, Judgment of 12 July 1988, par. 46 ("While Article 6 [...] of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. The Court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr. Schenk's trial as a whole was fair."); consider also *Khan v. The United Kingdom*, where the Court stated that "[i]t is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where violation of another Convention right is concerned, the nature of the violation found." See ECtHR, *Khan v. the United Kingdom*, Application No. 35394/97, Reports of Judgments and Decisions 2000-V, Judgment of 12 May 2000, par. 34; ECtHR, *Bykov v. Russia*, Application No. 4378/02, Judgment (Grand Chamber) of 10 March 2009, par. 89; ECtHR, *P.G. and J.H. v. The United Kingdom*, Application No. 44787/98, Judgment of 25 September 2001, par. 76; ECtHR, *Gäfgen v. Germany*, Application No. 22978/05, Reports 2010, Judgment (Grand Chamber) of 1 June 2010, par. 165.

²⁴⁷ ECtHR, *Schenk v. Switzerland*, Application No. 10862/84, Judgment of 12 July 1988, par. 47-48. In *Kkan*, the Court stated that the weight to be given to the fact that the conviction was not solely or mainly based on the illegally obtained evidence depends on the circumstances of the case. Where *in casu* the tape recording was the only evidence tendered by the Prosecution, the Court considered it relevant that there was no suggestion that the evidence was unreliable. Therefore the need for the Court to look for supporting evidence was considered less important. See ECtHR, *Khan v. the United Kingdom*, Application No. 35394/97, Reports of Judgments and Decisions 2000-V, Judgment of 12 May 2000, par. 37-38; ECtHR, *P.G. and J.H. v. The United Kingdom*, Application No. 44787/98, Judgment of 25 September 2001, par. 79.

II. SPECIFIC INVESTIGATIVE MEASURES

II.1. General

At the outset, it should be noted that it is almost impossible to provide an exhaustive overview of all non-custodial coercive investigative measures given the broad and potentially unrestricted powers to collect and examine evidence at the disposal of the Prosecutor of at least some of the international(ised) criminal courts and tribunals. Therefore, a selection has been made and is based on the criterion of the actual relevance of certain investigative measures according to the practice of the international(ised) criminal tribunals.

The Prosecutor's powers derive from the general evidence-gathering powers as laid down in the statutory documents.²⁴⁸ Consequently, and the general requirements for the adoption of non-custodial coercive measures formulated in Part I above notwithstanding, the contours of these investigative measures remain vague. On the one hand, in cases where these coercive measures are executed by national authorities pursuant to municipal law, the applicable national procedural standards further delineate these coercive measures. On the other hand, in cases where these coercive actions are executed by the tribunal on the territory of the state concerned directly, the exact boundaries of these powers are less clear. Establishing general principles concerning these coercive powers proves to be an arduous (if not impossible) task. Human rights law only provides us with broad and vague standards which are difficult to apply to concrete situations.

II.2. Search and seizure operations

For the purposes of this chapter, the term 'search and seizure' should be interpreted in a broad sense, as including the searching of premises, persons and objects and the seizure of objects. The seizure of persons is excluded, as are body searches.²⁴⁹ The seizure or freezing of assets occupies an important place in international criminal investigations and will be discussed in the next subsection to the present chapter.²⁵⁰ It is clear that some forms of searches, such as

²⁴⁸ Article 18 (2) of the ICTY Statute, Article 17 (2) of the ICTR Statute, Article 15 (2) of the SCSL Statute and Rule 39 (i) and (ii) of the ICTY, ICTR and SCSL RPE; Article 54 (2) and (3) ICC Statute.

²⁴⁹ The seizure of persons will be dealt with in Chapter 7, body searches are dealt with *infra*, Chapter 6, II.5.

²⁵⁰ See *infra* Chapter 6, II.3.

car searches or stop and frisk searches are less relevant in the investigation of crimes considerable time following their commission.²⁵¹

In order to fall within the ambit of the working definition of ‘coercive measures’, previously proposed, the search and seizure should infringe upon the individual rights and liberties of the person concerned. With regard to *searches*, it should be noted that human rights law understands ‘home’ in a broad sense, including the workspace.²⁵² Consequently, a search operation in the workspace of a defence counsel is protected by the right to privacy.²⁵³ The temporary *seizure* of property in criminal proceedings, in its turn, amounts to an interference with the peaceful enjoyment of property in the sense of Article 1 of Protocol 1 to the ECHR and Article 21 ACHR (Article 14 ACHPR).²⁵⁴ Consequently, these seizure operations can also be labelled as a ‘coercive measure’ pursuant to our working definition.

²⁵¹ Compare V. O’CONNOR and C. RAUSCH (eds.), *Model Codes for Post-Conflict Criminal Justice* (Vol. II), Washington D.C., United States Institute of Peace Press, 2008, pp. 195 – 203 (discussing the search of persons and car searches as part of a ‘model code of criminal procedure’ for post-conflict criminal justice).

²⁵² HRC, CCPR General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Article 17), U.N. Doc. HRI/GEN/1/Rev.6, 8 April 1988, par. 5 (clarifying that ‘home’ should be understood “to indicate the place where a person resides or carries out his usual occupation”). The case law of the ECtHR has clarified that the protection of the right to privacy extends to the work space, relying, among others, on the meaning of the French term ‘domicile’ and the object and purpose of Article 8. See ECtHR, *Niemietz v. Germany*, Application No. 13710/88, Series A, No. 251-B, Judgment of 16 December 1992, par. 29-31; ECtHR, *Buck v. Germany*, Application No. 41604/98, Reports 2005-IV, Judgment of 28 April 2005, par. 31.

²⁵³ ECtHR, *Niemietz v. Germany*, Application No. 13710/88, Series A, No. 251-B, Judgment of 16 December 1992, par. 33. See the discussion of the *Gotovina* case, *infra* Chapter 6, II.2.1.

²⁵⁴ The Inter-American Court of Human Rights interpreted the notion of property in a broad way, including all movable and immovable, corporeal and incorporeal elements, and any other immaterial object that may be of value. See IACtHR, *Case of the Sawhoyamaya Indigenous Community*, Series C, No. 146, Judgment of 29 March 2006, par. 121; IACtHR, *Case of Palamara Iribarne*, Series C, No. 135, Judgment of 22 November 2005, par. 102; IACtHR, *Case of the Ituango Massacres v. Colombia*, Series C, No. 148, Judgment of 1 July 2006, par. 174. Similarly, the ECtHR has given an autonomous meaning to the term ‘possessions’ in Article 1 of Protocol No. 1. According to the Court, ‘possessions’ are certainly not limited to ownership of physical goods. Certain other rights and interests constituting assets can also be regarded as ‘property rights’, and thus as ‘possessions’. See *e.g.* ECtHR, *Gasus Dosier –und Fördertechnik GmbH v. The Netherlands*, Application No. 15375/89, Series A, No. 306-B, Judgment of 23 February 1995, par. 53.

According to the jurisprudence of the ECtHR, seizures fall within the ambit of the right of the state to ‘control the use’ of property as it sees fit pursuant to Article 1 (2) Protocol No. 1 ECHR. (see, *e.g.* ECtHR, *Raimondo v. Italy*, Application No. 12954/87, Series A, No. 281-A, Judgment of 22 February 1994, par. 27; ECtHR, *Borzonov v. Russia*, Application No. 18274/04, 22 January 2009, par. 57). A ‘fair balance’ should be struck between the general interests of the community and the requirement of the protection of individual fundamental rights. In other words, these interferences should be proportionate. (See *e.g.* ECtHR, *AGOSI v. The United Kingdom*, Application No. 9118/80, Series A, No. 106, Judgment of 24 October 1986, par. 52; ECtHR, *Borzonov v. Russia*, Application No. 18274/04, 22 January 2009, par. 59).

II.2.1. The *ad hoc* tribunals and the SCSL

§ General

No explicit provision detailing search and seizure powers can be found in the Statute or the Rules of Procedure and Evidence of the *ad hoc* tribunals or the SCSL. The power derives from Article 18 (2) of the ICTY Statute, Article 17 (2) of the ICTR Statute, Article 15 (2) of the SCSL Statute and Rule 39 (i) and (ii) of the RPE of the ICTY, ICTR, and SCSL. According to the Trial Chamber in *Stakić*, the absence of an explicit provision on search and seizure is “based in principle on the expectation that such matters would be governed by the law of the requested state.”²⁵⁵ These expectations ignore the competence of the tribunal, in exceptional cases, to directly enforce search and seizures, without directing a request to the state in which the search and seizure is to be executed.²⁵⁶ Indeed, in these cases, it is not clear what conditions apply to the search and seizure operation.

At least in theory, also the Defence can request the assistance of the tribunal, and can request the issuance of search and seizure warrants. However, as one commentator notes, “it is unlikely that an accused would be granted the same broad access to search for and seize material as the prosecution.”²⁵⁷ Not only will the Defence have to indicate the relevance of the material sought, but the ICTY has adopted a practice of securing the original materials from the relevant authorities, limiting the possibilities of the Defence to ‘fish’ through’ these materials.²⁵⁸ This was recognized by Judge Hunt, who noted that “[t]he power of seizure of the Office of the Prosecutor (“OTP”) is a very powerful weapon in its hands. By seizing material, the OTP denies the Accused access to that material. Experience has demonstrated that the results can be deleterious to the rights of the accused”.²⁵⁹ While the Defence may also seek the assistance of state authorities or state authorities, it is evident that the Prosecution is in an advantageous position in that regard as well.²⁶⁰

²⁵⁵ ICTY, Decision on Defence Request to Exclude Evidence as Inadmissible, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch. II, 31 July 2002, p. 2.

²⁵⁶ See *supra*, Chapter 6, I.2.

²⁵⁷ G. MCINTYRE, Equality of Arms – Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, in «Leiden Journal of International Law», Vol. 16, 2003, p. 280.

²⁵⁸ *Ibid.*, p. 280.

²⁵⁹ ICTY, Reconsideration of Order of 9 May 20002, Case No. IT-02-55-Misc4, Duty Judge, 17 July 2002.

²⁶⁰ G. MCINTYRE, Equality of Arms – Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, in «Leiden Journal of International Law», Vol. 16, 2003, p. 280.

§ *Items that can be seized*

Respect for the rights of the accused (or suspect) necessitates limitations to the items or materials that can be seized. In *Gotovina et al.*, the ICTY Appeals Chamber held that limitations may follow from the functional immunity to which the Defence team members (including the investigators) are entitled, in case the items seized “derive from acts performed by members of the [...] Defence in fulfilment of their official functions before the Tribunal.”²⁶¹ *In casu*, search and seizure operations were executed by the Croatian authorities at several locations associated with Gotovina’s Defence and formed part of criminal investigations for the alleged involvement in the concealment of missing military documents relating to a military operation that formed part of the proceedings before the ICTY.²⁶² The Appeals Chamber ordered that materials seized from the Gotovina Defence team be returned and that no further criminal prosecutions or further investigative steps be taken against members of the Gotovina Defence.²⁶³ This is in line with human rights law, which requires ‘special care’ when a search operation is conducted at a law office. The ECtHR held that “search warrants have to be drafted, as far as is practicable, in a manner calculated to keep their impact within reasonable bounds. This is all the more important in cases where the

²⁶⁰ *Ibid.*, p. 281.

²⁶¹ See ICTY, Decision on Gotovina Defence Appeal against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-A-AR73.5, A. Ch., 14 February 2011, par. 35-36 and 67-68. *In casu*, search and seizure operations were executed by the Croatian authorities at several locations associated with Gotovina’s Defence and formed part of criminal investigations for alleged involvement in the concealment of missing military documents relating to a military operation that formed part of the proceedings before the ICTY. Remarkably, these investigations followed an administrative investigation undertaken by Croatia into the missing documents pursuant to an order by the ICTY Trial Chamber at the Prosecutor’s request. Consider also the interim order for Croatia to stop, until further notice, all inspections of the contents of all documents and other objects that was issued by the Trial Chamber on 11 December 2009, see ICTY, Transcript, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, T. Ch. I, 11 December 2009, pp. 26160-26161. A written decision stating reasons for the oral order of 11 December was issued on 18 December 2009. See ICTY, Decision on Requests for Temporary Restraining Orders Directed to the Republic of Croatia and Reasons for the Chamber’s Order of 11 December 2009, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, T. Ch. I, 18 December 2009. Previously, Trial Chamber I had held that the items seized could include materials which are protected from disclosure under Rule 70 (A) (according to which internal documents, prepared by a party in connection with the investigation or preparation of the case are not subject to disclosure) and/or may violate Rule 97 (lawyer-client privilege). Hence, the possible handing-over of these seized materials by Croatia to the Prosecutor could make internal documents prepared by the Defence or materials protected by the lawyer-client privilege available to the Prosecution. See ICTY, Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, T. Ch. I, 12 March 2010, par. 32-35. Also in *Stakić*, the ICTY Trial Chamber acknowledged that the lawyer-client privilege under Rule 97 ICTY, ICTR and SCSL RPE puts a limitation on the documents that can be seized by the Prosecutor.

²⁶² Remarkably, these investigations followed an administrative investigation undertaken by Croatia into the missing documents pursuant to an order by the ICTY Trial Chamber at the Prosecutor’s request.

²⁶³ *Ibid.*, par. 36, 67, 71.

premises searched are the offices of a lawyer, which as a rule contains material which is subject to legal professional privilege.”²⁶⁴

Limitations to the places that can be searched and items that can be seized also follow from state or diplomatic immunities of property. For example, under customary international law, the premises of the diplomatic mission enjoy immunity protection.²⁶⁵ It has been argued that “there is little evidence in State practice that those immunities have suffered from an exception in the special case of investigative or other measures relating to proceedings for crimes under international law.”²⁶⁶ Whereas Article 7 (2) ICTY Statute and Article 6 (2) ICTR and SCSL Statute do away with personal immunities, immunities of property are not included in the said provision. Therefore, a request to a state for a search of premises or the seizure of objects subject to state or to diplomatic immunity may be at odds with a state’s obligations under international law. This problem has not, thus far at least, arisen in practice.²⁶⁷

§ *Inventory of documents*

It follows from Rule 41 (B) of the ICTR and SCSL RPE that the Prosecutor is under the obligation to draw up an inventory of all documents and objects seized from the accused and should return ‘without delay’ all materials that are of no evidentiary value.²⁶⁸ This provision puts an affirmative obligation upon the Prosecutor “to assess the evidentiary value of the seized materials in a timely manner in order to justify her retention of any seized materials [...]”²⁶⁹ The provision was inserted in the ICTR RPE following their amendment in May

²⁶⁴ ECtHR, *Stefanov v. Bulgaria*, Application No. 65755/01, Judgment of 22 May 2008, par. 41; ECtHR, *Niemietz v. Germany*, Application No. 13710/88, Judgment of 16 December 1992, par. 37.

²⁶⁵ As codified in Article 22 of the Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961 (entry into force 24 April 1964).

²⁶⁶ C. KRESS and K. PROST, Article 98, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1607. Consider also G. SLUITER, *International Criminal Adjudication and the Collection of Evidence*, Antwerp, Intersentia, 2002, p. 172 (“[T]here is under current international law no exception to the inviolability of an embassy if a State wishes to search it for evidence pursuant to a request from the ICC”).

²⁶⁷ As confirmed by H. FRIMAN, *Immunity of Property*, in A. CASSESE, *The Oxford Companion to International Criminal Justice*, Oxford, Oxford University Press, 2009, p. 370.

²⁶⁸ At the SCSL, it seems to be the practice that an inventory form for seized items is served on the national authorities of a state requested to execute an arrest warrant, see e.g. SCSL, *Documents Served on the National Authorities Pursuant to Rule 55 (C), Prosecutor v. Gbao*, Case No. SCSL-2003-09-I, 18 March 2003.

²⁶⁹ ICTR, *Decision on the Defence Motion for Return of Documents and Other Seized Personal Items, Prosecutor v. Rukundo*, Case No. ICTR-2001-70-I, T. Ch. III, 20 November 2002, par. 10.

2001.²⁷⁰ In earlier case law, the tribunal had acknowledged the existence of a *lacuna* in the Statute and Rules regarding the mandatory requirement for an inventory to be made during seizures and that therefore a seizure cannot be said to have been illegal when no such inventory had been drawn. Nevertheless, the Chamber recognised “that there is want of a mandatory specific legal provision for an inventory to be made.”²⁷¹ Unfortunately, a similar provision is lacking in the ICTY RPE. According to ICTY jurisprudence, in the absence of such a requirement, the failure to make a complete inventory of all items seized during a search and seizure does not in itself lead to the exclusion of this evidence.²⁷²

§ Urgency

An explicit provision regulates instances of urgency.²⁷³ In such event, the Prosecutor can request the state concerned to seize physical evidence pursuant to Rule 40 (ii) of the RPE of the ICTY and Rule 40 (A) (ii) of the RPE of the ICTR, and of the SCSL.²⁷⁴ It is clear from this rule that in case of urgency, no judicial warrant is required for the Prosecutor to request a state to seize evidence.²⁷⁵ This rule arguably reflects provisions in national criminal justice systems that no judicial authorisation is necessary regarding coercive measures in cases of urgency.²⁷⁶ The judicial authorisation can be given *ex post* in these cases. These search and

²⁷⁰ Rule 41 (B) ICTR RPE as amended during the Tenth Plenary Session, Arusha, 30-31 May 2001; Sixth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, U.N. Doc. A/56/351 – S/2001/863, 14 September 2001, p. 13.

²⁷¹ ICTR, Decision on the Defence Motion for Restitution of Personal Effects, *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, T. Ch. I, 7 July 1998, p. 6.

²⁷² ICTY, Decision on Defence Request to Exclude Evidence as Inadmissible, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch. II, 31 July 2002, p. 3.

²⁷³ Safferling argues that in these urgent cases, contrary to other situations where the legal justification for the interference with the privacy can be found in the authorisation of a judge, the legal basis for intrusion on a person’s privacy must be considered in the light of the domestic law of that state. However, what should then be done with the evidence seized if no legal justification can be found under the domestic law? See C.J.M. SAFFERLING, *Towards an International Criminal Procedure*, Oxford, Oxford University Press, 2001, p. 159.

²⁷⁴ Consider, e.g. ICTR, Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized, *Prosecutor v. Nzirorera*, T. Ch. II, 7 September 2000, par. 29-31; ICTR, Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items, *Prosecutor v. Ngirumpatse*, Case No. ICTR-97-44-I, T. Ch. II, 10 December 1999, par. 54-56; ICTR, Decision on the Defence Motion for the Restitution of Items and Documents Seized, *Prosecutor v. Kabiligi*, Case No. ICTR-97-34-I, T. Ch. II, 5 October 1998, p. 3.

²⁷⁵ It was argued previously that the explicit provision of the possibility of a search without prior judicial authorisation of any sort may be seen as a further indication of the existence of such requirement outside a scenario of procedural urgency, see *supra*, Chapter 6, I.3.3.

²⁷⁶ K. AMBOS, *The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports*, in «European Journal of Crime, Criminal Law and Criminal Justice», Vol. 8/2, 2000, p. 117. In several national criminal justice systems, the Prosecutor can order

seizure operations should be limited and should be justified by the exigencies of their urgency.²⁷⁷

§ *Searches incidental to arrest proceedings*

The Prosecutor may request the Judge confirming the indictment for an order to seize documents and search the premises where the accused is arrested, when seeking a warrant of arrest.²⁷⁸ What is more problematic is the situation where a search operation is conducted of the premises or of the immediate surroundings in which the accused is found at the moment of his or her arrest in the absence of such order.

ICTR Trial Chamber II clarified in the *Nyiramasuhuko* case that search and seizures which are incident to an arrest can sometimes be characterised as urgent measures, particularly in the light of the risk of the destruction of evidence.²⁷⁹ However, the Trial Chamber equally underlined the importance of a judicial warrant in the absence of a context of procedural urgency.²⁸⁰ More importantly, the Trial Chamber did not accept the Prosecutor's argument that the issuance of an arrest warrant implies the authorisation for a search and seizure operation of the surroundings incidental to the arrest.²⁸¹

certain compulsory measures in the absence of a judicial warrant in case a delay would hamper the further conduct of proceedings. For example, under German law, the Prosecutor or police can conduct certain search operations without a judicial warrant, see §102 and §105 StPO (Germany). It follows from §98 (2) StPO that an official who seized an object without a court order shall apply within three days for judicial approval if neither the person concerned or an adult relative was present at the seizure or if the person concerned or an adult relative raises an objection. If no complaint is lodged the seizure is considered lawful.

²⁷⁷ Consider the Defence argumentation in ICTR, Decision on the Defence Motion for Return of Documents and Other Seized Personal Items, *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-I, T. Ch. III, 20 November 2002, par. 2.

²⁷⁸ Rule 47 (H) (i) ICTY, ICTR RPE and SCSL RPE *juncto* Article 19 (2) ICTY Statute, Article 18 (2) ICTR Statute.

²⁷⁹ ICTR, Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized, *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, T. Ch. II, 12 October 2000, par. 24.

²⁸⁰ *Ibid.*, par. 23. The Trial Chamber stated that “searches and seizures violate, by their nature and their effect, fundamental individual rights, recognised by most legal systems in the world and enshrined in international law, including notably, the inviolability of a person’s home” and that “most legal systems make any operation of this type conditional upon explicit judicial authorisation, which may take the form of a warrant, an order, or rogatory letters.”

²⁸¹ *Ibid.*, par. 22-23.

In the *Muvunyi* case, the Defence argued that documents had been illegally seized at the time of Muvunyi's arrest in the United Kingdom.²⁸² The Trial Chamber referred to the holding of the Appeals Chamber in *Stakić* and held that the Defence should have shown how the documents collected were illegally seized either under the tribunal's Rules or under international law.²⁸³ The Chamber argued that English law provides for the seizure of materials in the course of an arrest or after that arrest has been made.²⁸⁴ Consequently, the Chamber concluded that "a sufficient legal basis existed for the seizure of materials from the accused at the time of his arrest, and for their subsequent use in proceedings before this Tribunal." The tribunal thus holds the view that a legal basis under national law suffices for the execution of a search and seizure operation incidental to arrest proceedings, without requiring any form of judicial authorisation by the tribunal.²⁸⁵

II.2.2. The International Criminal Court (ICC)

§ *General*

Similar to the *ad hoc* tribunals, the power to conduct search and seizure operations is not explicitly mentioned in the ICC Statute. The power derives from Articles 54 (3) (a) and 93 (1) (h) of the ICC Statute. Further requirements and conditions for the adoption and execution of search and seizures are subject to the domestic laws of the country requested to execute the operation, coupled with any specific measures requested by the Court, pursuant to Article 99 (1) ICC Statute. Furthermore, it has already been argued above that some conditions follow from other sources of law. It has also been argued that international human rights law dictates

²⁸² ICTR, Decision on the Prosecutor's Motion Pursuant to Trial Chamber's Directives of 7 December 2005 for the Verification of the Authenticity of Evidence Obtained out of Court Pursuant to Rules 89 (C) & (D), *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, T. Ch. II, 26 April 2006, par. 13.

²⁸³ *Ibid.*, par. 24.

²⁸⁴ *Ibid.*, par. 24. The Chamber refers to the Police and Criminal Evidence Act, 1984, which states: Section 17 (1) (a) '...a constable may enter and search any premises for the purpose (A) of executing a warrant of arrest issued in connection with or arising out of criminal proceedings;...'; Section 18 (1) provides that 'a constable may enter and search any premises occupied or controlled by a person who is under arrest for an arrestable offence, if he has reasonable grounds for suspecting that there is on the premises evidence...that relates (a) to that offence, or (b) to some other arrestable offence which is connected with or similar to that offence'.

Section 18 (2): 'A constable may seize and retain anything for which he may search under subsection (1) above'.

²⁸⁵ *Ibid.*, par. 25. This confirms the view that the *ad hoc* tribunals do not require a judicial warrant before the Prosecutor can use search and seizures, *supra*, Chapter 6, I.3.5.

the requirement of a prior judicial authorisation before the Prosecutor can resort to search and seizure operations.²⁸⁶

Domestic regulations may have been conceived to regulate interferences with the fundamental rights of the suspect (accused) or third persons. The Court may therefore face a situation where it has to examine the execution of a request for cooperation from the Court by a state in order to determine whether it should apply the exclusionary rules on the admission of evidence contained in Article 69 (7) ICC Statute.²⁸⁷ As acknowledged by ORIE, it will be difficult for the Court to keep entirely away from it in that case as “the observing of these formal requirements might be decisive for the determination as to whether or not human rights have been violated while obtaining the evidence.”²⁸⁸

§ ‘Search and seizure privacy right’ proposal

During the negotiations on the Rome Statute, a proposal was made to include an explicit provision on ‘search and seizure privacy rights’ in the ICC Statute. The Zutphen draft of the ICC Statute contained the following provision:

“[The right of all persons to be secure in their homes and to secure their papers and effects against entries, searches and seizures shall not be impaired by the Court except upon warrant issued by the [Court] [Pre-Trial Chamber], on the request of the Prosecutor, in accordance with Part 9 [7] or the Rules of the Court, for adequate cause and particularly describing the place to be searched and things to be seized, or except on such grounds and in accordance with such procedures as are established by the Rules of the Court.]”²⁸⁹

²⁸⁶ *Supra*, Chapter 6, I.3.

²⁸⁷ R. RASTAN, Testing Co-operation: The International Criminal Court and National Authorities, in «Leiden Journal of International Law», Vol. 21, 2008, pp. 449-453.

²⁸⁸ A. ORIE, Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC, in A. CASSESE et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, p. 1486.

²⁸⁹ Draft Report of the Intersessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, 30 January 1998, as reprinted in S. WEXLER (ed.), *Observations on the Consolidated ICC Text before the Final Session of the Preparatory Committee*, Toulouse, Association internationale de droit pénal, Érès, 1998, pp. 115-249. It should be observed that this provision leaves unresolved the question whether the Defence can request the Pre-Trial Chamber for a warrant to carry out a search and seizure operation.

The proposal to adopt an express privacy right as a safeguard against unauthorised search and seizure operations was first proposed by Australia and The Netherlands, but was not adopted.²⁹⁰ A slightly altered version of the proposed provision was reinserted in the Working Group on Procedural Matters ('WGPM') and taken over into the Zutphen draft, but was later deleted. It was argued by EDWARDS that the principal reason for the deletion of this provision was "because it was thought that those rights were covered in other Parts of the Rome Statute, including in Part IX."²⁹¹

Whereas the provision should ideally have been formulated in broader terms considering that other investigative actions may equally infringe upon privacy rights, the provision would have had the welcome effect of clarifying that the Prosecutor should seek judicial authorisation before executing a search and seizure and of further limiting the prosecutorial power by setting clear conditions for the execution of search and seizures.

The failure to include an express search and seizure provision in the ICC Statute does not mean that the right to privacy is not protected under the ICC Statute. As confirmed by the Court's case law, the right is included in the 'internationally recognized human rights' referred to in Article 21 (3) of the ICC Statute and is therefore binding upon the Court and upon the Prosecutor when conducting investigations.²⁹²

§ Items that can be seized

An improvement in comparison with the procedural frameworks of the *ad hoc* tribunals and the SCSL is the clarification under Article 98 (1) ICC Statute, restricting the power to request assistance in relation to property which is subject to state or diplomatic immunity. These immunities will prevail, unless the Court can first obtain the cooperation of the third state for the waiver of that immunity.²⁹³ Consequently, the ICC cannot request states to search

²⁹⁰ G.E. EDWARDS, International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy, in «The Yale Journal of International Law», Vol. 26, 2001, p. 351.

²⁹¹ *Ibid.*, p. 350.

²⁹² See ICC, Decision on the Prosecutor's Request Relating to three Forensic Experts, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC- 01/04-01/07-988, T. Ch. II, 25 March 2009, par. 5. See *supra*, Chapter 2, III.2.

²⁹³ Whereas the reference in Article 98 (1) may mean two things, to know 'every state other than the state requested' or, alternatively, 'a non-State party', the former interpretation is to be preferred, where the ICC Statute on other occasions uses the term 'a State not party to the Statute' to refer to non-States Parties. See C.

premises or seize objects protected by these immunities. Pursuant to Article 27 ICC Statute, States Parties do not renounce claims of state or diplomatic immunity of property.

In the *Mbarushimana* case, an issue arose with regard to items that had been seized at the suspect's house in France. However, this litigation concerned the question of whether potentially privileged materials, which are not subject to disclosure pursuant to Rule 73 ICC RPE, had been seized rather than the question of whether these privileges put limitations on the kind of items which can be seized.²⁹⁴

II.2.3. Other tribunals with international elements

§ *ECCC and SPSC*

The procedural frameworks of the ECCC and the SPSC share that they both provide a detailed set of procedural conditions regulating the execution of search and seizures, akin to what is found in most national jurisdictions in common.²⁹⁵ Search and seizures could/can normally only be initiated by the Investigating Judge or Co-Investigating Judges respectively. During the preliminary investigation, the ECCC Co-Prosecutors can request that judicial police officers or investigators search premises and gather relevant information, only with the written approval of the owner or occupier of the premises.²⁹⁶ Nevertheless, if the owner or occupier is absent, or in cases where he or she refuses access, a written judicial authorisation by the President of the Pre-Trial Chamber is required.²⁹⁷

Both tribunals include exceptions in cases of *urgency*. At the ECCC an exception exists for the requirement to obtain a written approval for searches conducted during the preliminary investigation: the approval by the owner or occupier may be given orally and be confirmed in

KRESS and K. PROST, Article 98 in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, München, Verlag C.H. Beck, 2008, p. 1606.

²⁹⁴ ICC, Decision on the "Prosecution's Request for a Review of Potentially Privileged Material", *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-67, PTC I, 4 March 2011; ICC, Second Decision on Matters Regarding the Review of Potentially Privileged Material, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-105, PTC I, 15 April 2011.

²⁹⁵ Section 15 TRCP; Rules 61 and 62 ECCC IR. The judicial police can conduct search and seizures upon rogatory letter. Exceptionally, search and seizures can be conducted by the Judge or Judges indicated by the Trial Chamber, when the Trial Chamber considers the conduct of additional investigations necessary (Rule 93 (2) ECCC IR).

²⁹⁶ Rule 50 (2) ECCC IR.

²⁹⁷ Rule 50 (3) ECCC IR.

written form within 48 hours. The SPSC also provided for warrantless searches in cases of urgency. In this scenario, the written record of the search had to be sent to the Investigating Judge immediately who would assess the regularity of the search and seizure *ex post*.²⁹⁸

At the ECCC, irrespective of whether the search and seizure has been authorised by the president of the Pre-Trial Chamber or by the Co-Investigating Judges, these measures should respect the general principles of proportionality and of necessity which are included in Rule 21 (2) ECCC IR.²⁹⁹ In turn, the procedural framework of the SPSC included an important substantial requirement for the initiation of searches. It included a threshold for the issuance of a search warrant, to know ‘reasonable grounds to believe that this search would produce evidence necessary for the investigation or would lead to the arrest of a suspect whose arrest warrant has previously been issued’.³⁰⁰ Moreover, the provision detailed the necessary content of a search warrant, including the identification of the location or items to be searched, the reasons for the search, the restrictive measures that could be used by the police officers during the search and the time of day during which the search warrant could be executed.³⁰¹ The search warrant had to be served to the occupant of the premises.

While the SPSC procedural framework limited searches to daylight hours, the ECCC only provides for a similar limitation for searches conducted during the preliminary investigation.³⁰² The ECCC procedural framework provides that a search operation should be executed in the presence of the occupant of the premise or two witnesses if this is not possible.³⁰³ The SPSC procedural framework stated that the police ‘may’ provide for at least one independent witness if nobody is present at the premises.³⁰⁴ A written record of the search, including an inventory of items seized should/had to be made at both the ECCC and the SPSC.³⁰⁵

²⁹⁸ Required are reasonable grounds to believe that evidence of a crime is located in or on the premises and that: (a) such evidence may be tampered with, removed or destroyed; or (b) it is necessary to safeguard or preserve the scene of a crime; or (c) the police are in hot pursuit of a suspect; or (d) there is an immediate danger to the safety or security of persons.

²⁹⁹ See *supra*, Chapter 6, I.1.

³⁰⁰ Section 15.2 TRCP.

³⁰¹ Section 15.3 TRCP.

³⁰² Rule 50 (2) ECCC IR (investigators or police can only enter the premises between six o’clock in the morning and six o’clock in the evening).

³⁰³ Rule 61 (1) ECCC IR (judicial investigation) and Rule 50 (3) ECCC IR (preliminary investigation).

³⁰⁴ Section 15.6 TRCP.

³⁰⁵ Rule 50 (2) and (5) ECCC IR (search during preliminary investigation); Rule 61 (2) and (3) ECCC IR (judicial investigation); Section 15.5 TRCP.

§ STL

At the STL, the prosecutorial power to conduct search and seizures derives from the general evidence-collecting powers.³⁰⁶ The Prosecutor or the Head of the Defence Office (at the request of the Defence) may either request Lebanon or a third state to execute the search and seizure directly or have the search and seizure executed by the judicial authorities, with or without the presence of OTP (or Defence) staff.³⁰⁷ In exceptional circumstances the Pre-Trial Judge can request a state to search premises or to seize evidence, at the request of a party or of a victim or *proprio motu*.³⁰⁸ This presupposes that the parties are not able to collect the evidence themselves, and collecting this evidence would be in the interests of justice. The Pre-Trial Judge can *proprio motu* gather evidentiary items, if he considers that the interests of justice, the need for the impartial establishment of the truth, and the necessity to ensure a fair and expeditious trial, in particular the need to ensure the equality of arms and to preserve evidence, make it imperative. The seizure seems limited to ‘probative materials’.

No other provisions regulate the adoption or execution of search and seizures. In the absence of an express provision establishing the need for a judicial authorisation to rely on search and seizure operations, the competence of the Pre-Trial Chamber to provide such warrants and orders, as are necessary for the conduct of the investigations, may be interpreted as including an obligation to request judicial authorisation.³⁰⁹

II.3. Tracing, freezing, and seizure of property, proceeds or instrumentalities of the crime

II.3.1. Introduction

Seizure can also be unrelated to the search of premises. Notably, assets of a suspect or accused may be seized or frozen in the course of the investigation. Whereas the jurisprudence of the *ad hoc* tribunals in relation to such measures is scarce, these provisional measures

³⁰⁶ Article 11 (5) STL Statute, Rule 61 (i) STL RPE.

³⁰⁷ Rule 16 (B) and (C) STL RPE; Rule 18 (B) and (C) STL RPE. Consider also Article 15 of the STL Agreement on the cooperation between Lebanon and the Tribunal.

³⁰⁸ Rule 92 (A) and (C) STL RPE.

³⁰⁹ Rule 77 (A) and (B) STL RPE. Consider also Article 18 (2) STL Statute which only refers to the Prosecutor.

prove more important at the ICC, especially in light of the reparation scheme envisaged in the ICC Statute.³¹⁰

These provisional measures are not always aimed at gathering evidence or information to establish the guilt or innocence of the accused (e.g. by proving the role of those most responsible). They serve additional purposes. These acts may be supportive of the execution of other coercive measures. They may serve the administration of justice by ensuring the execution of the arrest warrant by means of drying up the accused's support network. Furthermore, these measures may anticipate and safeguard the potential execution of the penalty of restitution of property. Finally, the nature of the ICC proceedings allows for the ordering of a fine or a forfeiture of proceeds, property, and assets, which may be used to compensate victims. In this regard, the provisional freezing of assets supports the goals of international criminal justice and of providing satisfaction to victims.

It will be illustrated that different problems surround the use of such measures. On the one hand, to some extent, these actions are at odds with the presumption of innocence. On the other hand, since assets (primarily moveable goods) can easily be moved and hidden, it will be important to freeze these assets at an early point in the investigation. Swift action is essential.³¹¹ In its turn, this raises questions regarding the minimum threshold required for adopting these orders. Furthermore, and to ensure the efficiency of freezing orders, it will be important that applications for these orders can be made on an *ex parte* basis, without the notification of the person concerned.

§ Working definition

Neither the statutory documents nor the relevant jurisprudence of any of the international criminal tribunals define what should be understood under the 'freezing of assets' (Rule 61 (D) ICTY and ICTR RPE) or the 'identification, tracing, freezing or seizure of proceeds, property, assets and instrumentalities of crimes' (Article 93 (1) (k) ICC Statute).³¹² The lack

³¹⁰ See *infra*, Chapter 6, II.3.3.

³¹¹ P. LEWIS and H. FRIMAN, *Reparations to Victims*, in R.S. LEE (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, Transnational Publishers, 2001, p. 489.

³¹² See the discussion of this provision, *infra*, Chapter 6, II.3.3.

of any definition is striking, since these measures by nature infringe upon the individual rights (right to the peaceful enjoyment of property) of suspects and accused persons.

In the absence of a definition, some relevant international instruments may provide us with a useful working definition. Firstly, ‘freezing’ or ‘seizure’ refers to a provisional measure. It entails a temporal infringement on the suspect’s (or the accused’s) property rights and deprives him or her of the availability of his financial resources. In that sense, it should be distinguished from permanent forms of deprivation of property (forfeiture, confiscation). The U.N. Convention against Transnational Organised Crime defines it as “temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority.”³¹³

Article 93 (1) (k) ICC Statute limits the objects that can be seized to proceeds, property, assets and instrumentalities of crimes. Again, international instruments may offer some guidance in defining these concepts. Firstly, ‘proceeds’ can be defined as any property, derived from or obtained, directly or indirectly, from the criminal offence (*productum sceleris*).³¹⁴ Within this sub-section, secondly, ‘property’ will be defined as assets of any description, irrespective of its nature (corporeal or incorporeal, moveable or immovable) including legal documents evidencing title to or interests in these assets.³¹⁵ Lastly, ‘instrumentalities’ can be defined as any property which is used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences (*instrumentum sceleris*).³¹⁶

³¹³ Article 2 (f) of the United Nations Convention against Transnational Organised Crime, adopted by General Assembly Resolution 55/25, U.N. Doc. A/RES/55/21, 8 January 2001 (entry into force 29 September 2003). An almost identical definition can be found in Article 1 (g) of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism of the Council of Europe, adopted in Warsaw, 16 May 2005 (entry into force 1 May 2008).

³¹⁴ Article 2 (g) of the United Nations Convention against Transnational Organised Crime; Article 1 (a) of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism of the Council of Europe.

³¹⁵ Article 2 (d) of the United Nations Convention against Transnational Organised Crime; Article 1 (b) of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism of the Council of Europe.

³¹⁶ Article 1 (c) of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism of the Council of Europe.

II.3.2. The *ad hoc* tribunals and the SCSL

Provisional measures to freeze the assets of the accused are explicitly provided for in relation to Rule 61 (ICTY and ICTR RPE) proceedings (procedure in the case of a failure to execute an arrest warrant in a reasonable time). According to Rule 61 (D), the Trial Chamber can, *proprio motu* or upon request by the Prosecutor, order (a) State(s) to adopt provisional measures to freeze the assets of the accused, without prejudice to the rights of third parties.³¹⁷

In the *Milošević* case, the Prosecution made an application for a consequential order to the arrest warrant to request that states provisionally freeze the assets of the accused.³¹⁸ According to the Prosecution, the freezing of assets intends to prevent the accused at large from using these assets to evade arrest and from taking steps to disguise his assets or putting them beyond the reach of the tribunal.³¹⁹ However, it also serves a second, separate purpose. Assets can be frozen for the purpose of granting the restitution of property or payment from its proceeds, which can be ordered by the Trial Chamber pursuant to Article 24 (3) ICTY Statute, Article 23 (3) ICTR Statute and Article 19 (3) SCSL Statute as well as to Rule 105 ICTY and ICTR RPE and Rule 104 SCSL RPE upon conviction.³²⁰

The application was based on Rule 54 ICTY RPE. The ICTY Single Judge acknowledged that such recourse may be at odds with the more specific procedure that can be found in Rule 61 (D).³²¹ This provision authorises the ordering, by the Trial Chamber (whereas pursuant to Rule 54, a Judge can issue such order³²²), of provisional measures to freeze the accused's

³¹⁷ Provisional measures can be ordered by the Trial Chamber for the preservation and protection of property or proceeds *only after a judgement of conviction* (Rule 105 (A) ICTY and ICTR RPE and Rule 104 (A) SCSL RPE).

³¹⁸ ICTY, Decision on Review of Indictment and Application for Consequential Orders, *Prosecutor v. Milošević et al.*, Case No. IT-99-37-I, T. Ch., 24 May 1999.

³¹⁹ *Ibid.*, par. 27.

³²⁰ Provided that a finding pursuant to Rule 98ter (B) ICTY RPE (Rule 88 (B) ICTR and SCSL RPE) has been made in the judgement. Consider the argumentation of the Prosecution in the *Milošević* case referring to the indictment which alleged that property was unlawfully taken from the homes of victims and that many victims were robbed of money and other valuables. See *ibid.*, par. 26. Similarly, in *Musema*, the ICTR Trial Chamber stated that it could only make an order for the restitution of property if the indictment contained a charge of the unlawful taking of property; see ICTR, Decision on an Application by African Concern for Leave to Appear as *Amicus Curiae*, *Prosecutor v. Musema*, ICTR-96-13-T, T. Ch. I, 17 March 1999, par. 10-11.

³²¹ *Ibid.*, par. 27, 28.

³²² Notably, the 1999 Expert Group made the suggestion to leave this power to the single Judge in Rule 61 proceedings. See, UNITED NATIONS, Comprehensive report on the results of the implementation of the recommendations of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the

assets in the specific situation in which the arrest warrant has not been executed within a reasonable time. Although the Judge (Hunt) acknowledged that Rule 61 (D) ICTY RPE seems to limit the power under Rule 54 to order these provisional measures, the power ultimately derives from Article 19 (2) of the ICTY Statute and Rule 47 (H) (i) of the ICTY RPE. Consequently, no such limitation can be placed upon the power to issue orders to freeze assets.³²³ Hence, the freezing of assets may also be ordered by the Judge upon the confirmation of the indictment.

While the Prosecution in this case sought a court order, and the tribunal subsequently acknowledged the existence such power to order these provisional measures, this decision does not resolve the question of whether there is an obligation incumbent upon the Prosecution to obtain a court order or whether it can directly request States to freeze assets.³²⁴ Since the freezing order was issued *in casu* by the Confirming Judge based on Article 19 (2) ICTY Statute, a *prima facie* standard should be satisfied.³²⁵ Whether assets may be frozen before the confirmation of the indictment remains unclear.

The SCSL RPE do not envisage a provision similar to Rule 61 (D) ICTY and ICTR RPE. In the *Norman* case, an SCSL Judge declined to issue a similar order.³²⁶ Single Judge Thompson stated that “nowhere is it expressly provided that there is a law enforcement power to seek an order from a court to freeze the assets of an indicted person pending trial.”³²⁷ This freezing or

International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, U.N. Doc. A/56/853, 4 March 2002, par. 26.

³²³ ICTY, Decision on Review of Indictment and Application for Consequential Orders, *Prosecutor v. Milošević et al.*, Case No. IT-99-37-I, T. Ch., 24 May 1999, par. 27 - 28. It has been argued by SLUITER that “it would be undesirable if Judges, or other organs of the Tribunal, could circumvent the RPE by resorting exclusively to the “broad” provisions in the Statute. He argues that where Rule 61 (D) ICTY RPE limits the power conferred by Rule 54, it equally limits Article 19 (2) ICTY Statute (as Rule 54 further details the powers provided for under Article 19 (2)). To hold otherwise would violate the *generalis-specialis* principle. Whereas the Rule 61 (D) is not well-suited to deal with situations where urgent action is required, this provision governs the freezing of assets to facilitate the execution of an arrest warrant. G. SLUITER, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1997-1999, Vol. III, 2001, p. 48.

³²⁴ On this particular issue, see *infra*, Chapter 6, II.3.2, fn. 335 and accompanying text.

³²⁵ While a similar threshold exists before the ICTR, the threshold for the confirmation of the indictment at the SCSL seems to be considerably lower.

³²⁶ SCSL, *Norman* – Decision on *Inter Partes* Motion by Prosecution to Freeze the Account of the Accused Sam Hinga Norman at the Union Trust Bank (SL) Limited or at any Other Bank in Sierra Leone, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-PT, T. Ch., 19 April 2004.

³²⁷ *Ibid.*, par. 10. It should be noted that the SCSL RPE do not envisage a provision similar to Rule 61 (D) ICTY and ICTR RPE.

forfeiture is only explicitly referred to in a post-conviction setting.³²⁸ Even then, these measures are limited to property that has been acquired unlawfully or as a result of criminal conduct.³²⁹ The Judge, consequently, set a high threshold for any order to freeze assets of an accused pending trial, to know: “whether there is clear and convincing evidence that the targeted assets have a nexus with criminal conduct or were otherwise illegally acquired.”³³⁰ In explaining this threshold, the Judge referred to the infringement of such course of action on the constitutionally and internationally recognised right to property and the presumption of innocence.³³¹ This high a threshold, which resembles a standard for conviction, may render this prosecutorial tool useless. Indeed, the standard seems too high to be a provisional measure.³³² Nevertheless, the question as to the link required between the assets frozen and the criminal conduct is a pertinent one.

In line with the ICTY and the SCSL, it seems that applications for orders to seize assets have only sporadically been made at the ICTR. Orders to seize assets were made in relation to Felicien Kabuga, who allegedly financed the genocide of Tutsis in Rwanda.³³³ Orders were made requesting different states to freeze the assets of the accused. These orders were not made for the goal of compensating the victims but to serve other goals, including the execution of the arrest warrant against the accused.³³⁴ Based on Rule 40 (A), the Prosecutor requested that the French authorities freeze certain bank accounts owned by Kabuga and of his family.³³⁵ Notably, the Prosecutor did not request a judicial order by a Judge or Trial Chamber. The French authorities complied. When Kabuga’s family filed a request to the President of the ICTR to lift the provisional measure they were informed that they did not

³²⁸ Article 19 (3) SCSL Statute; Rule 88 (B) and Rule 104 (C) SCSL RPE.

³²⁹ *Ibid.*, par. 11.

³³⁰ *Ibid.*, par. 13. Single Judge Thompson further explained that what is ‘clear and convincing evidence’ will depend on the particulars of the case. The targeted property must be specifically identifiable as a product of criminality or illegality. Neither probable cause nor mere suspicion or speculation will suffice.”

³³¹ *Ibid.*, par. 14.

³³² A. KLIP, Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: The Special Court for Sierra Leone 2003 - 2004*, Vol. IX, 2001, p. 742. KLIP remarks that, where the Judge found that the SCSL provides for forfeiture as a final measure, it would only be logical that such measure is also provided for as a provisional measure. For a similar view, see L. VIERUCCI, ‘Freezing of assets’, in A. CASSESE, *The Oxford Companion to International Criminal Justice*, Oxford, Oxford University Press, 2009, p. 327.

³³³ Interview with a member of the OTP, ICTR-09, Arusha, 20 May 2008, p. 9.

³³⁴ Interview with Dr. Alex Obote Odora of the OTP, ICTR-11, Arusha, 21 May 2008, p. 13 (“it has not been the context of compensating the victims”).

³³⁵ ICTR, Decision (Appeal of the Family of Felicien Kabuga against Decisions of the Prosecutor and President of the Tribunal), *Prosecutor v. Kabuga*, Case No. Miscellaneous-Kabuga Family-01-A, A. Ch., 22 November 2002.

have *locus standi* before the tribunal.³³⁶ The Appeals Chamber overturned that decision. It entertained, somewhat enigmatically, that where the Judges drafted the Rules, they retain the responsibility to review the working of an investigative action undertaken by the Prosecutor pursuant to a Rule, on a complaint by a non-party about any hardship caused by such action. The Appeals Chamber remitted the matter to a Trial Chamber.³³⁷ Furthermore, the Appeals Chamber emphasised the principle that a decision of a non-judicial body, which affects the liberty of individuals or their property, should be subject to judicial review.³³⁸ From the foregoing, it appears that the inclusion of a right of non-parties to request for the return of items seized is to be preferred.³³⁹

ICTR OTP staff often referred to the specific context of Rwanda when asked why more applications have not been made. They responded that in most cases, no property was left that could be frozen and restituted.³⁴⁰ The accused has usually lost their property. In addition, no victims have stood up to reclaim property.³⁴¹

Similar to other search and seizures, the issue of state or diplomatic immunity of property could arise.³⁴² Whereas, pursuant to Article 22 (3) of the Vienna Convention on Diplomatic Relations, premises of the mission are immune to search, requisition, attachment or execution, this protection seems limited to protection of the premises of the mission.³⁴³ The question arises whether the tribunal can order the freezing of a bank account used by a diplomatic

³³⁶ *Ibid.*

³³⁷ *Ibid.*

³³⁸ *Ibid.* (emphasis added). Judge Gunawardana attached a Declaration in which he emphasised that he does not agree with the inclusion of this principle, because it is “tantamount to a declaration of a principle, which is too broad for the purpose of this case, *even if it is an accurate representation of international law*” (emphasis added). Judge Shahabuddeen attached a declaration in which he concluded that, notwithstanding the hortatory character of such statement, “it is not safe to assume that a Trial Chamber, absent an enabling amendment of the Statute, necessarily has jurisdiction to make a jurisdictional review of any and every decision of a non-judicial organ of the Tribunal which affects the liberty of individuals or their property” (par. 3).

³³⁹ Compare Rule 74 (5) ECCC IR, which states that “[a]ny non-party to the investigation proceedings who has requested the return of seized items shall be entitled to appeal against any order of the Co-Investigating Judges denying such request.”

³⁴⁰ Interview with Dr. Alex Obote Odora of the OTP, ICTR-11, Arusha, 21 May 2008, p. 11 (The interviewee recalls that even where some of the accused may have some property on paper, the property has often been confiscated or appropriated by the government, or persons who previously lived in exile have been recognized as the new owners. The interviewee in that regard referred to the fact that the office used by the OTP in Kigali belonged to one of the accused).

³⁴¹ Interview with a member of the OTP, ICTR-16, Arusha, 4 June 2008, p. 10.

³⁴² As acknowledged by H. FRIMAN, Immunity of Property, in A. CASSESE, *The Oxford Companion to International Criminal Justice*, Oxford, Oxford University Press, 2009, p. 370.

³⁴³ E. DENZA, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (3rd Edition), Oxford, Oxford University Press, 2008, p. 157.

mission to cover their daily expenses. In most jurisdictions where the possibility exists to execute against foreign states on a wide basis (thus not limited to property directly linked to the cause of action), courts have decided that embassy accounts are not subject to enforcement.³⁴⁴

II.3.3. The International Criminal Court

Pursuant to Article 57 (3) (e) of the ICC Statute, the Pre-Trial Chamber may *proprio motu* or at the request of the Prosecutor or of victims (who have made a request for reparations or have made a written undertaking to do so³⁴⁵) seek cooperation from states in taking protective measures for the purpose of forfeiture.³⁴⁶ By restricting these requests for protective measures to situations in which a warrant of arrest or a summons has already been issued, a threshold has been included in the provision. Moreover, the Pre-Trial Chamber must have due regard to the strength of the evidence and the rights of the parties concerned. According to Rule 99 (2) ICC RPE, prior notification of the suspect against whom the protective measures are sought is not necessary unless such notification would *not* jeopardise the effectiveness of the protective measures.³⁴⁷

The Pre-Trial Chamber's power is accompanied by the requirement that States Parties provide cooperation for the "identification, tracing and freezing or seizure of proceeds, property, assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice

³⁴⁴ See *e.g.* Philippine Embassy Bank Account (BVerfGE) [1977], 65 ILR 146; *Alcom Ltd v. Republic of Columbia* [1984], 74 ILR 170 (on the State Immunity Act 1978). See further M.N. SHAW, *International Law* (6th Edition), Cambridge, Cambridge University Press, 2008, p. 762 and E. DENZA, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (3rd Edition), Oxford, Oxford University Press, 2008, pp. 157-159.

³⁴⁵ The reference to a 'written undertaking' was included to have at least some formal indication where the property rights of the suspect are at stake, see P. LEWIS and H. FRIMAN, *Reparations to Victims*, in R.S. LEE (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, Transnational Publishers, 2001, p. 489.

³⁴⁶ Article 57 (3) (e) ICC Statute *juncto* Rule 99 (1) ICC RPE.

³⁴⁷ The draft provision prescribed notification, with the exception of cases of urgency. Where no prior authorisation had occurred, an *inter partes* hearing should be organised. Nevertheless, the procedure was changed out of concerns that the suspect could hide his or her assets before this formal procedure was completed. Now, where the order is made without prior notification, the Registrar should notify those against whom a request is made 'as soon as is consistent with the effectiveness of the measures requested'. (Rule 99 (3) ICC RPE). See P. LEWIS and H. FRIMAN, *Reparations to Victims*, in R.S. LEE (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, Transnational Publishers, 2001, pp. 489-490.

to the rights of bona fide third parties” (Article 93 (1) (k) ICC Statute).³⁴⁸ It follows from the reference in Article 57 to Article 93 (1) (k) ICC Statute that the latter provides an exhaustive list of protective measures that can be ordered by the Chamber by way of a request for assistance under Article 57 (3) (e).³⁴⁹

In its turn, this latter provision is linked to Article 77 (2) (b) ICC Statute, providing the legal basis for the Court to order, upon conviction, “a forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of *bona fide* third parties.” No explicit reference to the seizure or freezing of assets to support the execution of a warrant of arrest can be found in the ICC Statute or the RPE. Nevertheless, the Court itself has previously underlined the importance of these measures for the arrest of a suspect or accused person, in order to disrupt the suspect’s support network.³⁵⁰ In this regard, the freezing of assets serves a twofold purpose of facilitating enforcement and supporting the arrest and surrender.³⁵¹

In the *Lubanga* case, Pre-Trial Chamber I interpreted Article 57 (3) (e) ICC Statute as including protective measures for the purpose of eventual reparations of victims.³⁵² From a strict literal reading of Article 57 (3) (e) ICC Statute, one may conclude that such cooperation requests can only be aimed at the enforcement of a future penalty of forfeiture. However, the provision includes a reference to ‘the ultimate benefit of victims’. The Pre-Trial Chamber, on the basis of a contextual³⁵³ and a theological³⁵⁴ interpretation of the provision, concluded that

³⁴⁸ Article 93 (1) (k) ICC Statute also refers to the freezing or seizure of the ‘instrumentalities of the crimes for the purpose of eventual forfeiture’. Nevertheless, it has been argued that such reference to the *instrumentum sceleris* “is widely believed to be an error.” The restraint of the instrumentalities of the crime was removed as a possible sanction under the Statute during the negotiations at Rome. Consider: W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 1021; C. KRESS and K. PROST, Article 93 in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes*, München, Verlag C.H. Beck, 2008, p. 1578. It should be noted that a request under Article 93 (1) (k) can also be made in conjunction with Article 75 (4) ICC Statute to ensure the enforcement of a reparation order. Nevertheless, a conviction is required for such order to be taken.

³⁴⁹ F. GUARIGLIA, K. HARRIS and G. HOCHMAYR, Article 57, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes*, Article by Article, München, Verlag C.H. Beck, 2008, p. 1131.

³⁵⁰ ICC, Report of the Bureau on Cooperation, ICC-ASP/6/21, par. 41.

³⁵¹ W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 1021.

³⁵² ICC, Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-8, PTC I, 24 February 2006, par. 130 and following.

³⁵³ *Ibid.*, par. 130-134. In particular, the Pre-Trial Chamber argued that Rule 99 (1) ICC RPE, which further details Article 57 (3) (e) ICC Statute, is to be found in the subsection dealing with reparations to victims.

this provision also includes requests for the taking of protective measures for the purpose of providing reparations to victims. In addition, this feature derives from the Statute's 'key feature', to know the reparation scheme.³⁵⁵ The Pre-Trial Chamber underlined the importance of the early seizure or freezing of assets:

“Existing technology makes it possible for a person to place most of his assets and moveable property beyond the Court’s reach in only a few days.” “Therefore, if assets and property are not seized or frozen at the time of the execution of a cooperation request for arrest and surrender, or very soon thereafter, it is likely that the subsequent efforts of the Pre-Trial Chamber, the Prosecution or the victims participating in the case will be fruitless.”³⁵⁶

Indeed, without the Court exercising its power to seize assets as early as possible in the proceedings, the prospects of monetary awards for the victims will remain limited.³⁵⁷

A request to the DRC to trace, identify, freeze and seize assets and property belonging to Lubanga (pursuant to Articles 57 (3) (e) and 93 (1) (k) ICC Statute) was later made, alongside the request for cooperation in the execution of the warrant of arrest. Since the warrant was issued under seal, the Pre-Trial Chamber required the Registrar to wait until the decision to unseal the warrant of arrest before transmitting a similar cooperation request to the States Parties.³⁵⁸ The latter request was, thus, made public. The decision to issue a public

³⁵⁴ *Ibid.*, par 135 (The power the Court has to grant reparations is a distinctive feature, intended to alleviate the negative consequences of victimisation. If cooperation can be sought only to take protective measures to guarantee the future enforcement of a residual penalty, this would be contrary to the “ultimate benefits of victims”).

³⁵⁵ In the wording of the Pre-Trial Chamber, “early tracing, identification and freezing or seizure of the property and assets of the person against whom a case is launched through the issuance of a warrant of arrest or a summons to appear is a necessary tool to ensure that, if that person is finally convicted, individual or collective reparation awards ordered in favour of victims will be enforced.” Otherwise there may be no property or assets available to enforce the award (*ibid.*, par. 136).

³⁵⁶ *Ibid.*, par. 137. Such could, according to the Pre-Trial Chamber, also occur in the *Lubanga* case. While Lubanga had been imprisoned, he had access to unmonitored satellite phone communications and could receive external phone calls. Moreover, the Pre-Trial Chamber acknowledged that Lubanga had the incentive and means to place his property and assets beyond the reach of the Court as soon as he becomes aware of the issuance of an arrest warrant against him (*ibid.*, par. 138).

³⁵⁷ M. HENZELIN, V. HEISKANEN and G. METTRAUX, Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes, in «Criminal Law Forum», Vol. 17, 2005, p. 337.

³⁵⁸ ICC, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-8, PTC I, 24 February 2006, par. 139; ICC, Request to States Parties to the Rome Statute for the Identification, Tracing and Freezing or Seizure of the Property and Assets of Mr. Lubanga

request was criticised as such requests may be self-defeating, since assets can easily and rapidly be moved.³⁵⁹

Remarkably, in *Lubanga*, the Pre-trial Chamber criticised the Prosecutor for not having made an application for protective measures for the purpose of forfeiture together with the application for a warrant of arrest. While the Chamber in the instant case consequently decided to act *proprio motu*, it opined that where the Prosecutor is the organ of the Court primarily in charge of the investigation of the situation in the DRC, the Prosecutor should take this matter into consideration in view of future applications for a warrant of arrest or a summons to appear as such would greatly benefit the effectiveness of the reparation system.³⁶⁰

The Regulations of the OTP address these concerns and determine that the OTP should consider, at the time when an application for a warrant of arrest or summons to appear is considered, to request measures for the identification, tracing, and freezing or seizure of property, assets or the instrumentalities of the crimes, in particular for the ultimate benefit of victims.³⁶¹

Similar requests for the identification, tracing and freezing or seizure of property and assets have been issued to the competent national authorities by the Pre-Trial Chamber regarding a number of other suspects.³⁶² The Prosecutor acknowledged that in the future it will seek to

Dyilo, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06, PTC I, 31 March 2006; ICC, Demande adressée à la République Démocratique du Congo en vue d'obtenir l'identification, la localisation, le gel et la saisie des biens et avoirs de M. Thomas Lubanga Dyilo, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06, PTC I, 9 March 2006.

³⁵⁹ Redress, State Cooperation and Rights of Victims before the International Criminal Court, 2006, p. 7, (available at: [http://www.redress.org/downloads/countryreports/StateCooperation &RightsofVictims.pdf](http://www.redress.org/downloads/countryreports/StateCooperation%20&RightsofVictims.pdf), last visited 14 February 2014).

³⁶⁰ ICC, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06, PTC I, 24 February 2006, par. 141.

³⁶¹ Regulation 54 (1) of the Regulations of the Office of the Prosecutor. According to Regulation 54 (2), the OTP will consider: (a) the availability of specific information regarding the existence of proceeds, property, assets or instrumentalities of crimes to be identified, traced or frozen within a given jurisdiction; and (b) any relevant information regarding persons enjoying the power of disposal with regard to such proceeds, property, assets or instrumentalities of crimes. Regulation 49 adds to this that "for the purposes of article 57, paragraph 3 (e), article 77, paragraph 2 (b) and article 93, paragraph 1 (k), the Office shall pay particular attention in its investigations to the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes, in particular for the ultimate benefit of victims."

³⁶² Consider, e.g. ICC, Urgent Request to the Democratic Republic of the Congo for the Purpose of Obtaining the Identification, Tracing, freezing and Seizure of the Property and Assets of Germain Katanga, *Prosecutor v.*

rely more on financial information not only to prove the role of those most responsible, but also to assist in providing reparations to victims.³⁶³

§ *What can be seized?*

The use of the term ‘forfeiture’ in Article 57 (3) (e) ICC Statute suggests that only proceeds, assets or property which are directly or indirectly related to the crime can be seized.³⁶⁴ Nevertheless, as discussed previously, the Pre-Trial Chamber held in *Lubanga* that, since “forfeiture is a residual penalty pursuant to Article 77 (2) (a) of the ICC Statute, it will be contrary to the ‘ultimate benefit of victims’ to limit to guaranteeing the future enforcement of this residual penalty the possibility of seeking the cooperation of states parties to take protective measures under Article 57 (3) (e) of the Statute.”³⁶⁵

Consequently, requests for provisional freezing or seizure should not be limited to the proceeds, property or assets which have been derived directly or indirectly from a crime within the jurisdiction of the court. Protective measures may relate to other proceeds, property or assets owned or controlled by the suspect.³⁶⁶ It is evident that when all assets of a suspect or accused have been frozen, this may frustrate the payment of his or her defence counsel. In such a case, the Court can order the States Parties to (partially) lift the freeze.³⁶⁷ States Parties

Katanga, Situation in the DRC, Case No. ICC-01/04-01/07, PTC I, 6 July 2007; on 27 May 2008, a request for cooperation was addressed to the Republic of Portugal to identify, trace, freeze and seize any property and assets of Mr. Jean-Pierre Bemba located on its territory, subject to the rights of bona fide third parties, which was subsequently executed by the Portuguese authorities. Nevertheless, some of the money frozen on Portuguese bank accounts by the Portuguese authorities, allegedly seemed to have disappeared. Subsequently, the Pre-Trial Chamber requested the competent judicial authorities to initiate an investigation into the alleged disappearance of the money that had been frozen. See ICC, Request for Cooperation to Initiate an Investigation Addressed to the Competent Authorities of the Republic of Portugal, *Prosecutor v. Bemba Gombo, Situation in the CAR*, Case No. ICC-01/05-01/08, PTC II, 17 November 2008, par. 3. In relation to other suspects, similar requests for protective measures have been issued. Nevertheless, these requests remain confidential. See for example the reference to Ngudjolo Chui, Al Bashir, Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman in ICC, Prosecution Response to the Defence’s Urgent “Requête aux fins de suspension de toute la procedure en cours”, *Prosecutor v. Bemba Gombo, Situation in the CAR*, Case No. ICC-01/05-01/08, PTC II, 7 August 2009.

³⁶³ ICC, Prosecutorial Strategy 2009 – 2012, par. 34 b).

³⁶⁴ See the definition of ‘forfeiture’ in Article 77 (2) (b) ICC Statute.

³⁶⁵ ICC, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06, PTC I, 24 February 2006, par. 135.

³⁶⁶ Consider, for example, ICC, Request for Cooperation to Initiate an Investigation Addressed to the Competent Authorities of the Republic of Portugal, *Prosecutor v. Bemba Gombo, Situation in the CAR*, Case No. ICC-01/05-01/08, PTC II, 17 November 2008, par. 3 (the Pre-Trial Chamber requested the assistance of Portugal in the identification, tracing, freezing or seizure of any assets or proceeds of Bemba (emphasis added)).

³⁶⁷ *Ibid.*, par. 7-8.

should comply with requests for the identification, tracing, and freezing of assets without prejudice to the rights of *bona fide* third parties.³⁶⁸

II.3.4. Other tribunals with international elements

As far as the international(ised) criminal courts are concerned, only the RPE of the STL refer to the possibility of freezing the accused's assets. According to Rule 82 (C) STL RPE, the Pre-Trial Judge may request state(s) to freeze the accused's assets, without prejudice to the rights of third parties. The Pre-Trial Judge can issue such a request after having heard the Defence, either *proprio motu*, or upon request by the Prosecutor or the Registrar.

II.4. Interception of communications

II.4.1. Generally

The interception of communications may take different forms, and is done covertly. It may take the form of wire taps, video-surveillance and other forms of electronic surveillance, or be limited to forms of metering (storage of information in relation of numbers dialled (*e.g.* time, duration...)).³⁶⁹ The suspect or accused person is not normally aware of the interception. In most cases, the interception of private communications interferes with the right to privacy.³⁷⁰

³⁶⁸ Article 93 (1) (k) ICC Statute.

³⁶⁹ Also forms of metering fall within the ambit of the right to privacy, see *e.g.* ECtHR, *Malone v. United Kingdom*, Application No. 8691/79, Judgment of 2 August 1984, par. 81.

³⁷⁰ The applicable provisions (Article 8 (1) ECHR, Article 17 (1) ICCPR, Article 11 (2) ACHR and Article 12 UDHR) refer to 'correspondence'. Only Article 7 of the EU Charter of fundamental freedoms refers to 'communications'. Nevertheless, the ECtHR held that other communications are covered by the notions of 'private life' and 'correspondence'. See ECtHR, *Klass and Others v. Germany*, Application No. 5029/71, Series A, No. 28, Judgment of 6 September 1978, par. 41; ECtHR, *Khan v. United Kingdom*, Application No. 35394/97, Reports of Judgments and Decisions 2000-V, Judgment of 12 May 2000, par. 22-28; ECtHR, *Schenk v. Switzerland*, Application No. 10862/84, Judgment of 12 July 1988, par. 52-53. The interception of communications may also touch upon other rights, including the right to express opinions and to obtain information. However, there will not always be an interference.

Whereas according to General Comment No. 16 (par. 8) all sorts of surveillance and interception of communications are prohibited, the HRC clarified that interception of communications are compatible with Article 17 as long as they are strictly controlled and overseen by an independent, preferable judicial body. See, *e.g.* HRC, Concluding Observations of the Human Rights Committee: Zimbabwe, U.N. Doc. CCPR/C/79/Add. 89, 6 April 1998, par. 25. (stating that "as regards telephone tapping, the Committee is concerned (a) that the Prosecutor (without judicial consent) may permit telephone tapping; and (b) that there is no independent monitoring of the use of the entire system of telephone telephones"); HRC, Concluding Observations of the Human Rights Committee: Lesotho, U.N. Doc. CCPR/C/79/Add.106, 8 April 1999, par. 24 (stressing the importance of independent supervision).

There will be interference in cases where the person does not have the expectation that their communications are intercepted or recorded, also outside his or her home.³⁷¹

Since the interception of private communications is of a secret character and interferes with the right to respect for private life and correspondence, human rights law requires a law which is sufficiently clear to give an adequate indication as to the circumstances and the conditions in which the authorities can resort to this power (foreseeability).³⁷² As argued previously, the absence in international criminal procedural law of detailed procedures and detailed conditions which need to be met supports the argument that a judicial authorisation by a tribunal Judge or Trial Chamber should be required.³⁷³ The jurisprudence of the ECtHR underlined that where the implementation of secret surveillance is not open to scrutiny by the persons concerned, or by the general public, it would be a violation to the rule of law if the legal discretion granted to the executive (or to the Judge) is expressed in terms of an unfettered power.³⁷⁴ In *Malone*, the ECtHR held that “[e]specially where a power vested in the executive is exercised in secret, the risks of arbitrariness are evident.”³⁷⁵ Consequently, the Court applies a higher standard on the basis of the covert nature of the interception of communications.³⁷⁶ Hence, a legal basis for the investigative method which is “particularly

³⁷¹ Consider in this regard, e.g. ECtHR, *P.G. and J.H. v. The United Kingdom*, Application No. 44787/98, Judgment (Grand Chamber) of 25 September 2001, par. 57 (“Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person’s reasonable expectations as to privacy may be a significant, although not necessarily conclusive”); S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, p. 546.

³⁷² See *supra*, Chapter 6, I.3.1 ECtHR, *Malone v. United Kingdom*, Judgement, Application No. 8691/79, Judgment of 2 August 1984, par. 67.

³⁷³ See, *supra*, Chapter 6, I.3.1.

³⁷⁴ See e.g. ECtHR, *Bykov v. Russia*, Application No. 4378/02, Judgment (Grand chamber) of 10 March 2009, par. 78; ECtHR, *Huvig v. France*, Application No. 11105/84, Judgment of 24 April 1990, par. 32; ECtHR, *Khan v. the United Kingdom*, Application No. 35394/97, Reports of Judgments and Decisions 2000-V, Judgment of 12 May 2000, par. 26.

³⁷⁵ ECtHR, *Malone v. United Kingdom*, Judgement, Application No. 8691/79, Judgment of 2 August 1984, par. 67.

³⁷⁶ ECtHR, *Weber and Saravia v. Germany*, Application No. 54934/00, Reports of Judgments and Decisions 2006-XI, Judgment of 29 June 2006, par. 93 (“In view of the risk of abuse intrinsic to any system of secret surveillance, such measures must be based on a law that is particularly precise, especially as the technology available for use is continually becoming more sophisticated”). In turn, where the interference is considered less, less stringent safeguards against arbitrary interference apply. See ECtHR, *Uzun v. Germany*, Application No. 35623/05, Reports of Judgments and Decisions 2010, Judgment of 2 September 2010, par. 66 (“these rather strict standards, set up and applied in the specific context of surveillance of telecommunications [...] are not applicable as such to cases such as the present one, concerning surveillance via GPS of movements in public places and thus a measure which must be considered to interfere less with the private life of the person concerned than the interception of his or her telephone conversations”). Consider M.F.H. HIRSCH BALLIN, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, p. 115 (“The Court seems to impose higher standards for covert investigative techniques”).

precise” is necessary.³⁷⁷ The Court advanced a number of minimum safeguards to ensure foreseeability and avoid arbitrariness in relation to secret measures of surveillance. The statute law should set forth: (i) the nature of the offences which may give rise to an interception order, (ii) a definition of the categories of people liable to have their telephones tapped, (iii) a limit on the duration of telephone tapping, (iv) the procedure to be followed for examining, using and storing the data obtained, (v) the precautions to be taken when communicating the data to other parties, and (vi) the circumstances in which recordings may or must be erased or the tapes destroyed.³⁷⁸

II.4.2. The *ad hoc* tribunals and the SCSL

Previously intercepted evidence has played an important role in proceedings before the *ad hoc* tribunals.³⁷⁹ Most case-law concerns the admission of evidence resulting from unlawful interceptions or the reliability of the intercepted evidence.³⁸⁰ One noteworthy example is the important role intercepted communications between VRS members have played in several cases before the ICTY, often to prove key elements of the prosecution’s case.³⁸¹ Usually, the communications that have been intercepted have previously been gathered by intelligence organisations, often outside and in disrespect of existing procedural frameworks, in war-like situations.³⁸² The presence of a ‘war-like situation’ is not without importance. The ICCPR, the ECHR and the ACHR provide that the right to privacy is not absolute and may be derogated

³⁷⁷ ECtHR, *Huvig v. France*, Application No. 11105/84, Judgment of 24 April 1990, par. 32; ECtHR, *Kruslin v. France*, Application No. 11801/85, Series A, No. 176-A, Judgment of 24 April 1990, par. 33.

³⁷⁸ ECtHR, *Weber and Saravia v. Germany*, Application No. 54934/00, Reports of Judgments and Decisions 2006-XI, Judgment of 29 June 2006, par. 95.

³⁷⁹ C. DEL PONTE, Investigation and Prosecution of Large-Scale Crimes at the International Level, in «Journal of International Criminal justice», Vol. 4, 2006, pp. 554-555; S. SWOBODA, Admitting Relevant and Reliable Evidence, in T. KRUESSMANN, ICTY: Towards a Fair Trial?, Antwerp, Intersentia, 2008, p. 389.

³⁸⁰ Consider the case law referred to *supra*, Chapter 6, I.7.2. and accompanying footnotes.

³⁸¹ ICTY, Judgement, *Prosecutor v. Krstić*, Case No. IT-98-33-A, T. Ch., 2 August 2001, par. 105. Within the OTP, a special project, known as the “intercept project” was set up which assembled, analysed and translated the transcripts and checked the reliability of the intercepts by checking their internal consistency and by corroborating the information with information that had been obtained by other sources.

³⁸² The use of the fruits of previously intercepted communications recorded by intelligence organisations raises interesting questions on the use of intelligence in international criminal proceedings, but it is outside of the scope of this chapter. Caution is necessary when relying on intelligence information. Intelligence gathering is not ‘carried out with a constant eye on documenting and preserving a chain of evidence for use at a future trial. Intelligence gathering and evidence gathering serve different purposes.’ See L. MORANCHEK, Protecting National Security Evidence while Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY, in «Yale Journal of International Law», Vol. 31, 2006, p. 493.

from in emergency situations.³⁸³ Derogations are permissible only when the substantive and procedural requirements for such derogations have been met.

The Prosecutor may want to intercept communications him or herself. One such example is provided by the *Haraqija* and *Morina* (contempt) case.³⁸⁴ Conversations between the accused Morina and a protected witness during which he allegedly dissuaded the witness from testifying in the *Haradinaj* case were covertly recorded by the police of an unnamed European country in consultation with the ICTY Prosecutor.³⁸⁵ This investigative action, whereby a witness had been fitted with hidden electronic recording devices, apparently followed from the strong impression held by the Trial Chamber in the *Haradinaj* case that “the trial was being held in an atmosphere where witnesses felt unsafe.”³⁸⁶ Morina argued on appeal that the interception of conversations violated his right to privacy under international human rights law (Article 8 (1) ECHR and 17 (1) ICCPR) because the interception occurred in violation of domestic law and was not ‘in accordance with law’. Moreover, he argued that “the use of secret recordings during his suspect interview violated his right against self-incrimination, since it prompted him to give a detailed account of the meeting which the Trial Chamber relied upon to convict him.”³⁸⁷ However, the Appeals Chamber held that *even if* the recordings violated domestic law, Rule 89 (D) and Rule 95 did not require that the evidence intercepted be excluded.³⁸⁸

³⁸³ See Article 4 ICCPR, 15 ECHR and Article 27 ACHR. As noted in ICTY, Decision on the Defence “Objection to Intercept Evidence”, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, T. Ch. II, 3 October 2003, par. 30 and par. 63 (3) (noting that “there is enough evidence to prove on a *prima facie* basis that the country was, at the time, on the brink of armed conflict and the purpose of the proposed interceptions was to uncover the extent or the expected extent of the threat to the internal security of Bosnia and Herzegovina”); ICTY, Decision on the Accused’s Motion to Exclude Intercepted Conversations, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, T. Ch., 30 September 2010, par. 11.

³⁸⁴ ICTY, Decision on Morina and Haraqija Second Request for a Declaration of Inadmissibility and Exclusion of Evidence, *Prosecutor v. Haraqija and Morina*, Case No. IT-04-84-R77.4, T. Ch. I, 27 November 2008.

³⁸⁵ *Ibid.*, par. 1. On the involvement of the Prosecutor, see ICTY, Judgement, *Prosecutor v. Haraqija and Morina*, Case No. IT-04-84-R77.4-A, A. Ch., 23 July 2009, par. 17.

³⁸⁶ ICTY, Decision on Morina and Haraqija Second Request for a Declaration of Inadmissibility and Exclusion of Evidence, *Prosecutor v. Haraqija and Morina*, Case No. IT-04-84-R77.4, T. Ch. I, 27 November 2008, par. 20.

³⁸⁷ ICTY, Judgement, *Prosecutor v. Haraqija and Morina*, Case No. IT-04-84-R77.4-A, A. Ch., 23 July 2009, par. 19 – 22.

³⁸⁸ *Ibid.*, par. 28.

The power to resort to the interception of communications derives from the general power to collect evidence.³⁸⁹ No specific reference to the interception of communications can be found in the statutory documents of either the *ad hoc* tribunals or the SCSL. The interception of communications will normally be executed by a national state following a request to that effect. Hence, national procedures on the interception of such evidence will be followed. It is argued here that in the absence of any explicit conditions for the interception of communications, the general formal and material conditions for the use of coercive measures, which were previously identified, should be respected. A judicial warrant should be requested. Furthermore, any such request should respect the requirements of necessity and specificity and honour the principle of proportionality.

It should be reiterated that in cases where such interception is conducted under domestic law, by national law enforcement officials, the violation of the domestic law and the resulting violation of the right to privacy will not automatically lead to the non-admissibility of the evidence.³⁹⁰

II.4.3. The International Criminal Court

The prosecutorial power to resort to the interception of communications derives from the general prosecutorial power to collect and examine evidence (Article 54 (3) (a) of the ICC Statute). Again, the law does not provide further guidance as to the limits of this power. Unless so authorised under Article 57 (3) (d) ICC Statute, the Prosecutor will lack the power to directly intercept communications by means of on-site investigations.³⁹¹ Of course, the state concerned may voluntarily accept Prosecutor's conducting these investigative measures.³⁹²

If these investigative acts cannot be undertaken by the Prosecution by means of on-site investigations, the Prosecutor will have to rely on state cooperation. In this regard, KRESS notes that during the negotiations of the Statute it was understood that requests for other types

³⁸⁹ Article 18 (2) of the ICTY Statute, Article 17 (2) of the ICTR Statute, Article 15 (2) of the SCSL Statute and Rule 39 (i) and (ii) of the ICTY, ICTR and SCSL RPE.

³⁹⁰ See *supra*, Chapter 6, I.7.2.

³⁹¹ Exceptionally, in case of a 'failed state' scenario, the Prosecution may itself intercept communications upon authorisation by the Pre-Trial Chamber (Article 57 (3) (d) ICC Statute).

³⁹² Article 54 (3) (c) and (d) ICC Statute.

of assistance under Article 93 (1) (l) ICC Statute would also encompass modern intrusive methods such as telecommunication intercepts.³⁹³ Alternatively, if the intercepts have been previously undertaken by the national authorities on their own initiative, the request would be for “the provision of records and documents, including official records and documents” (such as evidence contained in domestic investigative dossiers or police files) under Article 93 (1) (i) ICC Statute.³⁹⁴

However, the reliance on 93 (1) (l) ICC Statute to request States Parties to intercept communications potentially violates human rights norms. This provision refers to the duty of States Parties to comply with requests for assistance regarding ‘any other type of assistance which is not prohibited by the law of the requested state, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court’. It should be recalled that under human rights law, the use of coercive measures requires a legal basis (lawfulness requirement). However, in cases where no legal basis exists under domestic law for the interception of communications, the State Party requested would still be required to cooperate, unless domestic law *prohibits* this conduct.³⁹⁵ In this scenario, because of the absence of a precise legal basis under domestic law, this would entail a violation of international human rights norms (the right to privacy). For this reason, it has been suggested by one commentator that Article 93 (1) (l) ICC Statute, in relation to coercive measures, is read as requiring not only that such measures are not prohibited under domestic law but also that the measures requested are allowed for by national law.³⁹⁶

³⁹³ C. KRESS and K. PROST, Article 93, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, München, Verlag C.H. Beck, 2008, p. 1574. Article 93 (1) (l) ICC Statute concerns requests by the Court for “[a]ny other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.” Consider also ICC, Decision on “Defence Application Pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an Order for the Preparation and Transmission of a Cooperation Request to the Government of the Republic of the Sudan”, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan*, ICC-02/05-03/09-169, T. Ch. IV, 1 July 2011, par. 19.

³⁹⁴ For example, in *Mbarushimana*, communications previously intercepted by French and German authorities were admitted into evidence for the purpose of the confirmation of charges. See ICC, Decision on the Confirmation of Charges, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-465-Red, PTC II, 16 December 2011, par. 66-74. It seems that at least the German intercepts did not result from a request by the Prosecutor to that extent. See e.g. the reference in ICC, Defence Request for a Ruling on the Admissibility of Two Categories of Evidence, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. 01/04-01/10-329-Corr, PTC I, 10 August 2008, par. 14.

³⁹⁵ According to Article 93 (3) ICC Statute, an ‘existing fundamental legal principle of general application’ is required. Hence, a prohibition cannot be adopted after the ratification of the Rome Statute. See R. RASTAN, *Testing Co-operation: The International Criminal Court and National Authorities*, in «Leiden Journal of International Law», Vol. 21, 2008, p. 440.

³⁹⁶ C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, p. 273.

II.4.4. Other tribunals with international elements

In relation to the other internationalised criminal tribunals under review, it can be observed that the power to intercept communications is explicitly mentioned in the statutory frameworks of the ECCC and the SPSC. The SPSC required judicial authorisation to intercept communications.³⁹⁷ At the ECCC, this power rests with the Co-Investigating Judges. In turn, the Co-Prosecutors lack the authority to take these measures.³⁹⁸

II.5. Examinations of body and mind

II.5.1. The *ad hoc* tribunals and the SCSL

Persons can be requested to undergo certain tests in the course of the investigation for the purpose of collecting evidence. These tests may include medical, psychological or psychiatric examinations. In addition, biometric data, fingerprints, photographs as well as voice and handwriting samples may be requested. Body samples (including breath, blood, urine or other bodily specimens) may also be requested, which may be used for DNA identification. These examinations may serve in identifying a person or may help clarify the factual circumstances of a case.³⁹⁹ The gathering of such samples is not expressly provided for. This is surprising, since “such evidence is often key to modern investigations.”⁴⁰⁰ These measures risk interfering with the privacy rights or the privilege against self-incrimination of the person concerned. In the absence of a provision detailing this power, the power derives from the

³⁹⁷ Section 9 (3) (i) TRCP. According to Section 9 (8) (i) the requesting Prosecutor may execute the warrant.

³⁹⁸ Rule 52 ECCC IR.

³⁹⁹ C.J.M. SAFFERLING, *Towards an International Criminal Procedure*, Oxford, Oxford University Press, 2001, p. 162. It should be noted that the ICTY Appeals Chamber held in *Alekovski* that neither the Statute nor the Rules oblige a Trial Chamber to require medical reports or other scientific evidence as proof of a material fact: ICTY, Judgement, *Prosecutor v. Alekovski*, Case No. IT-95-14/1-A, A. Ch., 24 March 2000, par. 62-64. Consequently, the Appeals Chamber held that the Trial Chamber did not err in convicting the accused without medical reports or other scientific evidence. Medical evidence is not required in relation to evidence of witnesses in relation to crimes such as rape, torture, outrages upon personal dignity and enslavement, and the circumstances in which expert medical evidence would even be relevant are rare. For an example, see ICTY, Order on Defence Experts, *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, T. Ch., 29 March 2000, par. 5 (the Trial Chamber mentions on example where such evidence may be relevant, to know the situation where a witness claims that a particular scar resulted from a cigarette burn, but the expert was able to say that the scar was the result of a surgical procedure).

⁴⁰⁰ A. ALAMUDDIN, *Collection of Evidence*, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), *Principles of Evidence in International Criminal Justice*, Oxford, Oxford University Press, 2010, pp. 257 – 258 (the author notes that “[a]t the national level, police make extensive use of DNA and fingerprint identification evidence”).

general evidence-gathering powers of the Prosecutor.⁴⁰¹ In turn, the RPE of the *ad hoc* tribunals and the SCSL deal only with the medical, psychiatric or psychological examination of the accused in relation to proceedings before the Trial Chamber, not in the course of the investigation.⁴⁰² Hence, and likewise, this power derives from the general powers of the Prosecutor in collecting evidence.

§ *Privilege against self-incrimination*

It can rightly be asked how far the privilege against self-incrimination protects against compelling the suspect or the accused from providing materials for the execution of certain tests, including DNA tests. This question arose in the *Delalić et al.* case.⁴⁰³ At stake was a request by the Prosecution for an order, pursuant to Rules 39 (iv) and 54 ICTY RPE to direct Mucić to provide a sample of his handwriting for analysis and identification. This sample would be necessary to determine the authorship of a letter, considered to be a threatening letter, which was allegedly written by the accused and sent to a witness. According to the Prosecution, this order was sought only because of its value for identification purposes. The Defence objected to this order insofar that requesting an accused to provide a handwriting sample against his will would be in violation of Article 21 (4) (g) ICTY Statute and would have the effect of compelling the accused to contribute to the process of incriminating himself.⁴⁰⁴

The Trial Chamber was not satisfied that a handwriting sample *per se* can be regarded as forming material proof against an accused. Nevertheless, the Chamber held that “where the material factor absent in the incriminating elements is the handwriting sample of the accused, the Trial Chamber cannot compel the accused to supply the missing element. Doing so will infringe the provisions of Article 21 (4) (g) ICTY Statute protecting the accused from self-incrimination.”⁴⁰⁵ Importantly, the fact that the handwriting sample *per se* is neutral is not the

⁴⁰¹ Article 18 (2) of the ICTY Statute, Article 17 (2) of the ICTR Statute, Article 15 (2) of the SCSL Statute and Rule 39 (j) and (ii) of the RPE of the ICTY, ICTR and SCSL.

⁴⁰² Rule 74bis ICTY, ICTR and SCSL RPE.

⁴⁰³ ICTY, Decision on the Prosecution’s Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucić, to Provide a Handwriting Sample, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, T. Ch., 19 January 1998.

⁴⁰⁴ *Ibid.*, par. 24.

⁴⁰⁵ *Ibid.*, par. 47.

issue.⁴⁰⁶ The situation is different where the accused consents with this request. If the handwriting sample, taken together with the other evidence, will constitute material evidence to prove the charge against the accused then the order of the Trial Chamber would have compelled the production of self-incriminating evidence.⁴⁰⁷

The Prosecution contended, based on United States jurisprudence and the Fifth Amendment to the U.S. Constitution⁴⁰⁸, that a distinction should be drawn between testimonial evidence ('communications') which is protected by the privilege and non-testimonial or physical evidence ('real evidence') which is not protected.⁴⁰⁹ The Trial Chamber noted that powerful judicial and academic voices criticise this division in U.S. jurisprudence and, subsequently, argued that the wording of Article 21 (4) (g) ICTY Statute is 'clear and unambiguous' and does not require modification or qualification. Reading this distinction into the provision (in the absence of an express limitation) would be reading a condition into it which had not been contemplated by the drafters.⁴¹⁰

The holding of the Trial Chamber is perhaps surprising in light of human rights jurisprudence concerning the privilege against self-incrimination.⁴¹¹ Whereas, since *Saunders*, constant ECtHR jurisprudence has held that the privilege against self-incrimination lies at the heart of a fair procedure (Article 6 (1) ECHR), the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent and does not extend to the use in the criminal proceedings of material which may have been obtained from the accused through the use of compulsory powers but *which has an existence independent of the will of the accused*. The privilege does not extend to the taking of samples of blood, breath,

⁴⁰⁶ *Ibid.*, par. 48.

⁴⁰⁷ In this regard, consider the reference by the Trial Chamber to the holding by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), par. 49.

⁴⁰⁸ The Trial Chamber's reasoning seems to imply that the reference by the Prosecutor to U.S. jurisprudence is justified where Article 21 (4) (g) ICTY Statute and the U.S. Fifth Amendment to the U.S. Constitution "[t]hrough differently worded, [...] protect the same rights."

⁴⁰⁹ This distinction is based on the dictum by Justice Holmes in *Holt v. United States* (218 U.S. 245), which was adopted subsequently in *Schmerber v. U.S.* (384 U.S. 757); see also the reference to *Gilbert v. California*: "One's voice and handwriting are, of course, means of communication. It by no means follows, however, that every compulsion of an accused to use his voice or write compels a communication within the cover of the privilege. A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection" (388 U.S. 266-267).

⁴¹⁰ ICTY, Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucić, to Provide a Handwriting Sample, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, T. Ch., 19 January 1998, par. 58.

⁴¹¹ As stated earlier, such privilege is included in Article 14 (3) (g) ICCPR and Article 8 (2) (g) of the ACHR and has been recognised in the case law of the ECtHR.

urine, voice samples or other bodily specimens, including for the purposes of DNA testing.⁴¹² From this enumeration, it follows that even some level of coercion would be allowed for, e.g. in order to obtain a blood or urine sample. Later case law, and in particular the Judgment of the Grand Chamber in the *Jalloh* case has nuanced this picture substantially. Whereas the Court held that “drugs hidden in the applicant’s body which were obtained by the forcible administration of emetics, could be considered to fall into the category of material having an existence independent of the will of the suspect”, it held that this evidence fell within the ambit of the privilege against self-incrimination.⁴¹³ The Court then sought to distinguish the situation from that of the *Saunders* case. Whereas in the former case, “the administration of emetics was used to retrieve real evidence in defiance of the applicant’s will [...] the bodily material listed in *Saunders* concerned material obtained by coercion for forensic examination with a view to detecting, for example, the presence of alcohol or drugs.”⁴¹⁴ Additionally, the degree of force used in *Jalloh* differed “significantly” from the *Saunders* case. Where the taking of a body or blood sample entails “a minor interference with his physical integrity”, in *Jalloh* the accused was compelled to regurgitate evidence sought through the “forcible introduction of a tube through his nose and the administration of a substance so as to provoke a pathological reaction in his body.”⁴¹⁵ Lastly, in *Jalloh*, evidence was obtained through a procedure which violated article 3 ECHR.⁴¹⁶ Hence, the distinction seems to consist of the level of coercion applied. Doubtless, this distinction further obfuscates the matter.⁴¹⁷ In the aforementioned *Delalić et al.* case, the Trial Chamber did not make any reference to the jurisprudence of the ECtHR. Consequently, by interpreting Article 21 (4) (g) ICTY Statute as a self-standing provision without having reference to the jurisprudence of the international

⁴¹² ECtHR, *Saunders v. The United Kingdom*, Application No. 19187/91, Reports 1996-VI, Judgment of 17 December 1996, par. 69; ECtHR, *Jalloh v. Germany*, Application No. 54810/00, Judgment (Grand Chamber) of 11 July 2006, par. 102, 112; ECtHR, *Heaney and McGuinness v. Ireland*, Application No. 34720/97, Reports 2000-XII, 21 December 2000, par. 40; ECtHR, *O’Halloran and Francis v. The United Kingdom*, Application Nos. 15809/02 and 25624/02, Reports 2007-III, Judgment (Grand Chamber) of 29 June 2007, par. 47. This distinction by the Court has been criticised. On this issue, consider J.D. JACKSON and S.J. SUMMERS, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*, Cambridge, Cambridge University Press, 2012, pp. 251-252.

⁴¹³ ECtHR, *Jalloh v. Germany*, Application No. 54810/00, Judgment (Grand Chamber) of 11 July 2006, par. 102, par. 116.

⁴¹⁴ *Ibid.*, par. 113.

⁴¹⁵ *Ibid.*, par. 114.

⁴¹⁶ *Ibid.*, par. 115.

⁴¹⁷ Critical, consider e.g. J.D. JACKSON and S.J. SUMMERS, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*, Cambridge, Cambridge University Press, 2012, pp. 251-255 (the authors criticize the distinctions made by the Court. They conclude that “[i]t is hard to escape the view that the court wanted to include the authorities’ actions in *Jalloh* within the scope of the privilege because of the extreme degree of force and coercion that was used in obtaining the incriminating material”).

human rights courts, the Trial Chamber's decision widened the scope of the privilege against self-incrimination, surpassing the existing human rights protection.⁴¹⁸

§ *Right to privacy*

The taking and retention of materials from the suspect or accused may also give rise to privacy concerns. The concept of privacy covers the physical and moral integrity of the person.⁴¹⁹ That said, not each instance of interference with the physical or moral integrity will constitute an interference with the right to privacy.⁴²⁰ The ECommHR in *McVeigh, O'Neill and Evans v. UK* held that some identification measures, such as the taking of fingerprints or the taking of photographs, may interfere with the right to privacy under Article 8 ECHR, but the Commission left the question of what measures exactly interfere with the said right open.⁴²¹ The HRC and the ECtHR found that the taking of cellular material to establish a DNA profile constitutes an interference with the right to respect for private life,⁴²² as is the retention of fingerprints. The taking and retention of a voice sample equally constitutes an interference with the right.⁴²³ Likewise, forced blood tests were found to constitute an interference with Article 8 ECHR.⁴²⁴

In addition, it was held by the HRC that, since these measures interfere with the right to bodily integrity, body searches should be carried out in a manner which is consistent with the

⁴¹⁸ For a similar argumentation, see P. MEVIS, Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases*, Vol. III, Antwerpen, Intersentia, 2001 pp. 340-341.

⁴¹⁹ ECtHR, *Costello-Roberts v. The United Kingdom*, Application No. 13134/87, Judgment of 25 March 1993, par. 34; ECtHR, *X and Y v. The Netherlands*, Application No. 8978/80, Series A, No. 91, Judgment of 26 March 1985, par. 22.

⁴²⁰ ECtHR, *Costello-Roberts v. The United Kingdom*, Application No. 13134/87, Series A, No. 247-C, Judgment of 25 March 1993, par. 34.

⁴²¹ ECommHR, *McVeigh, O'Neill and Evans v. The United Kingdom*, Application Nos. 8022/77; 8025/77; 8027/77, 25 DR 15, Report of 18 March 1981, p. 49.

⁴²² The HRC acknowledged the important implications the taking of DNA has for the right to privacy as guaranteed under Article 17 ICCPR in the context of immigration law. See HRC, *Concluding Observations of the Human Rights Committee: Denmark*, U.N. Doc. CCPR/CO/70/DNK, 31 October 2000, par. 15; ECtHR, *Van der Velden v. The Netherlands*, Application No. 29514/05, Decision of 7 December 2006, par. 2; ECtHR, *S. and Marper v. The United Kingdom*, Application Nos. 30562/04 and 30566/04, Judgment (Grand Chamber) of 4 December 2008, par. 70-77 (the latter case deals with the question of the *retention* of a DNA profile and fingerprints).

⁴²³ ECtHR, *P.G. and J.H. v. The United Kingdom*, Application No. 44787/98, Judgment (Grand Chamber) of 25 September 2001, par. 59.

⁴²⁴ ECommHR, *X v. The Netherlands*, Application No. 8239/78, 16 DR 184, Report of 4 December 1978, p. 189.

dignity of the person searched. Persons subjected to a body search should only be examined by a person from the same sex.⁴²⁵

§ *Inhuman and degrading treatment*

It cannot be excluded that examinations of body and mind amount to inhuman or degrading treatment, which is prohibited under international human rights law.⁴²⁶ The leading case of the ECtHR in this regard is *Jalloh*.⁴²⁷ If forcible medical intervention, interfering with a person's physical integrity, is used to retrieve evidence of the crime from the inside of the individual's body, "rigorous scrutiny" of all surrounding circumstances is required. This includes the availability of alternative methods of recovering the evidence, the seriousness of the offence, the risks involved for the health of the suspect, the manner in which the procedure is carried out and the degree of medical supervision available.⁴²⁸ This intervention must attain the minimum level of severity that would bring it within the scope of Article 3 ECHR (torture or inhuman or degrading treatment or punishment). In *Jalloh*, the Court found that the forcible administration of emetics to obtain evidence (drugs) constituted inhuman and degrading treatment or punishment insofar that it attained the minimum level of severity required, and provided (i) that less intrusive methods were available, where (ii) the manner in which the procedure was executed "was liable to arouse in the applicant feelings of fear, anguish, and inferiority that were capable of humiliating and debasing him", (iii) where the procedure involved health risks, and (iv) where the measure resulted in both physical and mental pain.⁴²⁹

II.5.2. The International Criminal Court

At the Rome conference, the possibility to include medical examinations of persons to whom Article 55 (2) ICC Statute applies ('suspects') was advanced.⁴³⁰ According to reports, the debate focused on the question of whether the person's consent would be required for medical

⁴²⁵ HRC, CCPR General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Article 17), U.N. Doc. HRI/GEN/1/Rev.6, 8 April 1988, par. 16.

⁴²⁶ 1984 Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment; 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Council of Europe); Art. 7 ICCPR; Art. 3 ECHR; Art. 5 ACHR; Art. 5 ACHPR.

⁴²⁷ ECtHR, *Jalloh v. Germany*, Application No. 54810/00, Judgment (Grand Chamber) of 11 July 2006.

⁴²⁸ *Ibid.*, par. 71 and 76.

⁴²⁹ *Ibid.*, par. 82–83.

⁴³⁰ H. FRIMAN, Investigation and Prosecution, in R.S. LEE (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, Transnational Publishers, 2001, p. 504.

examinations, as such examinations may interfere with the right to physical integrity. While it could be argued that for medical examinations that serve the purpose of assessing the fitness to stand trial, no consent should be required; delegates disagreed on the question whether a medical examination could be ordered for the purposes of obtaining incriminating evidence.⁴³¹ It was suggested that the intrusiveness of the examination should be taken into consideration (blood or urine samples may not require the consent of the person concerned).⁴³² Nevertheless, there was a broad understanding that the ‘suspect’ should have access to the results of the examination.⁴³³

A provision was included in the RPE concerning the ‘collection of information regarding the state of health of the person concerned’ (Rule 113 ICC RPE). It allows the Pre-Trial Chamber to order, either *proprio motu* or at the request of the Prosecutor or the person concerned, that the person be given a medical, psychological or psychiatric examination.⁴³⁴ The provision gives considerable discretion to the Pre-Trial Chamber but underlines that the Chamber should consider the nature and purpose of the examination and whether the person has consented or not. The expert executing the examination will be chosen from the list of experts or an expert approved by a party, following approval by the Pre-Trial Chamber.⁴³⁵ It follows from the formulation of the provision that this power ensures the administration of justice, and does not solely aim at gathering evidence.

Neither the ICC Statute nor the RPE detail the prosecutorial powers to gather biometric data.⁴³⁶ The OTP will, in cases where the taking of cellular materials is required for identification purposes including the execution of DNA analysis, transmit a request to the competent national authorities. These tests should be executed in compliance with the national laws.⁴³⁷

⁴³¹ *Ibid.*, p. 505.

⁴³² *Ibid.*, p. 505.

⁴³³ *Ibid.*, p. 505.

⁴³⁴ Rule 113 (1) ICC RPE.

⁴³⁵ Rule 113 (2) ICC RPE.

⁴³⁶ A. ALAMUDDIN, Collection of Evidence, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), *Principles of Evidence in International Criminal Justice*, Oxford, Oxford University Press, 2010, p. 291.

⁴³⁷ For example, the government of Uganda requested the OTP for assistance on two occasions in the execution of DNA tests on the body of an alleged suspect. See, ICC, Notification that Government of Uganda has Requested the Office of The Prosecutor to Provide Assistance in Conducting DNA Tests on the Alleged Body of Raska Lukwiya, *Situation in Uganda*, Case No. ICC-02/04-01/05-269, PTC II, 28 August 2006; ICC, Press Release: ICC Unseals Results of Dominic Ongwen DNA Tests, ICC-OTP-20060707-147, 2006.

II.5.3. Other tribunals with international elements

In line with the procedural norms concerning other coercive measures, examinations of the body and mind will normally require judicial intervention at the ECCC and SPSC. The TRCP required a warrant or an order for the execution of physical examinations, including blood tests and the taking of DNA and other bodily specimen.⁴³⁸ Furthermore, the TRCP included limitations as to the persons that can lawfully execute the warrant or order for physical examination and required these persons to have ‘appropriate medical qualifications’.⁴³⁹ The ECCC require judicial intervention for medical, psychiatric, and psychological examinations of the charged person.⁴⁴⁰ This examination by an expert may be ordered by the Co-Investigating Judges *proprio motu* or at the request of a party. It can be ordered to determine the person’s fitness to stand trial or ‘for any other reason’. The provision seems broad enough to include examinations for identification purposes or in order to clarify the factual circumstances of the case in the course of the judicial investigation.⁴⁴¹ The examination can also be organised in the absence of the counsel of the accused.⁴⁴²

III. CONCLUSION

Formal and material requirements

Firstly, the comparative analysis revealed that no general requirement for the Prosecutor to obtain a judicial authorisation for the initiation of non-custodial coercive measures currently exists in either the law or in the practice of the *ad hoc* tribunals, the ICC and the SCSL. However, in cases where the ICC Prosecutor directly executes a coercive measure on the territory of a state (failed state scenario), an authorisation by the Pre-Trial Chamber is required. In contrast, the procedural frameworks of the ECCC and the SPSC require a judicial

⁴³⁸ Section 9.3 (h) TRCP.

⁴³⁹ Section 9.8 (h) and Section 16.5 TRCP.

⁴⁴⁰ Rule 32 ECCC IR. Rule 31 sets out the procedure to be followed by the Co-Investigating Judges in seeking an expert opinion.

⁴⁴¹ The Pre-Trial Chamber interpreted Rule 32 ECCC IR to be sufficiently broad to encompass requests to assess the ability to effectively participate in the proceedings. See, ECCC, Decision on Nuon Chea’s Appeal Regarding Appointment of an Expert, *Prosecutor v. Nuon Chea*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC07), PTC, 22 October 2008, par. 19; ECCC, Decision on Ieng Sary’s Appeal Regarding Appointment of a Psychiatric Expert, *Prosecutor v. Ieng Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 10), PTC, 21 October 2008, par. 26 – 28.

⁴⁴² Rule 31 (6) ECCC IR.

authorisation, normally *ex ante*, for the use of non-custodial coercive measures. Finally, the STL does not make such requirement explicit, with the possible exception of the direct gathering of evidence on the territory of Lebanon. It was explained how in light of the broad and unrestricted coercive powers of the Prosecutor, a requirement to obtain a judicial authorisation from the tribunal or Court follows from the application of international human rights norms. Furthermore, it was argued that this judicial authorisation should be preferable be sought at the international, rather than at the national level. Only in this manner can *lacunae* in the protection of suspects and accused persons be avoided. In addition, the requirement to obtain authorisation by a Judge or Chamber of the international criminal court guarantees judicial intervention for all scenarios of evidence gathering by the Prosecutor, including independent evidence gathering by the Prosecutor in the state concerned. It enables the role of the international Judge as guarantor of individual rights and liberties in the course of the investigation. Finally, it was argued that an *ex ante* judicial authorisation, rather than an *ex post* one, should be preferred, because of its potential to prevent the violation of international human rights norms. In cases of urgency, an *ex post* judicial authorisation should suffice.

Secondly, a principle of proportionality in the broad sense, could be inferred from the practice of the *ad hoc* tribunals and the ICC. It requires that coercive measures are (1) suitable, (2) necessary and (3) their degree and scope are in a reasonable relationship to the envisaged target. This principle is in line with international human rights law. It is also reflected in the procedural frameworks of the ECCC and the SPSC (reasonableness).

Thirdly, no specific threshold for the use of non-custodial coercive measures could be discerned. As far as the internationalised criminal tribunals are concerned, only the SPSC require the existence of ‘reasonable grounds’ before coercive measures can be authorised by the Investigating Judge.

Lastly, it was concluded that the different international criminal tribunals are less strict regarding the admission of evidence gathered through coercive measures that are in violation of individual rights (right to privacy or right to the peaceful enjoyment of property) which are not explicitly covered by the tribunals’ statutory documents. Breaches of individual rights *may* lead to the exclusion of the evidence. Since breaches of the right to privacy do not necessarily influence the reliability of the evidence, it seems that international criminal

tribunals favour admission of the evidence. Rather than automatically excluding such evidence, the international tribunals engage in a balancing test of different interests.

Individual non-custodial coercive measures

In the absence of specific norms in the procedural frameworks of the international(ised) courts and tribunals under review, the Prosecutor's powers to conduct specific non-custodial coercive measures derive from the Prosecutor's general evidence-gathering powers. The law and practice of the different international criminal tribunals establish the prosecutorial power to initiate search and seizure operations. The RPE of the *ad hoc* tribunals and the SCSL expressly provide for the possibility of urgent requests to national authorities for the seizure of physical evidence. Limitations to the places that can be searched were found to follow from the functional immunity to which members of the defence team are entitled as well as from immunities of property. An inventory should be made of all the documents and objects seized.

Unlike the rudimentary regulation of search and seizures in the procedural frameworks of the different international criminal tribunals, the ECCC and the SPSC provide for a detailed set of procedural conditions. These conditions include requirements as to the content of the search warrant (SPSC), the condition that the search warrant is served on the occupant of the premise (SPSC), limitations regarding the time when search and seizure operations can be executed (SPSC, ECCC) or requirements regarding the persons that should be present during search and seizures (SPSC, ECCC). Importantly, the procedural framework of the SPSC requires the existence of 'reasonable grounds to believe that such a search would produce evidence necessary for the investigation or would lead to the arrest of a suspect whose arrest warrant has previously been issued', before a warrant can be issued.

Substantial differences were identified between the international criminal tribunals regarding the possibility to provisionally freeze the accused's assets in the course of the investigation. While the jurisprudence of the ICTY and the SCSL is in agreement on the existence of such power, the SCSL Trial Chamber ruled that a high threshold should be applied and that such seizure or freezing should be limited to property that has been acquired unlawfully or as a result of criminal conduct. The ICC Statute provides that the Pre-Trial Chamber may, either *proprio motu* or at the request of the Prosecutor or of the victims, seek cooperation from states in taking protective measures for the purposes of forfeiture. The Court's case law clarified

that protective measures for the purposes of eventual reparations of victims are included. Furthermore, the ICC has interpreted its procedural framework as allowing for the freezing or seizure of property and assets to support the execution of arrest warrants. The applicable threshold requires that a warrant of arrest or a summons should already have been issued.

While the laws of the different international criminal tribunals do not expressly provide for the power of the Prosecutor to intercept communications (with the exception of the ECCC and the SPSC), the broad prosecutorial powers to gather evidence do include this power.

Lastly, it was shown how the suspect or the accused can be subjected to certain tests or be required to provide certain samples in the course of the investigation. No common ground could be identified between the international criminal tribunals. It was noted that the ICTY gave a broad interpretation to the privilege against self-incrimination, since it held that an accused cannot be compelled to provide materials, including a sample of their handwriting or a DNA sample.

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INTRODUCTION

This chapter and the subsequent chapter both deal with *custodial* coercive measures. Different forms of deprivation or restrictions on the right to liberty of the person are examined in the ensuing analysis. Most prominently featured among these different forms is the arrest of the suspect or accused person. The importance of the arrest of the suspect or accused person should be understood in the light of the general prohibition of *in absentia* trials in international criminal law.¹ Claims to the effect that the arrest “constitutes an obvious key

¹ Article 63 (1) ICC Statute; Article 21 (4) (d) ICTY Statute; Article 20 (4) (d) ICTR Statute and Article 17 (4) (d) SCSL Statute (right of the accused to be tried in his or her presence); Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, par. 101 (“A trial should not commence until the accused is physically present before the International Tribunal. There is a widespread perception that trials in absentia should not be provided for in the statute as this would not be consistent with article 14 of the International Covenant on Civil and Political Rights, which provides that the accused shall be entitled to be tried in his presence”); ICTR, Decision on Interlocutory Appeal, *Zigiranyirazo v. Prosecutor*, Case No. ICTR-2001-73-AR73, A. Ch., 30 October 2006, par. 11-12 (the Appeals Chamber holds that ‘presence’ pursuant to Article 20 (4) (d) requires the physical presence of the accused at trial). The only exception is Article 22 of the STL Statute, which makes allowance for trial proceedings in the absence of the accused. Consider, in general, W. A. SCHABAS, *In Absentia* Proceedings before International Criminal Courts, in G. SLUITER and S. VASILIEV (eds.), *International Criminal Procedure: Towards a Coherent Body of Law*, London, Cameron May, 2009, pp. 335 – 380. Consider also SLUITER, who argues that difficulties in the cooperation by states and other organisations in the effectuation of arrests may in the future lead to the reconsideration of this prohibition. See G. SLUITER, in S. MÜLLER, S. ZOURIDIS, M. FRISHMAN and L. KISTEMAKER (eds.), *The Law of the Future and the Future of the Law*, Torkel Opsahl Academic EPublisher, Oslo, 2011, p. 630 (to be found at: http://www.ficlh.org/fileadmin/ficlh/documents/FICHL_11_Web.pdf, last visited 22 December 2013). It should also be noted that accused persons or suspects may appear voluntarily before the tribunal. For example, according to one commentator, “somewhere around two dozen defendants surrendered voluntarily” to the ICTY. See P.M WALD, *Apprehending War Criminals, Does International Cooperation Work?*, in «American University International Law Review», Vol. 27, 2012, p. 236. It may be argued that the importance of the arrest “goes beyond the prohibition of trials in absentia.” In case such trials are allowed, they carry less authority. See K. DE MEESTER, K. PITCHER, R. RASTAN and G. SLUITER, *Investigation*,

step in conducting prosecutions” should be assessed in light of this basic principle and starting point.² It will emerge that, unlike what was said regarding non-custodial coercive measures, international(ised) criminal tribunals in principle require prior judicial intervention in case the liberty of the person is at stake.

The present chapter focuses on the arrest and the surrender (or transfer) of persons to the jurisdiction of the international criminal tribunals. In turn, the ensuing pre-trial detention and the possible provisional (or interim) release will be the subject of attention of the next chapter. It should be noted that a chronological approach is not always strictly followed. For example, while pre-transfer provisional detention (or the possibility of interim release in the custodial state) should logically be discussed in the next chapter on provisional detention and provisional release, this detention by definition precedes the transfer to the international jurisdiction which is dealt with in the present chapter.

The arrest and detention of a person, by nature, infringe upon the basic right to the liberty and the security of the person, as well as on the presumption of innocence.³ Notably, irregularities in the course of the apprehension of suspects and accused persons, together with the problem of prolonged pre-trial detention are said to leave important stains on the legacy left behind by the *ad hoc* tribunals. Such criticisms mostly stem from deviations of the tribunals’ procedure from international human rights norms. In turn, as will be illustrated, the *ad hoc* tribunals seek to justify these deviations by referring to their unique characteristics and features.

Coercive Measures, Arrest and Surrender, in H. FRIMAN, S. LINTON, G. SLUITER, S. VASILIEV and S. ZAPALLÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 313.

² Y. GAMARRA and A. VICENTE, United Nations Member States’ Obligations Towards the ICTY: Arresting and Transferring Lukic, Gotovina and Zelenovic, in «International Criminal Law Review», Vol. 8, 2008, pp. 632 – 633 (later, in their conclusion, the authors explain that “because without arrest, there can be no trials” (p. 653)); Consider also, e.g. G. F. RUXTON, Present and Future Record of Arresting War Criminals; the View of the Public Prosecutor of ICTY, in W.A.M. VAN DIJK and J.I. HOVENS (eds.), *Arresting War Criminals*, Wolf Legal Productions, Nijmegen, 2001, p. 19; L. ARBOUR, The Crucial Years, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 397 (recalling that at the time, the absence of any arrests had become “a life-threatening issue for the ICTY as it had been conceived”); B. SWART, Arrest and Surrender, in A. CASSESE, P. GAETA and J. R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1640 (reminding that the adjudication of international crimes in the aftermath of WWI largely failed because the surrender of persons could not be secured).

³ Article 9 (1) ICCPR, Article 5 (1) ECHR; Article 7 (1) ACHR, Article 6 ACHPR. Consider also Article 9 UDHR and Principle 2 of the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment. For a detailed discussion of the relation between the presumption of innocence and pre-trial detention, see *infra*, Chapter 8, I.

In general, the apprehension of suspects and accused persons has been a persistent problem facing international criminal courts and tribunals.⁴ Since these institutions lack their own enforcement arm, and therefore rely upon states and international peacekeeping forces for the arrest and detention of suspects and accused persons, difficult questions arise as to the responsibility international criminal tribunals hold for violations that occur in the context of the apprehension (the attribution of pre-transfer violations). Moreover, procedural violations that occur raise questions as to the proper remedies. For example, whether and under what circumstances violations of the rights of the suspect or the accused, during their apprehension, can lead to the declination of the tribunal to exercise jurisdiction ought to be assessed. While international human rights norms require that the person be released if the arrest and detention are unlawful, it will be shown that under international criminal procedural law, this remedy is reserved to exceptional situations and has, as a matter of fact, never been awarded.

Some key concepts describing the apprehension and transfer of suspects and accused to the jurisdiction of the international(ised) criminal jurisdictions need to be defined at the outset of this chapter. Secondly, successively, the arrest pursuant to an arrest warrant, the arrest in emergency situations as well as the alternatives to arrest under international criminal procedural law will be discussed in detail. Attention will be paid to the interplay between the international and the domestic level in the effectuation of arrests. Thirdly, some of the suspect's and the accused person's key rights in relation to the deprivation of liberty will be the subject of our attention. These rights include basic human rights norms such as the right to be informed of the reasons of one's arrest or the right to be promptly brought before a judge or a judicial officer. Fourthly, some irregularities in the execution of the arrest and/or the transfer of persons, based on the practice of the tribunals, will also be discussed. Finally, the issue of remedies for violations of the suspect's or accused's rights in the context of the deprivation of liberty as well as the attribution of responsibility to the international criminal tribunals for pre-transfer violations will be considered.

⁴ Consider, e.g. P.M WALD, *Apprehending War Criminals, Does International Cooperation Work?*, in «American University International Law Review», Vol. 27, 2012, pp. 229 – 258. These problems even led some commentators to suggest a form of a 'citizen's arrest', which would be circumscribed in various ways. Permission and oversight by domestic law enforcement officials would be required, if not their direct participation. See N. WEISBORD and M.A. SMITH, *The Reason Behind the Rules: From Description to Normativity in International Criminal Procedure*, in «North-Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2011, p. 272.

I. DEFINITION

§ Arrest

The different international criminal tribunals do not provide identical definitions for what is considered to be an arrest. The ICTY RPE define ‘arrest’ as “[t]he act of taking a suspect or an accused into custody pursuant to a warrant of arrest or under Rule 40.”⁵ In turn, Rule 2 of the ICTR RPE provides for a slightly different definition which includes both the act of apprehension and of taking the person into custody.⁶ The definition provided for under the SCSL RPE is somewhat shorter and speaks of “[t]he act of apprehending and taking a suspect or an accused into custody”, thereby deleting the normative element of the definition.⁷

The Trial Chamber in the *Mrkšić et al.* case (Dokmanović) considered that in international law, “a restraint upon a person’s free movement is seen as a necessary component of an arrest.”⁸ The Trial Chamber argued, relying on human rights law that ‘arrest’ and ‘detention’ could be defined as the ‘act of depriving a person of his liberty’ and the ‘state of being deprived of liberty’ respectively.⁹ An arrest entails ‘an extreme form of restriction upon freedom of movement.’¹⁰ Consequently, when a law enforcement officer, “by physical restraint, conduct, or words indicates to an individual that he or she is not free to leave”, an arrest has occurred.¹¹ On the basis of this analysis, the Trial Chamber held that Dokmanović

⁵ Originally, Rule 2 ICTY, ICTR and SCSL defined ‘arrest’ as ‘the act of taking a suspect or an accused into custody by a national authority’. The provision was amended on 25 July 1997 during the thirteenth plenary session (IT/32/Rev.11).

⁶ Rule 2 ICTR RPE defines ‘arrest’ as the “act of apprehending and taking a suspect or an accused into custody pursuant to a warrant of arrest or under Rule 40.”

⁷ Rule 2 SCSL RPE.

⁸ ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 28-29. The Trial Chamber came to this conclusion after considering the definitions of ‘arrest’ and ‘detention’ under international human rights law (Article 5 (1) ECHR and Article 9 (1) ICCPR) and under national law (the Chamber only considers common law criminal justice systems). According to the Trial Chamber, national law at the minimum requires “some sort of restriction of liberty by government personnel, or their agents, of an individual.”

⁹ *Ibid.*, par. 28. For example, NOWAK defines arrest within the meaning of Article 9 ICCPR as “the act of depriving personal liberty and [which] generally covers the period up to the point where the person is brought before the competent authority. See M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd edition), Kehl am Rhein, Engel, 2005, p. 221.

¹⁰ ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 28.

¹¹ *Ibid.*, par. 28; D. NSEREKO, Cooperation with the Court on Matters of Arrest and Surrender of Indicted Fugitives: Lessons from the *ad hoc* Tribunals and National Jurisdictions, in J. DORIA, H-P GASSER, and M.C. BASSIOUNI (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Leiden – Boston, Martinus Nijhoff Publishers, 2009, p. 976.

had only been arrested on Croatian territory because he entered the UNTAES vehicle that transported him from the Federal Republic of Yugoslavia to Croatia of his own free will. Therefore, until his arrival at the UNTAES base, his freedom of movement had not been restricted and his liberty had not been deprived.¹²

As far as the internationalised criminal tribunals are concerned, the definition of arrest provided by the procedural framework of the STL differs considerably insofar that it does refer not only to suspects or accused persons, but applies equally to witnesses.¹³ In addition, the definition mistakenly leaves out forms of arrest in the absence of an arrest warrant, which are provided for under the tribunal's procedural framework.¹⁴ No definition of 'arrest' is provided for under the Internal Rules of the ECCC.¹⁵ In turn, the TRCP defined arrest as 'the act of taking a suspect or accused into custody with or without a warrant of arrest from an Investigating Judge or under Section 19A.4' (arrest by the police in the absence of a warrant of arrest).¹⁶ Surprisingly, the SPSC did not discover any problem with 'arresting' a person for crimes within the jurisdiction of the SPSC, when that person had already been arrested and detained (for illicitly crossing of the border).¹⁷ This interpretation, by the Special Panels, should be rejected on the basis of its own definition of 'arrest'. It refers to an act of 'taking a suspect or accused into custody'. In turn, custody refers to the "state of being held by the police". Consequently, when a person is already detained, the person cannot be taken into custody, in the sense in which it was meant by the TRCP.

¹² ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 30-31.

¹³ Article 2 STL RPE: "[t]he act of taking a suspect, accused or witness into custody pursuant to a warrant of arrest." Consider in this regard Rule 79 STL RPE which refers to the 'person', which may apparently include suspects, accused persons or witnesses.

¹⁴ Which is provided for under Rules 62, 63 STL RPE. See *infra*, Chapter 7, III.3.

¹⁵ In turn, the ECCC IR define and distinguish between an 'arrest warrant' (*mandat d'amener*) and an 'arrest and detention order' (*mandat d'arrêter*). Whereas the former refers to an order directed to the judicial police to arrest a person and bring that person before the Co-Investigating Judges or the Chambers, the latter refers to the order to the judicial police 'to search for, arrest and bring any person to the ECCC detention facility; and to the head of the ECCC detention facility to receive and detain that person pending an appearance before the Co-Investigating Judges or a Chamber'. See the Glossary annexed to the IR.

¹⁶ Section 1 (c) TRCP.

¹⁷ SPSC, Decision on the Application for Initial Detention of the Accused Aprecio Mali Dao, *Prosecutor v. Aprecio Mali Dao*, Case No. 18/2003, SPSC, 29 April 2004, par. 43 ("the court does not find any problem of arresting for a murder someone already arrested for crossing the border once it comes out during the investigation that the person arrested is also accused of other crimes. Once the information is confirmed the police investigator can arrest him for the new crime").

For the purposes of this chapter, the arrest refers to the act of the deprivation of liberty, whether this occurs with or without an arrest warrant. The period of arrest ends (and the period of pre-trial detention begins) when the person is brought before the competent judicial authority.¹⁸

With regard to the terms ‘transfer’ and ‘surrender’, it should be noted that both terms are referred to interchangeably in the Statutes of the *ad hoc* tribunals.¹⁹ No definition is provided for either of these terms. It is not clear what the distinction between these two terms entails.²⁰ However, according to SCHARF, ‘surrender’ refers to the situation when a person is already detained pursuant to action undertaken by national authorities under national law.²¹ In contrast, ‘transfer’ refers to the situation in which the person is taken into custody pursuant to an order of a tribunal and is therefore in the constructive custody of the tribunal at the time of arrest.²² No specific legal consequences are connected to these terms. Since the term ‘transfer’ is mostly used by the statutory framework of the *ad hoc* tribunals, that is the term that will be used here.

The ICC Statute uses the term ‘surrender’ to denote ‘the delivering up of a person by a State to the Court pursuant to the Statute’. The Statute distinguishes ‘surrender’ from ‘extradition’, which refers to the ‘delivering up of a person by one state to another as provided by treaty, convention or national legislation’.²³ It has been underlined that ‘surrender’ is concerned with

¹⁸ See *infra*, Chapter 8.

¹⁹ See Articles 19 (2) and 29 (2) (e) ICTY Statute and 18 (2) and 28 (2) (e) ICTR Statute. The use of these terms instead of ‘extradition’, “reflects important conceptual and operative differences between transfer or surrender under the Statute and traditional extradition.” See K.S. GALLANT, Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition, in «Criminal Law Forum», Vol. 5, 1994, p. 560.

²⁰ Confirming, consider B. SWART, Arrest and Surrender, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court, Oxford, Oxford University Press, 2002, p. 1666 (noting that “the Rules of Procedure and Evidence show a marked preference for the term ‘transfer’” and that “no particular consequences seem to attach to the distinction” (surrender is only referred to in Rules 58 and 60 ICTY RPE)).

²¹ See V. MORRIS and M.P. SCHARF, An Insider Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis (Vol. I), Ardsley, Transnational Publishers, 1995, p. 207.

²² On the meaning of ‘constructive custody’, see *infra*, Chapter 7, VIII.

²³ Article 102 ICC Statute, which was adopted as a ‘use of terms’ provision, following intense debates at the negotiations on the ICC Statute. B. SWART notes that “[i]t is one of the merits of the Statute that it has largely succeeded in creating a special regime with regard to the delivery of persons accused or convicted of crimes under general international law without which the Court would not be able to fulfil the expectations of the community. It is only proper that the Statute has underlined this fundamental choice by designating the process of delivering by the word ‘surrender’ instead of ‘extradition’.” See B. SWART, Arrest and Surrender, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court, Oxford, Oxford University Press, 2002, p. 1678. In a similar vein, consider KRESS and PROST, who note that

the delivering of a person, *aiming at* the prosecution of that person or the enforcement of a sentence.²⁴ The term surrender has been chosen because it refers to the process of the handing over of persons to treaty-based bodies, rather than the handing over of persons to other states.²⁵

In the following sections, a distinction will be drawn between two scenarios. Normally, the arrest and surrender of the suspect or accused person follows the issuance of an arrest warrant by a Judge or a (Pre-)Trial Chamber and, thus, requires judicial intervention. Exceptionally, however, a suspect can be arrested on a provisional basis. These two scenarios will be discussed separately.

II. ARREST UPON JUDICIAL AUTHORISATION

II.1. Preconditions for the issuance of the arrest warrant

At the *ad hoc* tribunals and the SCSL, an arrest warrant can be ordered by the Judge who has confirmed the indictment, at the request of the Prosecutor.²⁶ Furthermore, the power of the

“[the] clear distinction at the *terminological* level should, as was the underlying thinking, at the same time contribute to a growing awareness on the national level for the *substantial* differences between horizontal and vertical cooperation.” See C. KRESS and K. PROST, Article 102, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1646. On the negotiation history on the use of the term ‘surrender’, consider P. MOCHOCHOKO, Chapter Nine: International Cooperation and Judicial Assistance, in S. LEE (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, The Hague, Kluwer Law International, 1999, pp. 309 – 310. Consider in general MÉGRET, who argues that the fact that the ict’s speak of the transfer or surrender, rather than the extradition of individuals evidences the verticality of these institutions, which is characteristic of their identity. See F. MÉGRET, *In Search of the ‘Vertical’: Towards an Institutional Theory of International Criminal Justice’s Core*, in C. STAHN and L. VAN DEN HERIK (eds.), *Future Perspectives on International Criminal Justice*, Cambridge, Cambridge University Press, 2010, p. 183.

²⁴ Indeed, a distinct procedural regime applies to the transfer of detained witnesses (Article 93 (7) ICC Statute). See G. SLUITER, *Surrender of War Criminals to the ICC*, in «The Loyola of Los Angeles International and Comparative Law Review», Vol. 25, 2003, p. 607, fn. 5.

²⁵ M. OOSTERVELD, M. PERRY and J. MCMANUS, *The Cooperation of States with the International Criminal Court*, in «Fordham International Law Journal», Vol. 25, 2001 – 2002, p. 771. As recalled by MAOGOTO, the intent was “to free ‘surrender’ from a host of conditions, restrictions, and requirements which, developed in other epochs and designed for different purposes, are inappropriate in the context of the ICC.” “[T]o strengthen ‘surrender’ and render it more efficient, the number and scope of grounds for refusal by the requested state had to be significantly restricted.” See J. NYAMUYA MAOGOTO, *A Giant Without Limbs: The International Criminal Court’s State-Centric Cooperation Regime*, in «The University of Queensland Law Journal», Vol. 23, 2004, p. 120.

²⁶ Article 19 (2) ICTY Statute, Article 18 (2) ICTR Statute. No reference to arrest is made by the SCSL Statute, leaving the issue to be regulated by the RPE; Consider also Rule 47 (H) (i) ICTY, ICTR and SCSL RPE. Consider S. LAMB, *The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia*, in «The British Yearbook of International Law», Vol. 70, 2000, pp. 170 – 171 (arguing that the Article 19 (2) ICTY Statute “appears to be an extremely open-textured authorization for a judge to issue any such orders requested by

Judge or a Trial Chamber to issue an order for the arrest and transfer of accused persons follows from the general provision of Rule 54 ICTY, ICTR, and SCSL RPE. Both judicial supervision as well as the existence of a *prima facie* case (threshold) against the accused are required for the issuance of the arrest warrant. Remarkably, the existence of a legitimate purpose is not a precondition for the issuance of an arrest warrant (nor is it a precondition for pre-trial detention).²⁷ The ICTY's RPE also require that the arrest warrant be signed by a *permanent* Judge and be accompanied by an order for the *prompt* transfer of the accused to the tribunal upon arrest.²⁸

While the absence of a legitimate ground upon which the arrest is based is not problematic *in itself*, the case law of the ECtHR requires the existence of a “genuine requirement of public interest” for further pre-trial detention which, notwithstanding the presumption of innocence, outweighs the person's right to personal liberty.²⁹ This requirement of necessity will be considered further in Chapter 8.

The procedural regime of the ICC differs in some respects. The arrest warrant is issued by the Pre-Trial Chamber and does normally precede the confirmation of the charges.³⁰ In line with the *ad hoc* tribunals and the SCSL, judicial intervention is likewise required.³¹ A threshold is equally provided for and the Pre-Trial Judge should be satisfied that there exist ‘reasonable

the Prosecutor which a judge deems necessary [...] [t]he language of Article 19 does not suggest any limits upon the Tribunal's ability to issue arrest warrants”).

²⁷ SAFFERLING sought to explain the absence of the requirement of a legitimate purpose at the *ad hoc* tribunals by arguing that detention is always imperative in international criminal proceedings. See C.J.M. SAFFERLING, *Towards an International Criminal Procedure*, Oxford, Oxford University Press, 2001, p. 144.

²⁸ Rule 55 (A) ICTY RPE as amended at the Fourteenth plenary session on 20 October and 12 November 1997, IT/32/Rev. 12.

²⁹ Consider *e.g.* ECtHR, *Smirnova v. Russia*, Application Nos. 46133/99, 48183/99, Reports 2003-IX, Judgment of 24 July 2003, par. 60; ECtHR, *W. v. Switzerland*, Application No. 14379/88, Series A, No. 254-A, Judgment of 26 January 1993, par. 30; ECtHR, *Tomasi v. France*, Application No. 12850/87, Series A, No. 241-A, Judgment of 27 August 1992, par. 84. See the discussion *infra*, Chapter 8, I. While Article 5 (1) (c) ECHR refers to deprivation of liberty on reasonable suspicion of (i) having committed an offence, (ii) where it is considered necessary to prevent his committing an offence or (iii) fleeing after having so, this provision should not be understood as requiring a ‘double justification’ of ‘reasonable suspicion’ as well as a legitimate ground upon which the deprivation of liberty is based. Consider S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, p. 425.

³⁰ However, while it would normally be the case, a warrant of arrest is not necessarily issued *before* the confirmation of charges, as is sometimes suggested. Compare *e.g.* J.D. MICHELS, *Compensating Acquitted Defendants before International Criminal Courts*, in «Journal of International Criminal Justice», Vol. 8, 2010, p. 410 (“At the ICC, the arrest warrant is issued first [...] After the suspect has been surrendered to the ICC, the Pre-Trial Chamber holds a confirmation hearing”).

³¹ Article 58 (1) ICC Statute. Where the requirements for the issuance of an arrest warrant are fulfilled, an arrest warrant ‘shall’ be issued (*chapeau* of Article 58 (1) ICC Statute). Consequently, no discretion is left with the Pre-Trial Chamber.

grounds to believe' that the person has committed a crime within the Court's jurisdiction.³² Lastly, detention should be necessary on the basis of one of the alternative grounds justifying detention. The ICC Statute provides for three distinct purposes on which basis an arrest warrant can be ordered, to know that the arrest appears necessary (1) to ensure the person's appearance at trial, (2) to ensure that the person does not obstruct or endanger the investigation or court proceedings or (3) or to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out the same circumstances.³³ It follows from the wording of Article 58 (1) (b) ICC Statute that detention must 'appear' to be necessary to one of the reasons under Article 58 (1) (b) ICC Statute. The question revolves around the *possibility*, not the inevitability, of a future occurrence.³⁴ Consequently, the necessity of the arrest (as well as of the continued detention) for one of the reasons provided in Article 58 (1) (b) (i)-(iii) should not be based on one factor in isolation but may be established on the basis of all relevant factors taken together.³⁵ The legitimate grounds are in the *alternative*.³⁶

³² Article 58 (1) (a) ICC Statute.

³³ Article 58 (1) (b) (i) – (iii) ICC Statute. Some decisions on applications for an arrest warrant are limited to a determination that there are 'reasonable grounds to believe' and that detention is necessary, in the absence of any further discussion of the legitimate grounds. Consider *e.g.* ICC, Decision on Prosecutor's Application for Warrants of Arrest under Article 58, *Situation in Uganda*, Situation No. ICC-02/04, PTC II, 8 July 2005, p. 3. Note that the material conditions for detention will be discussed in Chapter 8.

³⁴ See ICC, In the Appeal by Mathieu Ngujolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, *Prosecutor v. Katanga and Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-572 (OA 4), A. Ch., 9 June 2008, par. 21; ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled "Decision on Application for Interim Release", *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-323 (OA), A. Ch., 16 December 2008, par. 53, 67; ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the African Republic*, Case No. ICC-01/05-01/08-80-Anx, PTC III, 20 August 2008 (annexed to ICC, Decision Concerning the Public Version of the "Decision on Application for Interim Release" of 20 August 2008, *Prosecutor v. Bemba, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-80, PTC II, 26 August 2008), par. 53; ICC, In the Appeal by Mathieu Ngujolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, *Prosecutor v. Katanga and Chui, Situation in the DRC*, A. Ch., Case No. ICC-01/04-01/07-572 OA 4, 9 June 2008, par. 21; ICC Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08, PTC II, 14 August 2009, par. 40.

³⁵ See *e.g.* ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled "Decision on Application for Interim Release", *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-323 (OA), A. Ch., 16 December 2008, par. 55.

³⁶ ICC, Judgment on the Appeal of Mr. Lubanga Dyilo Against the Decision of Pre-Trial Chamber I Entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. 01/04-01/06-824, A. Ch., 13 February 2007, par. 139; ICC, In the Appeal by Mathieu Ngujolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, *Prosecutor v. Katanga and Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-572 (OA 4), A. Ch., 9 June 2008, par. 20.

The question arises whether the admissibility of the case is a prerequisite for the issuance of a warrant of arrest. Hence, should an admissibility check be performed when the Pre-Trial Chamber considers an application for a warrant of arrest? Whereas earlier case law considered an ‘initial determination’ necessary to whether a case is admissible to be a precondition for the issuance of an arrest warrant³⁷, the Appeals Chamber clarified that the application of Article 17 (1) ICC Statute is not a *prerequisite* to the issuance of a warrant of arrest.³⁸ First, the Appeals Chamber held that Article 58 ICC Statute exhaustively lists all the preconditions for the issuance of an arrest warrant.³⁹ Moreover, the Article does not require that the Prosecutor provide any information or evidence on admissibility.⁴⁰ Nevertheless, it follows from Article 19 (1) ICC Statute that the Court *may* determine admissibility at its own motion. In deciding whether to exercise this discretion, the Court should give sufficient consideration to the suspect’s interests and should consider whether exercising this discretion is appropriate in the circumstances of the case.⁴¹ Since proceedings are *ex parte*, such insufficiently protects the rights of the suspect, even where the Pre-Trial Chamber held that this determination would be without prejudice to any later determination, because “a degree of predetermination is inevitable” if the suspect later appears before the same Chamber.⁴² The rights of other participants should also be borne in mind by the Pre-Trial Chamber in exercising this discretion.⁴³ Later jurisprudence confirms a cautionary approach towards the determination of the admissibility of a case during Article 58 proceedings.⁴⁴

³⁷ ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 18.

³⁸ ICC, Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I Entitled: “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, *Situation in the DRC*, Situation No. ICC-01/04-169, A. Ch., 13 July 2006, par. 38 – 53.

³⁹ *Ibid.*, par. 42. The Appeals Chamber noted that where the two prerequisites of Article 58 ICC Statute are fulfilled, the opening sentence of the said article provides that the Pre-Trial *shall* issue an arrest warrant.

⁴⁰ *Cf.* Article 58 (2) ICC Statute.

⁴¹ ICC, Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I Entitled: “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, *Situation in the Democratic Republic of the Congo*, Situation No. ICC-01/04-169, A. Ch., 13 July 2006, par. 52. According to the Appeals Chamber, such factors may include instances where a case is based on the established jurisprudence of the Court, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of a *proprio motu* review.

⁴² *Ibid.*, par. 50. The Appeals Chamber added that where decisions on the admissibility are appealable, the situation could even be worse in case the suspect would be confronted with a determination by the Appeals Chamber that the case is admissible.

⁴³ *Ibid.*, par. 52.

⁴⁴ Consider *e.g.* ICC, Decision on the Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADAFFI, Saif Al-Islam GADAFFI and Abdullah AL-SENSUSSI, *Situation in the Libyan Arab Jamahiriya*, Situation No. ICC-01-11, 27 June 2011, par. 12 (“In light of the information provided by the Prosecutor in his Application, the Chamber decides, at this stage, not to exercise its discretion to determine, on its own motion, the admissibility of the case against Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi as (i) the proceedings triggered by the Prosecutor’s application for warrants of arrest

As far as the internationalised criminal tribunals are concerned, the TRCP provided that a suspect could be arrested upon the issuance of an arrest warrant by the Investigating Judge upon request by the Public Prosecutor.⁴⁵ An arrest warrant was issued if there were ‘reasonable grounds to believe’ that the person had committed a crime.⁴⁶ No legitimate purpose was required. Once the indictment had been presented to the Court, the authority to order the arrest and the (continued) detention of the accused shifted to the Court.⁴⁷ In the *Júlio*

are conducted on an *ex parte* basis; and (ii) there is no ostensible cause or self-evident factor which impels the Chamber to exercise its discretion pursuant to article 19(1) of the Statute”); ICC, Public Redacted Version of “Decision on the Prosecutor’s Application under Article 58 Relating to Abdel Raheem Muhammad Hussein, *Prosecutor v. Abdel Raheem Muhammad Hussein, Situation in Darfur, Sudan*, Case No. ICC-02/05-01-12-1, PTC I, 1 March 2012, par. 10 (“The Chamber will not, at this stage, exercise its discretionary proprio motu power to determine the admissibility of the case against Mr Hussein as there is no ostensible cause or self-evident factor which impels the Chamber to exercise its discretion pursuant to article 19(1) of the Statute”); ICC, Decision on the Prosecutor’s Application under Article 58, *Prosecutor v. Mudacumura, Situation in the DRC*, Case No. ICC-01/04-01/12-1, PTC II, 13 July 2012, par. 18 (“The Chamber does not consider it necessary to examine the admissibility of the case at this stage of the proceedings”).

⁴⁵ Section 9.3 (a) and Section 19A.1 TRCP. Subsequently, the warrant or order for arrest of a suspect may be executed by a law enforcement official anywhere in East Timor (Section 9.8 (a)). No adversarial hearing should be organised on a request for the issuance of an arrest warrant. Consider in that regard the argumentation by the Deputy General Prosecutor (DGP), who argued that such hearing would allow “the media and the audience throughout the world” to evaluate the charges and to contribute to the establishment of a historical record, and referred to its ‘rule of law’ function: “[b]y following the rule of law, they have demonstrated that even the most serious criminal cases can be adjudicated in a manner that is fair and just.” Where the Prosecution asserted that what is not prohibited is allowed, the Investigating Judge responded that “[t]his proposition runs contrary to the very nature of the Rules themselves.” “The Rules constitute a form of positive legislation supplying a concrete legal foundation for the manner in which criminal cases shall be processed. Their purpose is to ensure that procedures are clearly stated in order to ensure both the integrity of the court’s proceedings as well as the rights of those subject to the Court’s authority.” Consider SPSC, Decision on the Motion of the Deputy General Prosecutor for a Hearing on the Application for an Arrest Warrant in the Case of Wiranto, *Prosecutor v. Wiranto et al.*, Case No. 05/2003, SPSC, 18 February 2004, pp. 6 – 9, 16. A detailed analysis of the arguments offered by the DGP and the reasoning of the Investigating Judge can be found in A. DE HOOG, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: Timor Leste – The Special Panels for Serious Crimes 2001 – 2003, Vol. XIII, 2008, pp. 86 – 87.

⁴⁶ Sections 9.2 and 19A.1 TRCP.

⁴⁷ According to Section 24.3 of TRCP, these powers of the Investigating Judge terminated at that moment. Whereas it followed from Section 29.5 (*juncto* Section 20.6) of the TRCP that at the preliminary hearing, a panel of Judges or an individual Judge could decide on the detention of the accused, it was not made explicit in the Rules what judicial organ was responsible for ordering detention following the indictment but *prior* to the preliminary hearing. The SPSC held in the *Sisto Barros* case that “when the powers of the Investigating Judge with respect to the detention or continued detention of a suspect terminate pursuant to TRCP Sec 24.3 by reason of the suspect’s indictment, those powers vest in the individual judge or the panel of judges to whom the indictment has been forwarded pursuant to TRCP Sec. 26.2 [Section 26.1 was meant]. This is so whether the defendant remains at liberty or is in detention at the time of the indictment.” The Court further reasoned that there are numerous instances where the TRCP refer to the authority of the individual Judge or a panel of Judges in matters relating to the detention status of the defendant. Furthermore, and looking at the drafters intentions, it is argued that it is hardly likely that an individual Judge or a panel of Judges were given the authority to decide on the detention of the defendant at all stages, except where the defendant is not already in custody at the moment of the indictment. See SPSC, Decision on Prosecutor’s Request for Pre-Trial Detention, *Prosecutor v. Sisto Barros et al.*, Case No. 01/2004, SPSC, 17 March 2004, par. 36 – 42. Consider also: SPSC, Decision on the Motion of the Deputy General Prosecutor for a Hearing on the Application for an Arrest Warrant in the Case of Wiranto, *Prosecutor v. Wiranto et al.*, Case No. 05/2003, SPSC, 18 February 2004, p. 5; SPSC, The request for the release of the Accused Benjamin Sarmento, Romerio Tilman and Joao Sarmento, *Prosecutor v. Sarmento et al.*, Case No. 18/2001, SPSC, 22 March 2002, par. 27.

Fernandes et al. case, arrest warrants were issued against persons that were already in custody. The Court of Appeals considered this to be improper insofar that Section 19 TRCP (issuance of arrest warrants) “relates to the initial arrest of a suspect and his detention or release during the course of investigations”.⁴⁸ Not only were the arrest warrants issued by the SPSC rather than by the Investigating Judge in the course of the investigation, but the Court of Appeals held that “it would not make sense to issue warrants of arrest against accused that were already in pre-trial detention which had been ordered based in their files [*sic*].”⁴⁹ They can only apply in relation to a person that is already in custody for another offence which is being investigated.⁵⁰

Article 18 (2) STL Statute and Rule 88 (A) STL RPE encompass the general power of the Pre-Trial Judge to issue orders for the arrest or transfer of persons at the Prosecutor’s request.⁵¹ It follows from Article 68 (J) and Rule 79 STL RPE that the confirmation of the indictment is a prerequisite for the issuance of a warrant of arrest. Consequently, the issuance of an arrest warrant by the Pre-Trial Chamber requires the existence of a *prima facie* case against the suspect.⁵² Further, the RPE provide for three distinct, alternative grounds justifying arrest. Pursuant to Rule 79 (A) STL RPE, the Pre-Trial Judge may issue an arrest warrant (1) to ensure the appearance of a person ‘as appropriate’⁵³; (2) to prevent the

⁴⁸ SPSC, Judgement of the Court of Appeal of East Timor, *Prosecutor v. Júlio Fernandes et al.*, Case of Appeal No. 2000/1, COA, 14 February 2001, Judgment of Frederick Egonda-Ntende, JA, pp. 6 – 7.

⁴⁹ *Ibid.*, p. 11.

⁵⁰ *Ibid.*, p. 7.

⁵¹ While peculiar to the STL, it should be noted that where, pursuant to Article 4 of the STL Statute, the STL has primacy over Lebanese prosecutions within its jurisdiction, and the competent judicial authorities should, upon request, defer competence over the investigation of the attack against Hariri and others, this implies that persons detained in connection with this investigation will also be transferred to the custody of the Tribunal (Article 4 (2) and 4 (3) (b) STL Statute). Pursuant to Rule 17 (A) (iii) STL RPE, the Lebanese judicial authorities seized with the Hariri investigation should submit to the Pre-Trial Judge, upon his or her request (which follows the request by the Prosecutor), among others, a list of persons detained in relation with this investigation. After this list has been communicated, the Prosecutor will make a reasoned submission regarding each of the people on the list whether they should be released or detained. In the former case, the Prosecutor should indicate whether conditions should be imposed (Rule 17 (B) STL RPE). In case the Prosecutor does not oppose release, the Pre-Trial Judge will decide whether to request the Lebanese authorities to release the person (with immediate effect) within a reasonable time. For every person whose release the Prosecutor opposes, a *public hearing* should be organised, which may include videoconferencing for the person and his counsel, if appropriate, and the Pre-Trial Judge will decide on the transfer into custody of the person (Rule 17 (B) (ii) STL RPE). These decisions may be appealed under Rule 17 (H) STL RPE. Besides, pursuant to Rule 17 (G) STL RPE the Pre-Trial Judge may, at the request of the Prosecutor, decide that persons detained by the national courts of Lebanon in relation to other investigations or criminal proceedings of which the Prosecutor requested the deferral, shall be transferred to the custody of the Tribunal.

⁵² Rule 68 (F) STL RPE.

⁵³ As amended on 10 November 2010, it previously read ‘at trial’. The amendment was adopted “to allow the flexibility, subject to approval by the Pre-Trial Judge, to issue warrants of arrest to ensure the appearance of persons before the Tribunal in any stage of the proceedings.” See STL, Summary of the Accepted Rule

obstruction or endangerment of the investigation or prosecution by the person, including through interference with witnesses or victims or (3) to prevent criminal conduct of a kind of which he stands accused.⁵⁴

In the course of their judicial investigation, the Co-Investigating Judges may issue an arrest warrant against a suspect, a charged person or an accused person.⁵⁵ In turn, an arrest and detention order may be ordered by the Co-Investigating Judges or the Trial Chamber against a charged person or an accused person who flees or resides in an unknown place, after hearing the Co-Prosecutors.⁵⁶ No other requirements are provided for the issuance of an arrest warrant. The only threshold follows from the status of the person concerned. The person should at least qualify as being a suspect. Consequently, the Co-Investigating Judges should “consider [such person] may have committed a crime within the jurisdiction of the ECCC.”⁵⁷ However, given the subjective nature of this definition, it does not establish a useful threshold. Nevertheless, in understanding this lower threshold, it should be reiterated that ‘arrest warrant’, as it is used in the Internal Rules, refers to ‘an order directed to the judicial police to arrest a person and bring that person before the Co-Investigating Judges’. It may better be translated as an ‘order to bring’ (*mandat d’amener* in the French version of the Internal Rules). In turn, for an arrest and detention order (which might be better translated as ‘arrest warrant’, in conformity with the French term (*mandat d’arrêter*)), the person should at least have the status of a charged person. Therefore, this person should be named in an introductory or supplementary submission or have been charged by the Co-Investigating Judges when they considered there to be ‘clear and consistent evidence indicating that this person may be criminally responsible for the commission of a crime referred to in an introductory submission or a supplementary submission’.⁵⁸ Furthermore, due regard should be paid to the peculiarities of the procedural framework of the Extraordinary Chambers which, rather than providing for automatic detention upon arrest, stipulates that provisional detention can only be ordered following an adversarial hearing when (i) there is well-founded reason to believe that the person may have committed the crime or crimes specified in the introductory

Amendments and some Key Rejected Rule Amendment Proposals Pursuant to Rule 5 (I) of the Special Tribunal for Lebanon’s Rules of Procedure and Evidence (Third Plenary of Judges), November 2010, pp. 40 – 41.

⁵⁴ Rule 79 (A) STL RPE.

⁵⁵ Rule 42 and 55 (5) (d) ECCC IR.

⁵⁶ Rule 44 ECCC IR. For the difference between an arrest warrant and an arrest and detention order, see *supra*, fn. 15.

⁵⁷ See the glossary annexed to the Internal Rules.

⁵⁸ Rule 55 (4) ECCC IR.

or supplementary submission and (ii) when provisional detention is required for one of the legitimate grounds provided for under Rule 63 (3) (b) ECCC IR.⁵⁹ A person who has been arrested should be brought before the Co-Investigating Judges or as soon as possible after their provisional detention.⁶⁰

II.2. Applicable standard of proof

The *ad hoc* tribunals, the Special Court, and the ICC all provide for a different threshold for the issuance of an arrest warrant. To what extent the standard provided for by the *ad hoc* tribunals is similar to the standard provided by the ICC remains unclear.⁶¹ The *ad hoc* tribunals and the SCSL (as well as the STL) require that the charges be confirmed as a prerequisite for the issuance of the arrest warrant. Consequently, an arrest warrant can only be issued against an accused person. At the *ad hoc* tribunals and the STL, the standard of proof for the confirmation of charges is the existence of a *prima facie* case.⁶² This standard entails that there is ‘a credible case which would, if not contradicted by the defence, be a sufficient basis to convict the accused of that charge’.⁶³ The procedural framework of the Special Court

⁵⁹ Rule 63 (3) ECCC IR. See in detail, *infra*, Chapter 8, II.4.1.

⁶⁰ Rule 45 (5) ECCC IR.

⁶¹ Consider O. FOURMY, Powers of the Pre-Trial Chambers, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, pp. 1219 - 1220 (arguing that “[i]t is unclear whether the criterion of ‘reasonable grounds’ in the ICC Statute should be understood as requiring a lesser degree of conviction than the criterion of ‘*prima facie* case.’” He notes the similarity in formulation between Article 58 (1) (a) ICC Statute and Rule 47 (B) ICTY RPE. However, the latter provision refers to the act of the forwarding of the indictment by the Prosecutor to the Registrar for confirmation by the Judge, the step immediately preceding the confirmation of the indictment. At least one author has noted that the two thresholds do not substantially differ. Consider G. SLUITER, Arrest and Surrender, in A. CASSESE, *The Oxford Companion to International Criminal Justice*, Oxford, Oxford University Press, 2009, pp. 250 – 251.

⁶² Article 19 (1) ICTY Statute *juncto* Rule 47 (E) ICTY RPE; Article 18 (1) ICTR Statute *juncto* Rule 47 (E) ICTR RPE.

⁶³ Consider *e.g.* ICTY, Decision on the Review of the Indictment, *Prosecutor v. Kordić et al.*, Case No. IT-95-14-I, T. Ch., 10 November 1995, p. 3; ICTY, Decision on Review of Indictment and Application for Consequential Orders, *Prosecutor v. Milošević*, Case No. IT-99-37-I, Confirming Judge, 24 May 1999, par. 4; ICTY, Decision on Review of Indictment and Order for Non-Disclosure, *Prosecutor v. Čermak and Markač*, Case No. IT-03-73-I, Judge, 24 February 2004, p. 2; ICTY, Decision on Review of Indictment, *Prosecutor v. Tabaković*, Case No. IT -98-32/1-R77.1, Confirming Judge, 17 November 2009, p. 2; ICTR, Decision on the Review of the Indictment, *Prosecutor v. Kayishema et al.*, Case No. ICTR-95-1-T, Confirming Judge, 28 November 1995. However, it should be noted, that no uniform definition was adopted as to what constitutes a ‘*prima facie* case’. For example, Judge Hunt noted in the *Milošević* case that there had been considerable investigation in the definition of a ‘*prima facie* case’ and defined it as “whether there is evidence (if accepted) upon which a reasonable trier of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question.” However, as rightly underlined by Judge May, such is the test applied at the Rule 98*bis* stage: see ICTY, Decision on Application to Amend Indictment and on Confirmation of Amended Indictment, *Prosecutor v. Milošević*, Case No. IT-99-37-I, Confirming Judge, 29 June 2001, par. 3 and ICTY, Decision on Review of Indictment, *Prosecutor v. Milošević*, Case No. IT-01-51-I, Confirming Judge, 22

does not require the judicial finding of a *prima facie* case for the confirmation of charges. All that is required is (1) that the Judge be satisfied that the crime(s) laid down in the indictment are within the Court's jurisdiction and (2) that the allegations in the case summary, if proven, amount to the crimes particularised in the indictment.⁶⁴ This threshold is considerably weaker than a *prima facie* standard. It falls short of the 'reasonable suspicion' threshold as provided for in Article 5 (3) ECHR.⁶⁵ It should, therefore, be rejected.

The threshold required for the issuance of a warrant of arrest by the ICC's Pre-Trial Chamber ('reasonable grounds to believe') (*cf.* SPSC) must be distinguished from the threshold required for the confirmation of charges ('substantial grounds to believe') and the threshold for conviction ('beyond reasonable doubt').⁶⁶ The Statute prescribes progressively higher thresholds which must be met at different stages during the ensuing proceedings.⁶⁷ In the Court's jurisprudence, the threshold of 'reasonable grounds to believe' has been equated with the 'reasonable suspicion' standard, which can be traced back to Article 5 (1) (c) ECHR.⁶⁸ This threshold has been interpreted by the ECtHR as requiring the "existence of facts or information which would satisfy an objective observer that the person concerned *may* have committed the offence."⁶⁹ What may be regarded as 'reasonable' will depend upon all circumstances.⁷⁰ According to the ECtHR, facts which raise a suspicion do not require

November 2001, par. 13 – 14. Subsequently, Judge Orić, in the *Mladić* case, adopted a slightly different interpretation, based on a comparative overview of the screening mechanisms in municipal criminal justice systems, and held that a *prima facie* case requires that "the Prosecution evidence, if accepted and uncontradicted, sufficiently supports the likelihood of the accused's being convicted by a reasonable trier of fact." See ICTY, Order Granting Leave to File an Amended Indictment and Confirming the Amended Indictment, *Prosecutor v. Mladić*, Case N. IT-95-5/18-I, Confirming Judge, 8 November 2002, par. 12.

⁶⁴ Rule 47 (E) SCSL RPE.

⁶⁵ See the discussion of this 'reasonable suspicion' standard in the following paragraph.

⁶⁶ Article 61 (7) ICC Statute and Article 66 (3) ICC Statute respectively.

⁶⁷ ICC, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Prosecutor v. Al Bashir, Situation in Darfur, Sudan*, Case No. ICC 02/05-01/09-3, PTC I, 4 March 2009, Separate and Partly Dissenting Opinion of Judge Ušacka, par. 10.

⁶⁸ ICC, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 12 (annexed to ICC, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the case against Mr. Thomas Lubanga Dyilo, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-8, PTC I, 24 February 2006).

⁶⁹ ECtHR, *Fox, Campbell and Hartley v. United Kingdom*, Application Nos. 12244/86; 12245/86; 12383/86, Series A, No. 182, Judgment of 30 August 1990, par. 32 (emphasis added). Consider also, among others ECtHR, *Cebotari v. Moldova*, Case No. Application No. 35615/06, Judgment of 13 November 2007, par. 48; ECtHR, *Labita v. Italy*, Application No. 26772/95, Reports 2000-IV, Judgment of 6 April 2000, par. 155.

⁷⁰ ECtHR, *Fox, Campbell and Hartley v. United Kingdom*, Application Nos. 12244/86; 12245/86; 12383/86, Series A, No. 182, Judgment of 30 August 1990, par. 32; ECtHR, *Murray v. the United Kingdom*, Application No. 14310/88, Series A, No. 300-A, Judgment (Grand Chamber) of 28 October 1994, par. 57.

sufficient evidence to bring charges,⁷¹ nor does the evidence need to be of the same level as what is necessary to justify a conviction.⁷² Something more than suspicion is required insofar that the provision requires reasonable grounds *to believe*. Belief imports a higher standard of acceptability of something compared to suspicion. It denotes the “acceptance of a fact.”⁷³ Article 58 (1) (a) ICC Statute requires that such belief be founded upon grounds which warrant its reasonableness.

When the Pre-Trial Chamber in the *Al Bashir* case introduced a test requiring that the evidence “show[s] that the only reasonable conclusion to be drawn [...] is the existence of reasonable grounds to believe in the existence”, the Appeals Chamber determined that it set the threshold too high because it required proof that was “beyond reasonable doubt”.⁷⁴

Occasionally, the threshold required may in practice be even higher because the ICC Statute requires that the request for arrest and surrender be accompanied by ‘documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested state’.⁷⁵ Indeed, with a view to the expeditious execution of the arrest warrant, the Prosecutor may well want to anticipate such higher threshold.⁷⁶ This higher threshold, required to fulfill domestic requirements, will be discussed in a next subsection.⁷⁷

⁷¹ ECtHR, *Brogan and others v. The United Kingdom*, Application Nos. 11209/84; 11234/84; 11266/84; 11386/85, Series A, No. 145-B, Judgment of 29 November 1989, par. 53; ECtHR, *Labita v. Italy*, Application No. 26772/95, Judgment of 6 April 2000, Reports 2000-IV, par. 155; ECtHR, *Cebotari v. Moldova*, Case No. Application No. 35615/06, Judgment of 13 November 2007, par. 48.

⁷² ECtHR, *Murray v. the United Kingdom*, Application No. 14310/88, Series A, No. 300-A, Judgment (Grand Chamber) of 28 October 1994, par. 55.

⁷³ ICC, In the Appeal by Matthieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, *Prosecutor v. Katanga and Chui, Situation in the DRC*, A. Ch., 9 June 2008, par. 18.

⁷⁴ ICC, Judgment on the Appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, *Prosecutor v. Al Bashir, Situation in Darfur, Sudan*, Case No. ICC 02/05-01/09-73, PTC I, 3 February 2010, par. 32; ICC, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Prosecutor v. Al Bashir, Situation in Darfur, Sudan*, Case No. ICC 02/05-01/09-3, PTC I, 4 March 2009, par. 158.

⁷⁵ Article 91 (2) (c) ICC Statute.

⁷⁶ G. SLUITER, Surrender of War Criminals to the ICC, in «The Loyola of Los Angeles International and Comparative Law Review», Vol. 25, 2003, p. 619.

⁷⁷ See *infra*, Chapter 7, II.3.1.

II.3. State cooperation in the enforcement of the arrest warrant

The effectuation of arrest warrants differs depending on the nature of the tribunal concerned. For example, the Extraordinary Chambers have not faced the kind of problems associated with the execution of arrest warrants issued by international criminal tribunals as of yet. Given the court's integration in the domestic court system, the ECCC can rely directly on judicial police officers who can execute arrest warrants and orders from the Co-Investigating Judges or Co-Prosecutors.⁷⁸ Therefore, the ensuing discussion will concentrate on the problems encountered by *international* criminal tribunals, since they cannot directly execute arrest warrants but should, instead, rely on other states and other international actors. The above is not to say that the internationalised criminal tribunals have not faced problems regarding the effectuation of arrests. It is to be recalled that, unlike cooperation obligations of the states "most concerned", the obligations of third states to cooperate with these jurisdictions are very much limited.⁷⁹ For example, the absence of a solid framework for cooperation with Indonesia seriously impacted upon the success of the SPSC.⁸⁰ The large majority of those indicted by the SPSC remain at large outside the jurisdiction of East-Timor.⁸¹ Most of the persons indicted resided in Indonesia, which country refused to cooperate with the SPSC or to try them.⁸²

⁷⁸ C. RYNGAERT, Arrest and Detention, in L. REYDAMS, J. WOUTERS and C. RYNGAERT (eds.), *International Prosecutors*, Oxford, Oxford University Press, 2012, p. 652 (holding that for the hybrid tribunals, the problem of arrest has "not been the most pressing one", because of their integration in the national court structure. However, the author notes, in relation to the Special Panels, that they did however face the problem that a great percentage of the indictees resided outside the jurisdiction of East Timor, in Indonesia).

⁷⁹ See the discussion *supra*, Chapter 2, VII.1; G. SLUITER, Legal Assistance to Internationalized Courts and Tribunals, in C.P.R. ROMANO, A. NOLLKAEMPER and J. KLEFFNER (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia*, Oxford, Oxford University Press, 2004, p. 405.

⁸⁰ A Memorandum of Understanding was signed between Indonesia and UNTAET, see Memorandum of Understanding between the Republic of Indonesia and the United Nations Transnational Administration in East Timor Regarding Cooperation in Legal, Judicial and Human rights Related Matters, Jakarta, 5 April 2000. As noted by SLUITER, it "contains rather far-reaching grounds for refusal, is based on reciprocity, and does not contain a compulsory dispute settlement mechanism." Consider, in more detail, G. SLUITER, Legal Assistance to Internationalized Courts and Tribunals, in C.P.R. ROMANO, A. NOLLKAEMPER and J. KLEFFNER (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia*, Oxford, Oxford University Press, 2004, pp. 390 – 393.

⁸¹ C. REIGER and M. WIERDA, *The Serious Crimes Process in Timor-Leste: In Retrospect*, International Center for Transnational Justice, 2006, p. 18.

⁸² D. COHEN, Indifference and Accountability: The United Nations and the Politics of Justice in East-Timor, in «East-West Center Special Reports», Nr. 9, 2006, p. 13 ("The reason for the discrepancy between the large number of indictees and the modest number of accused is the fact that the vast majority of those indicted are residing in Indonesia"); C. RYNGAERT, Arrest and Detention, in L. REYDAMS, J. WOUTERS and C. RYNGAERT (eds.), *International Prosecutors*, Oxford, Oxford University Press, 2012, p. 653.

II.3.1. The *ad hoc* tribunals

§ Addressees

Lacking their own enforcement powers, the *ad hoc* tribunals need to rely on state cooperation to arrest and surrender accused persons. While the usual *addressees* of the arrest warrant will be states, the ICTY and ICTR Statute do not preclude that warrants be directed to other actors. In *Mrkšić*, the Trial Chamber held that where Article 19 (2) ICTY Statute is couched in broad terms, arrest warrants should not be directed to states exclusively.⁸³ It follows from Rule 59*bis* ICTY RPE that arrest warrants may be transmitted to ‘an appropriate authority or international body’ or to the Prosecutor.⁸⁴ In this regard, Rule 59*bis* offers an *alternative route* for the execution of the arrest and transfer by states.⁸⁵ The reality is that a substantial number of ICTY arrest warrants have been effectuated by multinational forces.⁸⁶ The notions of

⁸³ ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 37. Consider also Rule 54 ICTY RPE.

⁸⁴ In *Mrkšić*, the ICTY Trial Chamber stated that such procedure is valid and supported by the terms of the Statute. In particular, Rule 59 *bis* “can be regarded as giving effect to [Article 19 (2) ICTY Statute] when a decision has been made by the Confirming Judge that it is ‘required’ that entities other than States receive and execute warrants for the arrest, detention and transfer of accused persons.” Besides, the Trial Chamber argued that Article 20 (2) on the procedure to be followed upon confirmation of the indictment lends support to this conclusion. Indeed, this article does not make any mention of states, nor does it place any limitation on the authority of an international body or the Prosecutor to participate in the arrest proceedings. The Defence had contended that, since the accused resided on the territory of the Former Republic of Yugoslavia (FRY), the FRY bore the sole responsibility for the arrest of Dokmanović, on the basis of Article 29 ICTY Statute *juncto* Rule 55 ICTY RPE. See *ibid.*, par. 37. The reference to arrest warrants issued directly to the Prosecutor seems to refer to arrests carried out at the behest of the Prosecutor, rather than arrests directly executed by the Prosecutor him or herself. See S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in «The British Yearbook of International Law», Vol. 70, 2000, p. 219. Consider also Rule 55 (G) ICTY RPE, which refers to the execution of an arrest warrant by an ‘appropriate authority or international body’.

⁸⁵ ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 40 (“[i]t became clear with the commencement and the continuation of the functioning of the Tribunal that several States were not fulfilling their obligations with regard to the arrest and transfer of indicted persons. [...] The Judges therefore, adopted Rule 59 *bis* within the parameters of Article 19 and 20 of the Statute to provide for a mechanism additional to that of Rule 55, which, however, remains the primary method for the arrest and transfer of persons to the Tribunal”). Consider also ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 50.

⁸⁶ As noted, for example, by H-R. ZHOU, The Enforcement of Arrest Warrants by International Forces: From the ICTY to the ICC, in «Journal of International Criminal Justice», Vol. 4, 2006, p. 203; C. STAHN, Arrest and Surrender Under the ICC Statute: a Contextual Reading, in C. STAHN and L. VAN DEN HERIK (eds.), *Future Perspectives on International Criminal Justice*, The Hague, T.M.C. Asser Press, 2010, p. 665. On the problems surrounding the effectuation of arrest warrants by international forces and the capacity of the ICTY to direct arrest warrants to international forces, consider: S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in «The British Yearbook of International Law», Vol. 70, 2000, pp. 181 – 213. The question as to the responsibilities of multinational forces in the effectuation of arrests has been the subject of extensive scholarly debate. Some authors argue that while multinational forces have the *authority* to effect arrests, there is no *duty* incumbent on the multinational forces to arrest accused persons. Consider e.g. P. GAETA, Is NATO Authorized or Obligated to Arrest Persons Indicted by the International Criminal Tribunal for

‘appropriate authority’ or ‘international body’ were left undefined, raising questions as to what addressees are included under Rule 59bis.⁸⁷ While Rule 59bis speaks of the transmission of a ‘copy’ of the arrest warrant, international forces have, in practice, been the direct addressees of arrest warrants.⁸⁸ This provision seems to have been relied upon in order to evade the cumbersome Rule 61 (D) procedure and to have been turned into the preferred vehicle to transmit an arrest warrant to the authorities of all member states of the United Nations.⁸⁹ While the ICTR RPE do not provide for a similar provision, the power to address arrest warrants to an appropriate authority or international body can indirectly be construed.⁹⁰

the Former Yugoslavia?, in «European Journal of International Law», Vol. 9, 1998, pp. 179 – 180 (the author argues, among others, that it is a fundamental principle of international law that an international obligation is binding on a state within the state’s own territory, including the territory over which the state may *de facto* exercise exclusive jurisdiction. This also applies to the obligations a state participating in a multinational state holds under Security Resolution 827 of 1993. However, where the multinational forces exercise extensive power, they do not *de facto* exercise exclusive jurisdiction); M.B. HARMON and F. GAYNOR, Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 412; S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in «The British Yearbook of International Law», Vol. 70, 2000, p. 194 (“[t]he better view appears to be that while multinational forces operating in Bosnia And Herzegovina [...] are arguably empowered to effect arrests, this has yet to crystallize into an explicit obligation to do so under customary international law”). Other authors have contended that an obligation is incumbent on multinational forces to execute arrests. Consider *e.g.* N. FIGÀ-TALAMANCA, The Role of NATO in the Peace Agreement for Bosnia and Herzegovina, in «European Journal of International Law», Vol. 7, 1996, p. 173 (“it could be contended that, *in so far as* a contributing State is legitimately *in control* of the territory where an accused is known to reside, and is *in practice able* to arrest him or her [...] the state is under the obligation to arrest the accused and transfer him to the tribunal”); J.R.W.D. JONES, The Implications of the Peace Agreement for the International Criminal Tribunal for the Former Yugoslavia, in «European Journal of International Law», Vol. 7, 1996, p. 239 (arguing that IFOR may not only have the right but also the *duty* to execute the Tribunal’s arrest warrants). This latter view has been adopted in the jurisprudence of the *ad hoc* tribunals. First, the jurisprudence has adopted the view that the duty to cooperate under Article 29 ICTY Statute and Article 28 ICTR Statute also extends to international organisations or its competent organ (see *infra*, fn. 94 and the authorities cited therein). Furthermore, among other arguments, the Trial Chamber argued in *Nikolić* that Article 59bis (A) refers to an ‘order’, which may indicate the binding character thereof. See ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 55.

⁸⁷ Whereas the notion of ‘international body’ refers in the first place to the execution of arrest warrants by SFOR and other multinational forces, what is meant by an ‘appropriate authority’ is less clear. See, *e.g.*, the argumentation by LAMB that such category could arguably include the local police administration or individual police chiefs: S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in «The British Yearbook of International Law», Vol. 70, 2000, pp. 213-218. Notably, the rule also foresees the scenario where the Prosecutor takes the accused into custody.

⁸⁸ Consider *e.g.* ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 3 (Judge Riad apparently directly addressed the arrest warrant to UNTAES); in other instances, a copy of the original warrant seems to have been transmitted. Consider *e.g.* ICTY, Order Under Rule 59bis for the Transmission of Arrest Warrant, *Prosecutor v. Todović*, Case No. IT-97-25-I, Duty Judge, 23 August 2002.

⁸⁹ Consider *e.g.* ICTY, Warrant of Arrest, Order for Surrender, *Prosecutor v. Stanišić*, Case No. IT-014-79-I, Single Judge, 25 February 2005 (where reviewing Judge Amim El Mahdi authorised the delivery of the Warrant of Arrest and Order for Surrender to all member states of the United Nations and does so on the basis of Rule 55 and Rule 59bis).

⁹⁰ See Article 18 (2) ICTR Statute, Rule 53 (D) ICTR RPE (disclosure of (parts of) an indictment to an appropriate authority or international body) and Rule 39 (iii) ICTR RPE (The Prosecutor may seek the assistance of any relevant international body including INTERPOL in the conduct of the investigation).

Rule 55(D) ICTY RPE deals with the transmission of copies of the arrest warrant to the person or authorities to which they are addressed (which may include the national authorities of a state in whose territory, or under whose jurisdiction the accused resides, was last known to be, or is believed by the Registrar to be found). This provision has been interpreted by the Confirming Judge (Judge Hunt) in the *Milošević* case as providing the authority, when read together with Rule 54 (as there can be no trial if the accused is not arrested), for the Judge to transmit copies of the arrest warrant to every member state of the UN. Judge Hunt argued “that the power to transmit certified copies of the arrest warrant pursuant to Rule 55 (D) is a wide one.”⁹¹ In turn, the ICTR RPE foresees the possibility of transmitting the arrest warrant to every state to facilitate the arrest of persons that move between states or whose whereabouts remain unknown.⁹² Rule 59 ICTR and Rule 60 ICTY RPE also allow for the public advertisement of the indictment at the Prosecutor’s request.

§ *Duty for states and other actors to comply with requests for arrest and transfer*

In cases where an arrest warrant is addressed to a state, this will normally be the territory of the state in whose territory or under whose jurisdiction or control the person resides or was last known to be found.⁹³ States should comply with any request for the arrest or detention of persons and the surrender or transfer of the accused to the tribunal (pursuant to Article 29 ICTY Statute (Article 28 ICTR Statute)) without delay.⁹⁴ Gaps or impediments under the

⁹¹ ICTY, Decision on Review of Indictment and Application for Consequential Orders, *Prosecutor v. Milošević et al.*, Case No. IT-99-37-I, T. Ch., 24 May 1999. As noted above, a similar broad interpretation was given to Rule 59 *bis* ICTY RPE. Critical of the approach by the Trial Chamber is G. SLUITER, who argues that for an international arrest warrant to be issued, the proper procedure (Rule 61 (D) ICTY RPE) should have been followed. These international arrest warrants can only be issued by a Trial Chamber and when the arrest warrant that has been issued pursuant to Rule 55 has not been executed within a reasonable time. The commentator argues that where Rule 61 is *specialis* to the *generalis* Rules 54 and 55, the former is the correct procedure to be applied. Nevertheless, Judge Hunt expressly distinguished between the procedure of Rule 55(D) of transmitting certified copies of the original arrest warrant and Rule 61 (D) regulating the issuance of international arrest warrants (par. 22). See G. SLUITER, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 1997-1999, Vol. III, 2001, p. 48.

⁹² Rule 55*bis* ICTR RPE, as adopted at the tenth plenary session, 30 – 31 May 2001. Consider ICTR, Sixth Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other serious Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, U.N. Doc. A/56/351; S/2003/863, 14 September 2001, p. 13 (“[t]he new rule 55 *bis* provides for the issuance of warrants of arrest to all States, with a view to facilitating the arrest of an accused person moving from State to State to evade arrest”).

⁹³ See Rule 61 (A) (i) ICTY and ICTR RPE and Rule 55 (B) ICTR RPE.

⁹⁴ Article 29 (2) (d) and (e) ICTY Statute, Article 28 (2) (d) and (e) ICTR Statute, Rule 56 ICTY and ICTR RPE. These obligations incumbent on States ultimately derive their binding force from Security Council Resolution

municipal law of the requested state do not relieve that state from its obligations.⁹⁵ The obligations under Article 29 ICTY Statute prevail over any legal impediment to the surrender or transfer of the accused or a witness to the tribunal (which may exist under the national law or extradition treaties of the state concerned).⁹⁶ As one author notes, requests for arrest and surrender impose an obligation of result on the requested state.⁹⁷ While many states adopted measures to domestically implement their obligation to arrest and surrender, there is, strictly speaking, no obligation to do so.⁹⁸ According to Rule 56 ICTY and ICTR, states have a *duty of due diligence* ‘to ensure proper and effective execution’. The unqualified nature of the obligations of states or other actors to surrender a person to the tribunal also entails that when a state effectuated an arrest and the tribunal as well as another state or actor requests the extradition, the request of surrender should prevail. However, the practice may sometimes be different.⁹⁹

827 adopted on 25 May 1993 and Security Council Resolution 955 of 8 November 1994, adopted under Chapter VII of the UN Charter and Article 25 of the UN Charter. Where the *ad hoc tribunals* are subsidiary organs of the UN Security Council, their order for cooperation may indirectly be regarded as decisions from the Security Council under Chapter VII. Consider in this regard the Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, par. 125-126 (“[a]n order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the United Nations”). For the SCSL, consider Article 17 (2) (c) and (2) SCSL Agreement (in the case of the SCSL, such obligation is only incumbent on the government of Sierra Leone, but consider Rule 56 SCSL RPE on addressing arrest warrants to third states and any relevant international body).

⁹⁵ ICTY, Decision on the Motion of the Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence, *Prosecutor v. Blaškić*, Case No. IT-95-14, President, 3 April 1996, par. 7.

⁹⁶ Rule 58 ICTY, ICTR and SCSL RPE. Note that this provision reflects the priority rule of Article 103 UN Charter according to which, in case a conflict arises between the obligations of member states of the United Nations under the UN Charter and their obligation under any other international agreement, their obligations under the UN Charter prevail. Presumably, the only exception would be the situation when the arrest and surrender would be impeded by norms of *jus cogens* or peremptory norms. Consider *e.g.* B. SWART, Arrest and Surrender, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1665; S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in «The British Yearbook of International Law», Vol. 70, 2000, pp. 201 – 202. An exception to the transfer of cases to the ICTY can be found in Article 10 ICTY Statute; Article 9 ICTR and SCSL Statute (non *bis in idem*).

⁹⁷ See G. SLUITER, Human Rights Protection in the ICC Pre-Trial Phase, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 467.

⁹⁸ Consider Y. GAMARRA and A. VICENTE, United Nations Member States’ Obligations Towards the ICTY: Arresting and Transferring Lukić, Gotovina and Zelenović, in «International Criminal Law Review», Vol. 8, 2008, pp. 639 – 653 (the authors illustrate, by discussing several examples of transfer of accused persons to the ICTY, that “the arrest and transfer of war criminals is more likely to take place when States have a true intention to cooperate, which is explicit when they adopt specific domestic legislation to make the process of arresting and transferring smooth and transparent”).

⁹⁹ C. RYNGAERT, Arrest and Detention, in L. REYDAMS, J. WOUTERS and C. RYNGAERT (eds.), *International Prosecutors*, Oxford, Oxford University Press, 2012, p. 686 (recalling the case of *Karamira*, in which Karamira was taken by Rwandese agents from Indian territory. When he escaped in Ethiopia, during his transfer, the ICTR Prosecutor learned about his presence in Ethiopia and requested his surrender. However, the Rwandese authorities threatened to stop cooperation with the ICTR and to block access to witnesses and the Prosecution gave in. Karamira was transferred to Kigali where he was sentenced to death and eventually

Given that arrests are in practice often effectuated by international organisations, it should be reiterated that Article 29 ICTY Statute (Article 28 ICTR Statute) also applies when states operate collectively.¹⁰⁰ Consequently, Article 29 ICTY Statute should be understood as conferring power upon the tribunal to require these international organisations, including their competent organ, to cooperate with the tribunal.¹⁰¹

Interestingly, the Statutes of the *ad hoc* tribunals encompass a duty to comply with requests for the arrest and detention of *persons* while the obligation to surrender and transfer is limited only to *the accused*.¹⁰² Consequently, the surrender and transfer of suspects seems to be excluded. However, an obligation on states to surrender and transfer suspects follows from the general cooperation obligation of states under the ICTY and ICTR Statute, as has been suggested by SWART.¹⁰³

executed. The Judgement can be found in the DomCLIC database at http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Rwanda/Karamira_jugement_14-2-2007.pdf (last visited 22 December 2013). Consider also V. PESKIN, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, Cambridge, Cambridge University Press, 2008, pp. 174 – 176.

¹⁰⁰ See ICTY, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, *Prosecutor v. Simić*, Case No. IT-95-9, T. Ch., 18 October 2000, par. 46 – 47 (holding that Article 29 ICTY applies to all states “whether acting individually or collectively.” “In principle, there is no reason why Article 29 should not apply to collective enterprises undertaken by States, in the framework of international organisations and, in particular, their competent organs such as SFOR in the present case.” A purposive construction of Article 29 suggests that it is as applicable to such collective enterprises as it is to States. The purpose of Article 29 of the Statute of the International Tribunal is to secure cooperation with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law in the former Yugoslavia. The need for such cooperation is strikingly apparent, since the International Tribunal has no enforcement arm of its own – it lacks a police force. Although this cooperation would, more naturally, be expected from States, it is also achievable through the assistance of international organizations through their competent organs which, by virtue of their activities, might have information relating to, or come into contact with, persons indicted by the International Tribunal.” [...] “The mere fact that the text of Article 29 is confined to States and omits reference to other collective enterprises of States does not mean that it was intended that the International Tribunal should not also benefit from the assistance of States acting through such enterprises”). Judge Robinson, in his separate opinion to the decision, agrees with the majority but adds that the customary right to *habeas corpus* further warrants that Article 29 ICTY Statute is so construed. Such contextual interpretation is in line with the rules of treaty interpretation (Article 31 (3) (1) (c) VCLT). See *ibid.*, Separate Opinion of Judge Robinson, par. 8. Consider also ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 49. This finding was confirmed by the Appeals Chamber in ICTY, Decision on Request of the North Atlantic Treaty Organisation for Review, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR108bis.1, A. Ch., 15 May 2006, par. 8.

¹⁰¹ ICTY, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, *Prosecutor v. Simić*, Case No. IT-95-9, T. Ch., 18 October 2000, par. 48.

¹⁰² Article 29 (2) (d) and (e) ICTY Statute and Article 28 (2) (d) and (e) ICTR Statute respectively.

¹⁰³ B. SWART, Arrest and Surrender, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1665 (reminding that the relevant provisions of the Statute include, but are not limited to the transfer of accused). See also: Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, par. 125 (the cooperation obligations of states extend to all phases of the proceedings).

One country, the U.S., has signed separate surrender agreements with both *ad hoc* tribunals.¹⁰⁴ The intention behind these agreements was not only to demonstrate the willingness of the U.S. to cooperate with the *ad hoc* tribunals but also, equally, to reconcile the “assistance to the *ad hoc* tribunals with requirements deriving from US extradition law, in particular (1) that suspects will only be surrendered on a treaty-base and (2) the requirement of a ‘probable cause’.”¹⁰⁵ On 17 December 1997, a U.S. magistrate Judge dismissed a request by the ICTR for the surrender of *Ntakirutimana*, following his provisional arrest, and ordered that he be released. The Judge decided that the obligation to cooperate with the tribunal was unconstitutional and that there was no ‘probable cause’.¹⁰⁶ A new request for the surrender of

¹⁰⁴ Agreement on Surrender of Persons between the Government of the United States and the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia, 5 October 1994, available at http://www.icty.org/x/file/Legal%20Library/Member_States_Cooperation/implementation_legislation_united_states_1994_en.pdf (last visited 22 December 2013); and the Agreement on Surrender of Persons between the Government of the United States and the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwanda Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, 24 January 1995. Consider also that legislation enacting these surrender agreements was passed by the approval of Public Law No. 104-106, the National Defence Authorization Act of 10 February 1996, section 1342 (amending Chapter 209 of Title 18 of the United States Code (‘USC’)). For a discussion thereof, consider R. KUSHEN and K. J. HARRIS, Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda, in «The American Journal of International Law», Vol. 90, 1996, pp. 510 – 518.

¹⁰⁵ J.A.F. GODINHO, The Surrender Agreements between the US and the ICTY and ICTR: A Critical View, in «Journal of International Criminal Justice», Vol. 1, 2003, p. 503. According to KUSHEN, one of the drafters and negotiators of the agreements, the agreements aimed at “put[ting] the Tribunals on notice and obtain Tribunal acquiescence to the need for a judicial process to take place in the US before surrender could be accomplished.” Besides, the agreements “served to frame the nature of the legislation that followed.” Where it only contains one substantive ground of refusal (finding of probable cause), it does away other traditional grounds for refusal in extradition law. See R. KUSHEN, The Surrender Agreements between the US and the ICTY and ICTR: The American View, in «Journal of International Criminal Justice», Vol. 1, 2003, pp. 517 – 518. According to the agreement, the request is to be supported by ‘copies of the warrant of arrest and of the indictment and by information sufficient to establish there is a reasonable basis to believe that the person sought has committed the violation or violations for which surrender is requested. This information is required to satisfy the constitutional ‘probable cause’ standard applied in US extradition proceedings (Article 2 (3) of the Agreement). Besides, supplemental information may be requested from the tribunal, in which case the proceedings continue and the person is detained during a period necessary to afford the tribunal a reasonable opportunity to provide the additional information (Article 2 (5) of the Agreement).

¹⁰⁶ In the Matter of SURRENDER of Elizaphan NTAKIRUTIMANA, 988 F. Supp. 1038, 17 December 1997, at 1040 - 1042, 1044. On the former point, the Judge held that the surrender agreement concluded with the ICTR was a congressional-executive agreement and no formal extradition treaty, as required. A formal extradition treaty is required by Section 3181 of Title 18 of the United States Code (USC). As argued by several authors, it is puzzling why the government did not refer to the UN Charter, which is the ultimate basis of the surrender request. Consider e.g. J.J. PAUST, The Freeing of Ntakirutimana in the United States and ‘Extradition’ to the ICTR’ in «Yearbook of International Humanitarian Law», Vol. 1, 1998, p. 206 (“Given the UN Charter treaty-base, the executive agreement was not a sole executive agreement, but at least a treaty-executive agreement with all the constitutional authority in the United States as a treaty.”); G. SLUITER, To Cooperate or not to Cooperate?: The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal, in «Leiden Journal of International Law», Vol. 11, 2008, p. 390 (“the question arises why the government did not suggest the UN Charter, in which the surrender request ultimately finds its basis”); J.A.F. GODINHO, The Surrender Agreements between the US and the ICTY and ICTR: A Critical View, in «Journal of International Criminal

Ntakirutimana was subsequently presented and approved by a magistrate and then confirmed by the U.S. Court of Appeals for the Fifth Circuit.¹⁰⁷ The review of the ‘probable cause’ and the possibility to refuse surrender when no evidence sufficient to establish ‘probable cause’ is found, is especially problematic in light of the absolute and unconditional cooperation requirements of the states *vis-à-vis* the *ad hoc* tribunals. It may unduly delay the surrender, which may lead to a violation of the obligation incumbent on the U.S. to provide timely cooperation.¹⁰⁸

§ *Enforcing the obligation to arrest and surrender*

In cases of non-compliance with a request for assistance, the *ad hoc* tribunals cannot directly take enforcement measures against the state concerned.¹⁰⁹ In the absence of such a power, the ICTY Appeals Chamber confirmed in *Blaškić* that the tribunal possesses the ‘inherent power’ to make a judicial ‘finding’ concerning a state’s failure to observe the provisions of the Statute or the RPE.¹¹⁰ The Prosecutor does not hold such a power. Hence, the finding of non-compliance constitutes a judicial pregorative.¹¹¹ In addition, the tribunal has the power to

Justice», Vol. 1, 2003, p. 511 (the author argues that “[t]he legal basis of the obligation for UN Member States lies first and foremost in the UN Security Council resolutions where such obligation was laid down”). On the latter point, the magistrate discovered several deficiencies in the affidavits that had been submitted. These deficiencies included the lack of identification of the witnesses, other than by letter in the affidavit filed by a Belgian police officer assigned to the ICTR; the fact that no statement was included regarding the witnesses’ reliability; the lack of an indication whether the witnesses were under oath; the circumstances of the interview; the accuracy of the translations etc.

¹⁰⁷ *Elizaphan Ntakirutimana v. Janet Reno*, 184 F.3d 419, 5 August 1999. The Court held that a formal treaty was not required (legislative approval by statute suffices) and that the evidence was sufficient to support the decision by the District Court that there was ‘probable cause’. For a discussion of the decision of the United States Court of Appeals for the Fifth Circuit, consider: G. SLUITER, *The Surrender of Ntakirutimana Revisited*, in «*Leiden Journal of International Law*», Vol. 13, 2000, pp. 459 – 466.

¹⁰⁸ J.A.F. GODINHO, *The Surrender Agreements between the US and the ICTY and ICTR: A Critical View*, in «*Journal of International Criminal Justice*», Vol. 1, 2003, p. 516.

¹⁰⁹ ICTY, *Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Prosecutor v. Blaškić*, Case No. IT-95-AR108 bis, A. Ch., 29 October 1997, par. 33.

¹¹⁰ *Ibid.*, par. 33. Rule 7bis ICTY and ICTR RPE. According to the ICTY Appeals Chamber, such ‘finding’ implies the formal establishment of the existence of an internationally wrongful act of the non-cooperating state. See C. KRESS and K. PROST, Article 86, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1530, referring to ICTY, *Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Prosecutor v. Blaškić*, Case No. IT-95-AR108 bis, A. Ch., 29 October 1997, par. 35.

¹¹¹ Compare G. SLUITER, *Obtaining Cooperation from Sudan – Where is the Law?*, in «*Journal of International Criminal Justice*», Vol. 6, 2008, p. 874 (holding that “The Prosecutor simply lacks the required impartiality to make the determination of non-compliance, a determination that has serious consequences for the state concerned”).

report this judicial finding to the Security Council.¹¹² In cases of non-compliance, Rule 7bis ICTY and ICTR RPE authorises the Judge or Trial Chamber to request the President to report the matter to the Security Council.¹¹³ A specific procedure regulates the non-compliance with requests for arrest and surrender.¹¹⁴ This procedure will be discussed in detail further on in this chapter.¹¹⁵

II.3.2. The International Criminal Court

The ICC's arrest and surrender cooperation regime is far more detailed than that of the *ad hoc* tribunals. In general, as discussed in Chapter 2, the cooperation regime of the ICC consists of a mixture of the 'horizontal' and 'vertical' approach.¹¹⁶ Some specific traits of the regime regarding the enforcement of warrants of arrest will be discussed below. Several commentators have discussed the procedural regime regarding requests for the arrest and surrender of persons by comparing it with and distinguishing it from classic inter-state extradition law.¹¹⁷ The obligations of states in relation to arrest and surrender differ, depending on the legal basis underlying their obligations to provide assistance to the ICC. Clearly, States Parties to the ICC Statute are bound by their obligations under the ICC Statute. However, leaving voluntary cooperation aside, there are situations when states not party may also be under an obligation to cooperate with the ICC. First, the obligations of cooperation under the ICC Statute *may* become obligations for UN member states that are not a party to the ICC Statute when a situation has been referred to the Prosecutor by the Security Council acting under Chapter VII of the UN Charter.¹¹⁸ Furthermore, cooperation obligations may

¹¹² *Ibid.*, par. 33.

¹¹³ Rule 7bis (A) and (B) ICTY and ICTR RPE. See D.A. MUNDIS, Reporting Non-Compliance: Rule 7bis, in R. MAY *et al.* (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, The Hague, Kluwer Law International, 2001, pp. 421 - 438.

¹¹⁴ Rule 61 ICTY and ICTR RPE.

¹¹⁵ See *infra*, Chapter 7, II.6.

¹¹⁶ See *supra*, Chapter 2, VII.1.

¹¹⁷ Three distinctive characteristics are noted: the absence of an element of reciprocity, the absence of most grounds for refusals and the presence of a compulsory dispute settlement mechanism. See *e.g.* B. SWART, Arrest and Surrender, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, pp. 1639 – 1703; G. SLUITER, Surrender of War Criminals to the ICC, in «The Loyola of Los Angeles International and Comparative Law Review», Vol. 25, 2003, pp. 611 – 615.

¹¹⁸ The correct view is that an Article 13 (b) referral by the UN Security Council *may* impose cooperation on a UN member state that is no party to the ICC Statute. However, this will depend on the formulation on the decision referring a situation to the Court. See *e.g.* C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, p. 353; *Contra*, see B. SWART, Arrest and Surrender, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International*

follow either from the *ad hoc* acceptance of the Court's jurisdiction pursuant to Article 12 (3) ICC Statute or from *ad hoc* agreements concluded by the Court with states not party, pursuant to Article 87 (5) (a) ICC Statute.

It follows from Article 58 (5) ICC Statute that the Court may request the arrest and surrender of the person pursuant to Part 9 of the ICC Statute only in cases where a warrant of arrest has been issued. In addition to the general cooperation obligations under Article 86 ICC Statute a duty to cooperate with the ICC in matters of arrest and surrender is provided for under Article 89 (1) ICC Statute. A request may be transmitted to any state on whose territory the person may be found.¹¹⁹ As a rule, these requests should be executed immediately.¹²⁰

§ Addressees

In line with what was previously discussed with regard to the *ad hoc* tribunals, the question arises whether the addressees of warrants of arrests could be states solely or could also include other entities. The statute solely refers to states. However, it follows from Article 87 (6) ICC Statute that the Court may request any intergovernmental organisation 'for other [than providing information and documents] forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate'. However, it is unclear how the arrest of persons might work in practice.¹²¹ For example, Article 59 (2) ICC Statute on arrest proceedings in the custodial state refers only to

Criminal Court, Oxford, Oxford University Press, 2002, p. 1677 ("The Fact that the Security Council [...] is acting under Chapter VII of the Charter of the United Nations has a number of important consequences for the system of surrender. The obligations arising out of Part 5 and 9 for States in the matter of arrest and surrender thereby become obligations for all Member States of the United Nations regardless of *whether or not they are parties to the Statute*." (emphasis added)). This is not to say that one would not expect the cooperation obligations, following a referral by the Security Council, to extend to all UN member states, where such important values as the interests of international peace and security are at stake. See e.g. G. SLUITER, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, Antwerp, Intersentia, 2002, pp. 71 – 72; A. ZAHAR and G. SLUITER, *International Criminal Law: a Critical Introduction*, Oxford, Oxford University Press, 2008, p. 466.

¹¹⁹ Article 89 (1) ICC Statute.

¹²⁰ See e.g. Article 59 (1) ICC Statute: "[a] State Party which has received a request for provisional arrest or for arrest and surrender *shall immediately take steps* to arrest the person in question" (emphasis added). See also the general cooperation obligation of Article 86 ICC Statute which encompasses a duty to cooperate 'fully', which implies an obligation to comply promptly and without delay (see e.g. C. KRESS and K. PROST, Article 86, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, Article by Article, München, Verlag C.H. Beck, 2008, pp. 1514 – 1515).

¹²¹ Consider S. LAMB, *The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia*, in «The British Yearbook of International Law», Vol. 70, 2000, p. 244 (the author notes that it is to be regretted that the ICC Statute "did not directly contemplate the arrest of suspects by international forces").

the competent judicial authority. It is not clear what this entails if the arrest has been effectuated by a multinational force.¹²²

§ *Duty for states and other actors to comply with requests for arrest and transfer*

While no formal grounds of refusal are included in Article 89 ICC Statute, several provisions qualify the obligation States Parties have to immediately arrest and surrender the person in relation to parallel national proceedings. Among others¹²³, the person whose surrender is sought may bring a challenge on the basis of the *ne bis in idem* principle before the national court. In this case, the requested state should determine whether the admissibility has been ruled on by the Court, in which case the requested state will proceed with the execution of the request.¹²⁴ In cases where an admissibility ruling is pending, the requested State may postpone the execution of the request for *surrender* of the person until the Court makes a determination on the admissibility.¹²⁵ Secondly, where the person whose surrender is sought is being prosecuted by the requested State Party or is serving a sentence for a crime different than the one for which surrender is sought, the state should grant the Court's request but should also consult with the Court.¹²⁶

¹²² See C.K. HALL, Article 59, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1151, fn. 20 (the author argues that “[a] degree of flexibility in the implementation of Article 59 that is consistent with the purpose of the Statute may be possible, such as bringing the person promptly before a court of the custodial State sitting in the State with jurisdiction where the person was arrested or prompt surrender to the Court, provided that the safeguards for the rights of the suspect, as envisaged in Article 59, were fully respected and kidnapping in violation of international law was prohibited”); G. SLUITER, *Human Rights Protection in the ICC Pre-Trial Phase*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 468 (noting that it is unclear what legal regime applies to arrests performed by non-state entities. He notes that problems may arise where Article 59 seems to be exhaustive and where violation of Article 59 opens the door for an enforceable right to compensation pursuant to Article 85 ICC Statute).

¹²³ It follows from the general rule in Article 97 ICC Statute that nothing prevents states parties from submitting additional obstacles which impede or prevent the execution of a request for arrest and surrender. Consider in detail G. SLUITER, *Surrender of War Criminals to the ICC*, in «*The Loyola of Los Angeles International and Comparative Law Review*», Vol. 25, 2003, pp. 635 – 643; G. SLUITER, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, Antwerp, Intersentia, 2002, pp. 175 – 202.

¹²⁴ Article 89 (2) ICC Statute. Note that pursuant to Article 19 (2) (a) ICC Statute, a person against whom a warrant of arrest or a summons to appear has been issued may also contest the admissibility before the Court.

¹²⁵ Article 89 (2) ICC Statute. Consequently, the arrest itself may not be postponed. Consider in that regard also the more general Article 95 ICC Statute, which allows for the execution of every request to be postponed pending the determination by the Court of an admissibility challenge pursuant to Articles 18 and 19 ICC Statute.

¹²⁶ Article 89 (4) ICC Statute. While the provision is open to several interpretations, it has been advanced that it should be read as leaving no room for the refusal of the request for surrender. See C. KRESS and K. PROST, Article 86, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1548 (explaining that the unfortunate formulation is attributable to the fact that the issue of the inclusion of grounds for refusal was not resolved until

In addition, Article 95 ICC Statute more generally provides for the postponement of the obligation to execute the request pending the determination of the admissibility pursuant to Articles 18 or 19 ICC Statute. However, under Article 19 (8) (c) ICC statute, the Prosecutor may seek a ruling from the Court, pending a determination by the Court, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest pursuant to Article 58 ICC statute. Furthermore, Article 94 ICC Statute allows for the postponement of the execution of a request if immediate execution would interfere with the ongoing investigation or prosecution of a case different from the one to which the request relates.

Characteristic of the ICC's procedural regime is the duty to consult with the court in case of difficulties in the execution of requests.¹²⁷ In turn, this feature is necessitated by the fact that, unlike that which is the case with regard to the *ad hoc* tribunals, the obligations to cooperate with the ICC do not prevail over obligations under other international agreements. According to Article 90 ICC Statute, whenever a state party is faced with competing requests for the extradition and surrender of the same person regarding *the same conduct*, notification of the Court and of the requesting state is required.¹²⁸ Where the competing extradition request originates from another State Party, priority should be given to the ICC request, if the Court made¹²⁹ or subsequently makes a determination that the case is admissible, taking into consideration the investigation and/or prosecution by that state.¹³⁰ Where the extradition request originates from a state not party, priority must be given to the Court's request when a

the very final stage of the negotiations on the ICC Statute). Temporary surrender in accordance with the conditions determined between the ICC and the requested state following the consultations under Article 89 (4) ICC Statute is provided for in Rule 183 ICC RPE.

¹²⁷ See the general duty to consult under Article 97 ICC Statute, in case the state party discovers problems that may prevent or impede the execution of a request. According to Article 97 (b) ICC Statute, such problems may include, in the case of a request for surrender, 'the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant'.

¹²⁸ Article 90 (1) ICC Statute.

¹²⁹ This will often not be the case. Consider in that regard the finding of the ICC Appeals Chamber that "an initial determination by the Pre-Trial Chamber that the case is admissible is not a prerequisite for the issuance of a warrant of arrest pursuant to article 58 (1) of the Statute." See ICC, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled: "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, *Situation in the DRC*, Case No. ICC-01/04-169, A. Ch., 13 July 2006, par. 38 – 53. See *supra*, Chapter 7, II.1.

¹³⁰ Article 90 (2) (a) and (b) of the ICC Statute. Where a decision is pending, the requested state may proceed with the extradition request but may not extradite until a determination has been made by the Court that the case is inadmissible (Article 90 (3) ICC Statute). Where the ability and willingness of the requesting state party would lead to the inadmissibility of the case before the Court, the Court will have to determine whether the requesting state party is unwilling and unable genuinely to investigate or prosecute the case.

determination on the case's admissibility has been made and when the state is not under an international obligation to extradite the person to the state concerned.¹³¹ In instances the state requested is under an international obligation to extradite, the state should decide whether to extradite or whether to surrender, taking a number of relevant factors into consideration which are outlined in Article 90 (6) ICC Statute.¹³² Nevertheless, how far this provision is binding on the requesting state may be questioned, since it is not a party to the ICC Statute and extraditions treaties normally contain provisions on competing requests on which basis a determination can be made.¹³³ If the extradition request and the request for surrender encompass *different conduct*, the Court's request has priority if no international obligation for the extradition exists. In cases where an international obligation does exist, the requested state shall decide, based on the criteria outlined in Article 90 (7) (b) ICC Statute.

More controversial is the provision that the ICC may not proceed with a request for surrender or assistance if it requires the requested state to act inconsistently with its obligations under international law concerning state or diplomatic immunity, unless a waiver of that immunity has first been obtained.¹³⁴ This provision limits the power of the Court to issue a request for surrender and imposes an obligation upon the Court "not to put a State in the position of

¹³¹ Article 90 (4) ICC Statute. This latter scenario also encompasses situations where the agreement between the requested state and the state party from which the request originates does not create an obligation to extradite under the specific circumstances of the case at hand. Where no determination as to the admissibility has been made, the state may proceed with the extradition at its own discretion. See Article 90 (5) ICC Statute.

¹³² These considerations include (a) the respective dates of the requests; (b) the interests of the requesting state including, where relevant, whether the crime was committed in its territory and the nationality of the victim and of the person sought and (c) the possibility of a subsequent surrender between the Court and the requesting states. A fourth consideration may be included, to know whether the requesting state is willing and able to genuinely pursue the criminal proceedings upon extradition. See e.g. W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 1006; C. KRESS and K. PROST, Article 86, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1556.

¹³³ B. SWART, *Arrest and Surrender*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1697.

¹³⁴ Article 98 (1) ICC Statute. Where it may be argued that no functional immunity exists under international law for the crimes within the jurisdiction of the ICC (and that therefore, Article 27 (2) ICC Statute is declaratory of customary international law), it is open to debate whether personal immunity attaches to some of the highest state officials while in function. It is not the place here to dwell upon the extent to which such personal immunities remain valid before international criminal tribunals and the ICC in particular. However, consider the *Arrest Warrant Case (Yerodia case)* (ICJ, *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium)*, Judgment, 14 February 2000, ICJ Reports 2000, par. 61) and the dictum that an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction (the Court refers to the ICTY, the ICTR and the ICC (the Court explicitly refers to Article 27 (2) ICC Statute)). Consider also, SCSL, *Decision on Immunity from Jurisdiction, Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, A. Ch., 31 May 2004, par. 51 (the Appeals Chamber explains the distinction drawn by the ICJ between national courts and international courts by referring to the non-applicability of the principle of sovereign equality).

having to violate its international obligations with respect of immunities.”¹³⁵ Rather than including a ground for refusal to execute the request for surrender, it prohibits the Court from formulating such a request in the instances given and, as such, requires a state to contest a request when a situation under Article 98 ICC Statute arises.¹³⁶ The determination thereof is left with the ICC and it is up to the Court to apply to third states for a waiver before it pursues the request.¹³⁷ There is some controversy relating to the exact scope of this provision, more

¹³⁵ C. KRESS and K. PROST, Article 98, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 1606; Similarly, consider D. AKANDE, International Law and the International Criminal Court, in «American Journal of International Law», Vol. 98, 2004, p. 421; S. WILLIAMS and L. SHERIF, The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court, in «Journal of Conflict & Security Law», Vol. 14, 2009, p. 86; G. SLUITER, International Criminal Adjudication and the Collection of Evidence: Obligations of States, Antwerp, Intersentia, 2002, p. 107.

Where Article 98 (1) ICC Statute refers to the 'State or diplomatic immunity of a person or property of a *third State*', it has been argued that 'third state' should be understood to refer to a state not party. Consider, P. GAETA, Does President Al Bashir Enjoy Immunity from Arrest?, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 328. This interpretation seems logical: where the third state would be a State Party, Article 27 (2) ICC Statute applies, implying that immunities do not bar the exercise of the jurisdiction of the Court and the issuance of an arrest warrant against an individual enjoying personal immunities. Suggesting that Article 98 (1) ICC statute would include States Parties would remove the *effet utile* of Article 27 (2) ICC Statute. Moreover, such interpretation is in line with Article 2 (1) (h) of the Vienna Convention on the Law of Treaties, which defines 'third state' as a 'a State not party to the Statute'. For a confirming view, consider also D. AKANDE, International Law and the International Criminal Court, in «American Journal of International Law», Vol. 98, 2004, pp. 423 - 424 (arguing that "an interpretation that allows officials of states parties to rely on international law immunities when they are in other states would deprive the Statute of its stated purpose of preventing impunity and ensuring that the most serious crimes of international concern do not go unpunished." Besides, he argues that such interpretation would nullify the removal of immunity from the Court's jurisdiction embodied in Article 27 ICC Statute); W.A. SCHABAS, The International Criminal Court: A Commentary on the Rome Statute, Oxford, Oxford University Press, 2010, p. 1041 ("if a 'vertical' approach to state cooperation is adopted, there may be no good reason why a State Party other than the requested State should be in a position to invoke any immunity to which it may be entitled *vis-à-vis* the requested State"); S. PAILLON, Has the United Nations Security Council Implicitly Removed Al Bashir's Immunity?, in «International Criminal Law Review», Vol. 10, 2010, pp. 283 - 284; S. WILLIAMS and L. SHERIF, The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court, in «Journal of Conflict & Security Law», Vol. 14, 2009, p. 86. Other authors have argued that 'third state' refers to states other than the requested state. Consider e.g. C. KRESS and K. PROST, Article 98, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 1606 (the authors argue that "it was widely felt during the negotiations [that] this inviolability could place an obstacle on the execution of a request for surrender, both *vis-à-vis* a State Party or a non-State Party"). In the end, where these authors conclude that "[b]y accepting the Statute, and more in particular, article 27, States Parties have waived any possible immunity under international law for the purpose of proceedings before the Court, the different interpretation of the term 'third state' has no consequences on a practical level (*ibid.*, p. 1607).

¹³⁶ According to Rule 195 (1) ICC RPE, where the requested state notifies the Court that a request for surrender or assistance raises problems of execution in respect of Article 98, the requested state should provide the Court with any information that may assist the Court in the application of Article 98 ICC Statute. Similarly, any concerned third state or sending state may provide additional information to assist the Court.

¹³⁷ Consider in that regard D. AKANDE, International Law and the International Criminal Court, in «American Journal of International Law», Vol. 98, 2004, p. 431 (where the author notes the absence of any procedure the Court should follow in making a determination under Article 98. The author notes that "on a matter of such importance, it can only be assumed that the state concerned is entitled to a decision by the pretrial chamber." "Although this issue is not specifically covered in the list of functions of the pretrial chamber in Article 57 of the Statute, Rule 195 arguably grants procedural rights to concerned third states or sending states in any hearings

precisely regarding the applicability of Article 98 (1) ICC Statute to officials of States Parties.¹³⁸ Unfortunately, Pre-Trial Chamber I in the *Al Bashir* case did not to elaborate on the applicability of Article 98 (1) ICC Statute when it issued a request for the arrest and surrender of Al Bashir to States Parties and Security Council members.¹³⁹

A similar limitation to the issuance of requests for surrender is provided by Article 98 (2) ICC Statute, which states that the Court should respect international agreements requiring the consent of the sending states (including, but not limited to, Status of Forces Agreements ('SOFA's')) and should not proceed with a request for surrender or assistance unless the sending state consents thereto.¹⁴⁰ Similar to Article 98 (1) ICC Statute, the rationale underlying this provision is to avoid situations of conflicting obligations.¹⁴¹ Again, divergent

before the pretrial chamber.” Leaving the decision to the Court implies that any error made in the determination by the Court leads to the criminal responsibility of the requested state. Whereas the person arrested may challenge the legality of the request for surrender in the custodial state (pursuant to Article 59 (2) ICC Statute), the author argues that disagreements as to the existence of an obligation to surrender a person to the court fall within the ambit of Article 119 ICC Statute, according to which disputes regarding the judicial functions of the Court should be settled by the decision of the Court).

¹³⁸ The standard view is that it follows from Article 27 ICC Statute and the *waiver* included therein, that Article 98 (1) ICC Statute is not applicable to state officials of States Parties. Through Article 27 ICC Statute, States Parties have already waived their obligations under international law concerning immunities as far as proceedings before the Court are concerned and with regard to other States Parties. The mainstream view is that Article 27 (2) ICC Statute does not only remove immunities *vis-à-vis* the ICC but also removes the applicability of immunities *vis-à-vis* national authorities of States Parties undertaking action in response to a request by the Court. Consider e.g. C. KRESS and K. PROST, Article 98, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1607 (the authors argue that in theory a distinction can be drawn between Article 27 (2) ICC Statute and Article 98 (1) ICC Statute as the latter provision deals with requests issued to states for surrender, which implies an exercise of that state's criminal jurisdiction while the former provision refers to the exercise of the Court's jurisdiction. However, such distinction denies the verticality in the relationship between the Court and national states and “fails to capture the substantial difference between the State arrest in a purely national or a traditional inter-State setting and in the context of direct enforcement of international criminal law *stricto sensu*” (*ibid.*, p. 1607)). For a similar view, see D. AKANDE, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, in «*Journal of International Criminal Justice*», Vol. 7, 2009, pp. 337 – 339 (“the better view is that Article 27 removes immunities, even with respect to actions taken by national authorities, where those authorities are acting in response to a request by the Court.” “[R]eading Article 27 as applying only to actions by the court render parts of that provision practically meaningless.”); D. AKANDE, *International Law and the International Criminal Court*, in «*American Journal of International Law*», Vol. 98, 2004, pp. 420 – 426.

¹³⁹ Consider in that regard D. AKANDE, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, in «*Journal of International Criminal Justice*», Vol. 7, 2009, p. 337 (calling such “a regrettable and amazing oversight by the Chamber” and that “[a] reader of the decision would think that the PTC was unaware that Article 98 appears to apply in precisely this sort of case”).

¹⁴⁰ Article 98 (2) ICC Statute; Rule 195 (2) ICC RPE.

¹⁴¹ D. AKANDE, *International Law and the International Criminal Court*, in «*American Journal of International Law*», Vol. 98, 2004, p. 426.

views exist regarding the question of whether the provision only applies to the nationals of states not party.¹⁴²

§ Rule of speciality

Surprisingly, a rule of speciality has been included in the ICC Statute implying that a person who is surrendered to the Court may only be prosecuted, punished or detained for conduct prior to the surrender which forms the basis of the crimes for which he or she was surrendered.¹⁴³ Rather than being a ground for refusing the surrender of a person, this rule limits the consequences thereof.¹⁴⁴ A waiver of this rule may be requested from the state that surrendered the person.¹⁴⁵ In turn, States Parties have the authority (read: are not obliged) to provide this waiver. This requirement stems from traditional extradition law.¹⁴⁶ This requirement is absent from the procedural scheme of the *ad hoc* tribunals.¹⁴⁷ The placement of

¹⁴² Consider *e.g.* AKANDE, who notes (*ibid.*, p. 428) that while Article 98 (2) ICC Statute does not expressly exclude States Parties, they should be excluded from the provision. He argues, *inter alia*, that given the substantial overlap between Article 98 (1) and (2) these provisions should be given a similar interpretation. Consequently, 98 (2) ICC Statute could be used to circumvent Article 98 (1). For a confirming view, see W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 1045. For another view, see C. KRESS and K. PROST, Article 98, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, München, Verlag C.H. Beck, 2008, p. 1915 (arguing that “[w]hile such a view would certainly yield results conducive to effective cooperation it must be recognized that the wording of paragraph 2 is not so confined”). However, at the same time, they reason that where the sending state is a State Party and is not exercising jurisdiction itself, it is bound to give its consent to a request for surrender. C. KRESS and K. PROST, Article 98, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, Article by Article, München, Verlag C.H. Beck, 2008, p. 1619.

¹⁴³ Article 101 (1) ICC Statute.

¹⁴⁴ G. SLUITER, *Surrender of War Criminals to the ICC*, in «The Loyola of Los Angeles International and Comparative Law Review», Vol. 25, 2003, p. 643.

¹⁴⁵ Article 101 (2) ICC Statute.

¹⁴⁶ Consider *e.g.* B. SWART, *Arrest and Surrender*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1699 (the author clarifies that such rule aims at enforcing other limitations and restrictions laid down in extradition law); P. WILKITZI, Article 101, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, Article by Article, München, Verlag C.H. Beck, 2008, p. 1635; G. SLUITER, *Surrender of War Criminals to the ICC*, in «The Loyola of Los Angeles International and Comparative Law Review», Vol. 25, 2003, p. 643 (“why prohibit prosecution for other conduct if a state party would be under a practically absolute duty to surrender for that conduct as well?”).

¹⁴⁷ Consider in this regard: ICTY, *Decision Stating Reasons for the Appeals Chamber's Order of 29 May 1998, Prosecutor v. Kovačević*, Case No. IT-97-24-AR73, A. Ch., 2 July 1998, par. 37 (“In the view of the Appeals Chamber, if there exists such a customary international law principle, it is associated with the institution of extradition as between states and does not apply in relation to the operations of the International Tribunal. That institution prohibits a state requesting extradition from prosecuting the extradited person on charges other than those alleged in the request for extradition. Obviously, any such additional prosecution could violate the normal sovereignty of the requested state. The fundamental relations between requested and requesting state have no counterpart in the arrangements relating to the International Tribunal”). This does not come as a surprise given that the states cannot refuse to arrest and surrender a person. See *supra*, Chapter 7, II.4.1.

this rule in the ICC Statute, characterised by a quasi-absolute obligation for states to surrender persons may surprise given that it is linked to the principle of state sovereignty.¹⁴⁸ Scholarly writings favour the deletion of this provision because it does not serve any purpose.¹⁴⁹ The provision may have been drafted with *ad hoc* cooperation agreements or *ad hoc* acceptance of jurisdiction in mind.¹⁵⁰ But then, this rule of speciality should, preferably, have been incorporated into the agreement.¹⁵¹ The person who has been surrendered to the Court should be provided the possibility to present their views on this issue.¹⁵²

§ *Requests for arrest and surrender*

Article 91 of the ICC Statute outlines the procedural requirements regarding the content of requests for arrest and surrender. The request should normally be made in writing.¹⁵³ It should be accompanied by a translation of the arrest warrant and by a translation of the relevant provisions of the Statute, in a language that the person ‘fully understands and speaks’.¹⁵⁴ The request should contain sufficient information allowing the identification of the person sought as well as information on the person’s probable location.¹⁵⁵ Moreover, a copy of the warrant of arrest as well as ‘documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested state’ should be included.¹⁵⁶ This latter requirement deserves our special consideration. The ICC Statute demands that requirements

¹⁴⁸ P. WILKITZI, Article 101, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1636.

¹⁴⁹ *Ibid.*, p. 1637 (arguing that where the jurisdiction of the Court is strictly limited, there is no real possibility for the surrendered person to be ‘cheated’ by a sudden extension of the charges); B. SWART, *Arrest and Surrender*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1700 (the author concludes that the requirement does not serve any useful purpose. First, the rule of speciality does not prohibit conviction for a lesser crime where such is based on the same set of facts. Besides, where the States Parties have an unconditional obligation to surrender a person to the Court, the rule of speciality cannot be applied where the state would have been obliged to surrender the person for an additional crime). One exception in this regard is KNOOPS, who argues that where “the rule of speciality constitutes one of the main principles of international extradition law, and has attained customary international law status, this rule may be regarded as normative for surrender proceedings initiated by international courts.” However, the author does not clarify what role such principle which stems from traditional extradition law plays in surrender proceedings. See G.-J.A. KNOOPS, *Surrendering to the International Criminal Court: Contemporary Practice and Procedures*, Ardsley, Transnational Publishers, 2005, p. 175.

¹⁵⁰ Article 12 (3) ICC Statute. G. SLUITER, *Surrender of War Criminals to the ICC*, in «*The Loyola of Los Angeles International and Comparative Law Review*», Vol. 25, 2003, p. 643.

¹⁵¹ B. SWART, *Arrest and Surrender*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1701.

¹⁵² Rule 196 ICC RPE.

¹⁵³ Article 91 (1) ICC Statute.

¹⁵⁴ Rule 187 ICC RPE *juncto* Rule 117 (1) ICC RPE (consider also Article 67 (1) (a) ICC Statute).

¹⁵⁵ Article 91 (2) (a) ICC Statute.

¹⁵⁶ Article 91 (2) (b) and (c) of the ICC Statute.

are not more burdensome than the requirements applicable to extradition requests pursuant to treaties and arrangements between the state concerned and other states.¹⁵⁷ Preferably, they should be less burdensome by taking the distinct nature of the ICC into consideration. This provision, in particular, seems to be incorporated to meet requirements characteristics for common law criminal justice systems. As explained above, common law criminal justice systems under domestic law often require supporting evidence to satisfy requests for extradition.¹⁵⁸ This requirement may imply that on some occasions, evidence additional to what is required pursuant to Article 58 ICC Statute is required for before addressing a request to the state concerned. In case no sufficient information is adduced, the person should be released.¹⁵⁹

§ Enforcing the obligation to arrest and surrender

In cases of failure of a State Party to honour a request for the arrest and surrender of a person, the Court may make a finding to that extent and refer the matter to the Assembly of States Parties, or where the Security Council referred the situation to the Court, to the Security Council.¹⁶⁰ The same regime applies if a state not party fails to honour a request for the arrest

¹⁵⁷ Article 91 (2) (c) ICC Statute.

¹⁵⁸ See SWART, noting that this provision is a compromise between different legal traditions regarding extradition proceedings. See B. SWART, Arrest and Surrender, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1690 (the author notes that “the basic compromise of Article 91 ICC Statute consists of respecting these differences in approach and allowing every State to stick to its own preferences.” While the author understands the advantage of such requirement where “a safeguard consisting of the production of evidence should not be disregarded”, he is equally sensitive to the argument that “it offers an opportunity for States unwilling to cooperate with an international court to delay compliance with that court’s requests or to sabotage them.”) See the discussion above on the U.S. surrender agreements with the *ad hoc* tribunals, *supra*, Chapter 7, II.3.1.

¹⁵⁹ This is so even if Article 59 (4) ICC Statute prevents the competent judicial authority from assessing the legality of the original arrest warrant. This provision does not prevent the requested state from raising the lack of sufficient information as an obstacle to the execution of the request for surrender. See G. SLUITER, Human Rights Protection in the ICC Pre-Trial Phase, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 470. Whereas SLUITER suggests inserting an additional provision in Article 59, giving additional time to the executive branch to request additional information from the ICC, it is not clear whether this would require the issuance of a new arrest warrant by the Court (including newly adduced evidence), as seems to be suggested by the author. At stake is the information, statements and documents that accompany the request for arrest and surrender, not the legality of the original warrant of arrest.

¹⁶⁰ Article 87 (7) ICC Statute *juncto* Regulation 109 of the Regulations of the Court; Article 112 (2) (f) ICC Statute. Consider also G. SLUITER, Obtaining Cooperation from Sudan – Where is the Law?, in «Journal of International Criminal Justice», Vol. 6, 2008, p. 875 (who points out that the ‘competent Chamber’ may be the same Chamber which issued the request for cooperation, in which case this provision would violate the *nemo iudex in sua causa* principle. Hence the author suggests “to build in a mechanism of review by a Chamber that is not directly involved and can review any finding with the required critical distance”). Consider e.g. ICC, Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with

and surrender of a person, in case of an Article 12 (3) declaration.¹⁶¹ Where a state not party which entered into an *ad hoc* arrangement or agreement with the Court fails to honour a request for the arrest and surrender of a person, the Court may inform the Assembly of States Parties or the Security Council (in case the Security Council referred the situation) of this failure to comply.¹⁶² The same regime applies in case of a state not party whose cooperation obligations follow from a Security Council resolution under Chapter VII of the UN Charter.¹⁶³

II.4. Execution of the arrest warrant

II.4.1. The *ad hoc* tribunals and the SCSL

The signed warrant of arrest, accompanied by the indictment and a statement of the rights of the accused, will be transmitted to the state concerned.¹⁶⁴ The latter document should be translated in a language which is understood by the accused.¹⁶⁵ When these documents are served to the accused, the documents should be read in a language which is understood by him or her. Furthermore, he or she should be cautioned in that language of his or her right to

the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Prosecutor v. Al Bashir, Situation in Darfur, Sudan*, Case No. ICC-02/05-01/09-140, PTC I, 13 December 2011; ICC, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Prosecutor v. Al Bashir, Situation in Darfur, Sudan*, Case No. ICC-02/05-01/09-139-Corr, PTC I, 12 December 2011.

¹⁶¹ See Article 12 (3) ICC Statute: 'The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9'.

¹⁶² Article 87 (5) (b) ICC Statute; C. KRESS and K. PROST, Article 87, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1524.

¹⁶³ C. KRESS and K. PROST, Article 86, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1524 (the authors note that the reference in Article 87 (5) (b) ICC Statute to 'an *ad hoc* arrangement or agreement with the Court' can only be exemplary and that binding obligations may also follow from a Security Council Resolution).

¹⁶⁴ Rule 55 (B) ICTR RPE; Rule 55 (C) ICTY RPE; or to the relevant authorities of the State of Sierra Leone in the case of the SCSL (Rule 55 (B) SCSL RPE). Note that no other information, including supporting evidentiary material will be transmitted to the state concerned. As noted by SWART, the absence of evidentiary material accompanying the request is more unusual to common law criminal justice systems where traditional extradition laws would require sufficient evidence for a person's arrest and his committal for trial. See B. SWART, *Arrest and Surrender*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1667.

¹⁶⁵ Rule 55 (B) (iii) ICTR and SCSL RPE; Rule 55 (C) ICTY RPE. Note that the ICTY Rule only requires that such translation is provided where the accused does not understand either of the official languages of the court and as far as the language understood by the accused is known to the registrar. The accused is not entitled to a copy of the warrant for his arrest in his or her own language. See ICTY, *Decision on the Motion for Release by the Accused Slavko Dokmanović, Prosecutor v. Mrkšić et al.*, Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 56.

remain silent and that any statement he or she provides will be recorded and may be used in evidence.¹⁶⁶ A member of the OTP can be present at the moment of the execution of the arrest warrant.¹⁶⁷ If this member is present, he or she has the authority to inform the accused of his rights and the nature of the charges.¹⁶⁸ However, this participatory right during the apprehension of the accused should be distinguished from the Prosecutor's power to execute the arrest him or herself directly.¹⁶⁹ While Rule 59bis (A) ICTY RPE allows for the transmission of a copy of the arrest warrant to the Prosecutor, this provision cannot be interpreted as allowing the Prosecutor to execute the arrest warrant on the territory of a state directly.¹⁷⁰

Rule 55 (E) ICTY and 55 (C) ICTR and SCSL RPE oblige the Registrar to 'instruct' the national authorities to serve the aforementioned documents on the accused. More interesting is the question of what the consequences are for the proceedings when these documents have not been properly served. The stated provisions do not provide for remedies in case of breaches of these obligations. In the *Ntagerura* case, the Defence alleged that the indictment, the warrant of arrest, and the statement of the rights of the accused were not properly served

¹⁶⁶ Rule 55 (E) ICTY RPE; compare Rule 55 (C) (iii) ICTR and SCSL RPE. According to Rule 55 (F) ICTY RPE, the documents should not be read to the accused where he or she has been served with the indictment and the statement of the rights of the accused in a language the accused understands or is able to read. On the right of the accused to remain silent, see *supra*, Chapter 4, IV.2.1.

¹⁶⁷ Rule 55 (D) ICTR and SCSL RPE and Rule 55 (G) ICTY RPE.

¹⁶⁸ ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 51; ICTR, Decision on Musabyimana's Motion on the Violation of Rule 55 and International Law at the Time of his Arrest and Transfer, *Prosecutor v. Musabyimana*, Case No. ICTR-2001-62-T, T. Ch. II, 20 June 2002, par. 16.

¹⁶⁹ ICTY, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v. Blaškić*, Case No. IT-95-AR108 bis, A. Ch., 29 October 1997, par. 26 (noting that the tribunal must turn to states in order to effectuate the arrests and to have them surrendered); ICTY, Decision on the Prosecutor's Request for Leave to Amend the Indictment and Issue of Warrant of Arrest and Order for Surrender, *Prosecutor v. Knežević*, Case No. IT-95-4-I, Confirming Judge, 19 July 2001, p. 3 ("the search for and arrest and transfer of an accused to the Tribunal do not form part of the functions assigned to the Prosecutor under Article 16 of the Statute of the Tribunal, and [...] Rule 55 (G) of the Rules provides that "when an arrest warrant issued by the Tribunal is executed by the authorities of a State or an appropriate authority or international body, a member of the Office of the Prosecutor may be present as from the time of the arrest"). Consider also M.P SCHARF, *The Prosecutor v. Slavko Dokmanović: Irregular Rendition and the ICTY*, in «Leiden Journal of International Law», Vol. 11, 1998, p. 379 (the author notes that the Appeals Chamber's judgment in *Blaškić* implies that the OTP may not act unilaterally, but that "it does not prevent them from participating in operations as an adjunct to the United Nations or NATO") and H-R. ZHOU, *The Enforcement of Arrest Warrants by International Forces: From the ICTY to the ICC*, in «Journal of International Criminal Justice», Vol. 4, 2006, p. 203 (noting that the OTP "should retain a strong participatory role in the apprehension of individuals indicted by the ICTY").

¹⁷⁰ See the argumentation provided *supra*, Chapter 7, II.3.1., fn. 84.

on Ntagerura.¹⁷¹ The Trial Chamber determined that in the absence of any information, it was unable to verify whether or not the relevant instruments were served on the accused. Nevertheless, the Trial Chamber reasoned that this possible lack of service was remedied as soon as was possible upon his transfer to the detention facilities in Arusha.¹⁷² Hence, the rights of the accused were respected as far as possible. This reasoning fails to acknowledge that serving these documents on the accused is not but a procedural error.¹⁷³ This requirement aims at safeguarding the rights of the accused, including the right to be informed of the reasons for his or her arrest and the right to be afforded sufficient time and facilities to prepare a defence. Regarding the former right, it should be noted that the warrant of arrest was confirmed on 10 August 1996 and that a request to serve these documents was sent to the authorities in Cameroon 12 August 1996.¹⁷⁴ It would not be until 23 January 1997, or more than five months later that Ntagerura would be transferred to Arusha and that the documents would be served on him.

Upon his or her arrest, the accused should be detained by the authorities concerned who will promptly notify the Registrar. Three different parties are involved in the transfer of the accused, namely the Registrar, the state authorities concerned, and the host state.¹⁷⁵ It is important to note that the RPE do not impose any time limitations on the length of the transfer proceedings. However, Rule 55 (A) ICTY RPE includes the additional requirement that the warrant of arrest includes an order for the prompt transfer of the accused to the tribunal upon the accused's arrest.¹⁷⁶

¹⁷¹ ICTR, Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment, *Prosecutor v. Ntagerura*, Case No. ICTR-96-10-I, T. Ch. II, 28 November 1997, par. 33.

¹⁷² Arguably, in the absence of any information, the Trial Chamber could have concluded that the non-compliance with Rule 55 (B) was not unequivocally shown. See G.-J.A. KNOOPS, *Surrendering to the International Criminal Court: Contemporary Practice and Procedures*, Ardsley, Transnational Publishers, 2005, pp. 178 – 179.

¹⁷³ ICTR, Decision on the Preliminary Motion filed by the Defence Based on Defects in the Form of the Indictment, *Prosecutor v. Ntagerura*, Case No. ICTR-96-10-I, T. Ch. II, 28 November 1997, par. 35.

¹⁷⁴ *Ibid.*, p. 2.

¹⁷⁵ Rule 57 ICTY, ICTR and SCSL RPE. No discretion is left to the national authorities to rule on provisional release.

¹⁷⁶ Rule 55 (A) ICTY RPE as amended at the fourteenth plenary session on 20 October and 12 November 1997 (IT/32/Rev. 12).

II.4.2. The International Criminal Court

The execution of requests for the arrest and surrender by the custodial state is governed by Article 89 (1) and 59 ICC Statute. First, where Article 89 (1) ICC Statute refers to a duty to cooperate ‘in accordance with the provisions of this Part [9] and the procedure under national law’, it implies that the state can choose how to implement a request for the arrest and surrender, as long as the surrender is obtained.¹⁷⁷ Secondly, and linked to that, is that the reference to Part 9 entails that Article 88 applies which requires that States Parties ensure that the procedures necessary for the arrest and surrender are foreseen under its domestic laws. Furthermore, Article 86 ICC Statute equally applies, which requires that the national law enables the state to ‘cooperate fully’ with the Court.¹⁷⁸ Consequently, the procedure under national law, referred to in Articles 89 and 59, should already have been amended to enable full cooperation. Thirdly, the discretion which is at the requested state’s disposal is substantially limited by Article 59 ICC Statute, which encompasses several obligations regarding the implementation of the request for arrest and surrender.¹⁷⁹

In contrast with the *ad hoc* tribunals, Article 59 sets out some rights the individual is entitled to in the course of arrest proceedings in the custodial state. A (*habeas corpus*) right for the person arrested to be promptly brought before the competent judicial authority is provided for.¹⁸⁰ This authority should determine, in accordance with municipal law (i) that the arrest warrant applies to that person, (ii) that the person has been arrested in accordance with the proper process, and (iii) that the person’s rights have been respected.¹⁸¹ The provision does not apply to the period of time before the receipt of the request for arrest and surrender by the custodial state. Different aspects of this provision are unclear. Differing views exist as to the

¹⁷⁷ See also Article 59 (1) ICC Statute and Article 99 (1) ICC Statute.

¹⁷⁸ For a similar argumentation, see M.M. EL ZEIDY, Critical Thoughts on Article 59(2) of the ICC Statute, in «Journal of International Criminal Justice», Vol. 4, 2006, p. 453 (suggesting that “the phrase ‘in accordance with the law of the state’ that appears in the *chapeau* of Article 59 (2) cannot be read in a manner that defeats the object and purpose of the Statute – namely the obligation to comply with the Court’s requests”).

¹⁷⁹ On the drafting history of Article 59 ICC Statute, consider *e.g. ibid.*, pp. 450 – 452 (the author notes (referring in particular to the prohibition for the competent authority to check the legality of the arrest warrant) that while “[t]he Rome Statute is based on the assumption that the ICC is to be complementary to national criminal jurisdictions; [...] some elements of Article 59 do not seem entirely consistent with this theory”).

¹⁸⁰ Article 59 (2) ICC Statute. For a discussion of the procedural right to be promptly brought before judge or ‘officer’ see *infra*, Chapter 7, V.2.

¹⁸¹ In doing so, the national competent authority acts on behalf of the Court (consider the argumentation of M.M. EL ZEIDY, Critical Thoughts on Article 59(2) of the ICC Statute, in «Journal of International Criminal Justice», Vol. 4, 2006, p. 458 (where the state loses its primacy once the ICC has ruled on the admissibility of the case, the state involved “is executing part of the proceedings *on behalf of the ICC*” (emphasis in original)).

scope of the ‘person’s rights’. To date, the Court’s jurisprudence has not elucidated its content further. Evidently, the rights the person is entitled to under national law as well as rights that follow from human rights treaties to which the requested state has acceded should be included.¹⁸² It has been noted by SLUITER that leaving the scope of ‘the person’s rights’ entirely to be determined by national law is dangerous: “if the attribution and interpretation of rights are a matter of national law only, the provision would lose much of its protective force, for the very simple reason that the degree of protection, and rights offered may vary considerably among States.”¹⁸³ At the very least, the rights under Article 55 should be included.¹⁸⁴ Such interpretation is not precluded by the wording of Article 55 (‘In respect of an investigation under this Statute’), nor by the holding of Pre-Trial Chamber I that Article 55 (1) does not apply to an investigation conducted by an entity other than the Prosecutor and which is not related to proceedings before the Court.¹⁸⁵ At issue here is the execution of the arrest proceedings at the request of the Court. Moreover, ‘the person’s rights’ should be interpreted as also encompassing the arrested person’s internationally protected rights.¹⁸⁶ Furthermore, it is unclear what ‘proper process’ in the sense of 59 (2) (b) ICC Statute entails exactly. In the absence of any definition, it is left to the States Parties or to the competent judicial authority to define these terms. From a study of the acts of States Parties implementing the ICC Statute, it follows that some states entertain the view that the term refers to the national procedural law applicable to the arrest of a person, while other states hold the view that the term refers to the lawfulness of the domestic arrest warrant executing

¹⁸² Such follows from the reference to ‘in accordance with the law of that State’ in the *chapeau* of Article 59 (2) of the Statute. Indeed, this reference has been interpreted by Pre-Trial Chamber I as referring to ‘national law’. See ICC, Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-512, PTC I, 3 October 2006, p. 6.

¹⁸³ G. SLUITER, Human Rights Protection in the ICC Pre-Trial Phase, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 472.

¹⁸⁴ However, as far as the determination of the ‘right not to be subjected to arbitrary arrest or detention and not to be deprived of his liberty except on such grounds, and in accordance with such procedures as are established in the Statute’ (Article 55 (1) (d) ICC Statute) is concerned, it should be noted that it is, for the biggest part, within the competence of the Pre-Trial Chamber and not within the competence of the competent national judicial authority. See B. SWART, Arrest Proceedings in the Custodial State, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, pp. 1253 – 1254.

¹⁸⁵ ICC, Decision on the ‘Corrigendum of the Challenge to the Jurisdiction of the International Criminal Court on the Basis of Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute Filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)’, *Prosecutor v. Gbagbo, Situation in Côte d’Ivoire*, Case No. ICC-02/11-01/11-212, PTC I, 15 August 2012, par. 96.

¹⁸⁶ G. SLUITER, Human Rights Protection in the ICC Pre-Trial Phase, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 474 (the author argues that whereas the *chapeau* of Article 59 (2) contains the words ‘in accordance with national law’, this should only refer to the national procedural steps). Consider also C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 709.

the arrest warrant issued by the ICC. Still other states leave the interpretation to the national judge.¹⁸⁷ At the very least, it implies that the arrest is executed in compliance with national law, including the human rights obligations which follow from treaties to which that state is a party.¹⁸⁸ However, it is regretful that the practice of the ICC refers only to ‘national law’, without any mention of human rights obligations.¹⁸⁹ Missing to the same extent again is any reference to Article 55 ICC Statute, including the right not to be subjected to arbitrary arrest or detention (Article 55 (1) (d) ICC Statute).

Importantly, according to Article 59 (4) ICC Statute, it is not open to the competent authority to challenge the legality of the warrant of arrest.¹⁹⁰ The person may challenge the legality of the arrest before the Pre-Trial Chamber and request the appointment of counsel to assist with proceedings before the Court.¹⁹¹ The Court should further ensure that as soon as the person is arrested by the requested state, he or she will receive a copy of the arrest warrant and of the

¹⁸⁷ Consider the survey by EL ZEIDY: M.M. EL ZEIDY, *Critical Thoughts on Article 59(2) of the ICC Statute*, in «Journal of International Criminal Justice», Vol. 4, 2006, pp. 454 – 455.

¹⁸⁸ Compare e.g. B. SWART, *Arrest Proceedings in the Custodial State*, in A. CASSESE, P. GAETA and J. R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1252 (arguing that the expression primarily refers to the national law of the requested state, including its obligations under human rights conventions) with C.K. HALL, Article 59, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1152 (arguing that the term means “that the warrant be duly served on the person arrested and the process be consistent with international law and standards”).

¹⁸⁹ Consider e.g. ICC, *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 41* (referring to “the process envisaged by Congolese law”). Nevertheless, it may be argued that the reference to national law may be interpreted as encompassing the obligations that follow from international human rights treaties, which that state is bound to apply. Critical is SLUITER, arguing that the Court should at least state whether the Congolese law was consistent with at least the rights set out in treaties to which Congo is a party. See G. SLUITER, *Human Rights Protection in the ICC Pre-Trial Phase*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 473.

¹⁹⁰ It seems to follow from the wording of Article 59 (4) ICC Statute that this provision does not apply to the proceedings under Article 59 (2) ICC Statute. First, the provision starts with the sentence “[i]n reaching a decision on any such application”, which refers to applications on interim release (Article 59 (3) ICC Statute). Secondly, whereas Article 59 (2) speaks of the competent *judicial* authority, Article 59 (4) refers to the competent authority. However, these arguments can be rebutted. First, the category of ‘competent authority’ may be interpreted as including the competent judicial authority referred to in Article 59 (2) ICC Statute. Secondly, it follows from the wording of Rule 117 (3) ICC RPE that the general competence to hear challenges to the legality of the arrest warrant lies with the Pre-Trial Chamber.

¹⁹¹ Rule 117 (2) and (3) ICC RPE. Apparently, these provisions do not include the assistance of counsel before the competent national authority. This is unfortunate where the assistance of counsel may not always be provided for. For a similar view, see W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 720.

relevant parts of the statute. This should be done in a language the person fully understands and speaks.¹⁹²

Furthermore, a right for the person to apply to the competent authority for provisional release pending surrender is provided for. This right will be discussed in detail in the subsequent chapter.¹⁹³ More important is what is *not* included in Article 59 ICC Statute. Absent are *remedies* in cases of violations of the rights of the person in the course of the arrest or during the detention in the custodial state. These violations should be distinguished from the non-compliance of States Parties with their cooperation obligations under Part 9, to which the remedies imbedded in Article 87 (5) (b) and (7) and 112 (2) (f) ICC Statute apply.¹⁹⁴ The absence of remedies in the context of proceedings at the national level coupled with the availability of remedies at the international level (Article 85) has been interpreted as reflecting the intention that the Court act as the final arbiter.¹⁹⁵ It seems impossible for the competent legal authority to impose a remedy if that prevents the execution of the request, without prior consultation with the Court.¹⁹⁶ Furthermore, when the national court determines that the proper process has not been respected, the person may have an enforceable right to compensation as a ‘victim of unlawful arrest or detention’.¹⁹⁷ In extreme cases, the state may refuse the surrender of the person, if the rights of the person have been breached.¹⁹⁸ Arguably, some risks are inherent to a cooperation regime which leaves flexibility to the requested state

¹⁹² Rule 117 (1) ICC RPE.

¹⁹³ See *infra* Chapter 8, II.3.

¹⁹⁴ Consider also Rule 109 of the Court Regulations.

¹⁹⁵ R.J. CURRIE, *Abducted Fugitives before the International Criminal Court: Problems and Prospects*, in «Criminal Law Forum», Vol. 18, 2007, p. 374.

¹⁹⁶ *Cf.* Article 97 ICC Statute. See G. SLUITER, *Surrender of War Criminals to the ICC*, in «The Loyola of Los Angeles International and Comparative Law Review», Vol. 25, 2003, p. 625.

¹⁹⁷ Article 85 (1) ICC Statute.

¹⁹⁸ See *e.g.* W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 719 (arguing that in case of violation of the person’s rights, the state should weigh its requirements pursuant to Article 59 (and 89) ICC Statute alongside other obligations it has pursuant to international human rights norms. In the absence of any hierarchy between these obligations, there is no reason why the state’s obligations under the Statute should prevail. In this regard, SLUITER notes that, pursuant to Article 59, the competent national authority cannot order final release with prejudice to the Prosecutor, if such would be warranted; nonetheless, egregious violations could be a reason for the executive branch to refuse cooperation. See G. SLUITER, *Human Rights Protection in the ICC Pre-Trial Phase*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 469. *Contra*: C.K. HALL, Article 59, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes*, München, Verlag C.H. Beck, 2008, p. 1152 (holding that “neither the determination by the judicial authority that the suspect’s rights were violated nor the remedies it adopted could prevent surrender to the Court”); M.M. EL ZEIDY, *Critical Thoughts on Article 59(2) of the ICC Statute*, in «Journal of International Criminal Justice», Vol. 4, 2006, p. 458 (“the national judge should not be competent to decline jurisdiction or stay proceedings at this point”).

to determine the remedy in case violations occur.¹⁹⁹ Overall, it seems that requested states could only refuse surrender exceptionally, since the Court “is seemingly best positioned to consider *all* the different elements playing a role in the process of an arrest and surrender.”²⁰⁰

§ *The supervisory role of the Court over Article 59 (2) ICC Statute*

The follow-up question then is to examine the role the Court can play in relation to the proceedings in the custodial state. It has been previously shown that the role of the Pre-Trial Chamber under Article 59 ICC Statute and Rule 117 ICC RPE *prior* to the transfer of the person is limited to challenges regarding the legality of the arrest and the appointment of counsel for proceedings before the Court. The importance of these responsibilities lies in the fact that it evidences that the role of the Pre-Trial Chamber in safeguarding the rights of suspects and accused persons also extends to pre-transfer proceedings.²⁰¹ More controversial is the role that the Pre-trial Chamber should play *following* the transfer of the suspect (or accused) to the Court in relation to the detention in the custodial state.

Even where the statutory provisions are silent on the question of whether any supervisory role is incumbent on the Pre-Trial Chamber, the litigation practice of the Court offers clarification. Notably, in *Lubanga*, the Defence argued on appeal that the Pre-Trial Chamber had ignored or paid inadequate attention to the supervisory role of the Pre-Trial Chamber under Article 59 (2) of the Statute. More precisely, the Defence argued that “the Pre-Trial Chamber is charged under this article to review the correctness of the decision of the Congolese authority to sanction the enforcement of the warrant of arrest.”²⁰²

¹⁹⁹ One may think of referrals of situations by the UN Security Council to the ICC pursuant to Article 12 (3) through what mechanism states not party may be forced to cooperate with the court (other scenarios are possible). Consider G. SLUITER, Human Rights Protection in the ICC Pre-Trial Phase, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 468 (warning that Article 59 ICC Statute may turn out to be a Trojan horse).

²⁰⁰ C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 727.

²⁰¹ In that regard, the Appeals Chamber in the case of *Katanga and Ngudjolo Chui* held that “the Pre-Trial Chamber has the primary responsibility of ensuring the protection of the rights of the suspects during the investigation stage of proceedings.” See ICC, Judgment on the Appeal of Mr. Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, *Situation in the DRC, Prosecutor v. Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07-2259 (OA 10), A. Ch., 12 July 2010, par. 40.

²⁰² ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 41; ICC, Decision on the “Corrigendum of the Challenge to the Jurisdiction of the International Criminal Court

The Appeals Chamber clarified that the Court does not sit as a court of appeal on the decision of the national competent authority.²⁰³ Its power to review questions of substance and procedure before national courts is limited.²⁰⁴ Rather, its task is to see that the national law was followed and that the rights of the person arrested were respected.²⁰⁵ As argued by the Pre-Trial Chamber, “it is for the national jurisdictions to have primary jurisdiction for interpreting and applying national law.”²⁰⁶ However, Pre-Trial Chamber I held that “this does not prevent to retain a degree of jurisdiction over how the national authorities interpret and apply national law when such an interpretation and application relates to matters which [...] are referred directly back to that national law by the Statute.”²⁰⁷ Similarly, in *Bemba*, Pre-Trial Chamber III held that questions of substance and procedure before national authorities should primarily be raised and pursued before the national authorities as they are better placed than international jurisdictions to deal with such issues and may provide for a proper remedy.²⁰⁸ The Chamber relied upon the approach taken by the ECtHR that:

“it is, not normally the Court’s task to review the observance of domestic law by national authorities [...] it is otherwise in relation to matters where [...] the Convention refers directly back to that law; for in such matters, disregard of the domestic law entails breach of the

on the Basis of Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute Filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)”, *Prosecutor v. Gbagbo, Situation in Côte d’Ivoire*, Case No. ICC-02/11-01/11-212, PTC I, 15 August 2012, par. 38.

²⁰³ *Ibid.*, par. 41; ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the CAR*, Case No. ICC-01/05-01/08-80-Anx, PTC III, 20 August 2008 (annexed to ICC, Decision Concerning the Public Version of the “Decision on Application for Interim Release” of 20 August 2008, *Prosecutor v. Bemba, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-80, PTC II, 26 August 2008), par. 42.

²⁰⁴ ICC, Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-512, PTC I, 3 October 2006, p. 6; ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the African Republic*, Case No. ICC-01/05-01/08-80-Anx, PTC III, 20 August 2008 (annexed to ICC, Decision Concerning the Public Version of the “Decision on Application for Interim Release” of 20 August 2008, *Prosecutor v. Bemba, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-80, PTC II, 26 August 2008, par. 42.

²⁰⁵ ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 41.

²⁰⁶ ICC, Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-512, PTC I, 3 October 2006, p. 6.

²⁰⁷ *Ibid.*, p. 6.

²⁰⁸ ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the CAR*, Case No. ICC-01/05-01/08-80-Anx, PTC III, 20 August 2008 (annexed to ICC, Decision Concerning the Public Version of the “Decision on Application for Interim Release” of 20 August 2008, *Prosecutor v. Bemba, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-80, PTC II, 26 August 2008), par. 42.

Convention, with the consequence that the Court can and should exercise a certain power of review.”²⁰⁹

Furthermore, as far as the interpretation of domestic laws goes, the ECtHR held that:

“It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic law [...] The Court’s role is confined to ascertain whether the effects of such an interpretation are compatible with the Convention.”²¹⁰

Consequently, a distinction should be drawn. On the one hand it is clear that the Pre-Trial Chamber, in the absence of an explicit provision, determined that it has the authority to review Article 59 (2) proceedings. This ‘procedural review’ is limited to the assessment of whether the procedural rights of the person pursuant to Article 59 (2) (a) – (c) were respected (e.g. the person was not promptly brought before the competent judicial authority) and limited to the international procedure.²¹¹ Consequently, this review would not encompass a review of the efficiency of the domestic procedure.

The Court seems more careful in its consideration and interpretation of the procedure and substance of domestic law. This review is primarily left with the national authorities. Nevertheless, the Court recognised that, since the international and national proceedings are entangled and to the extent that the respect of the procedural rights under Article 59 (2) ICC Statute depends on the national proceedings, it cannot disregard national law entirely. Regrettably, what is unclear from the Court’s reasoning is whether the Court should assess the domestic proceedings in light of Article 21 (3) and Article 55 (1) ICC Statute.

²⁰⁹ ECtHR, *Winterwerp v. Netherlands*, Communication No. 6301/73, Series A, No. 33, Judgment of 24 October 1979, par. 46.

²¹⁰ ECtHR, *Edificaciones March Gallego S.A. v. Spain*, Application No. 28028/95, Reports 1998-I, Judgment of 19 February 1998, par. 33; ECtHR, *Bulut v. Austria*, Application No. 17358/90, Reports 1996-II, Judgment of 22 February 1996, par. 29; ECtHR, *Beshiri and Others v. Albania*, Application No. 7352/03, Judgment of 22 August 2006, par. 37.

²¹¹ EL ZEIDY argues that the review powers of the Court follow from the fact that notwithstanding the principle of complementarity, at the Article 59 stage, the state acts on behalf of the ICC. Consider M.M. EL ZEIDY, Critical Thoughts on Article 59(2) of the ICC Statute, in «Journal of International Criminal Justice», Vol. 4, 2006, p. 458. This argument seems to be based on the view that the issuance of an arrest warrant necessarily encompasses an assessment of the admissibility of the case. However, consider in this regard ICC, Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I Entitled “Decision on the Prosecutor’s Application for Warrants of Arrests, Article 58”, *Situation in the DRC*, Situation No. 01/04-169, A. Ch., 13 July 2006.

There is an inherent tension in the way the Court views its role with regard to proceedings in the custodial state. It is difficult to reconcile the Court's self-proclaimed 'primary' role which it should play at the pre-trial stage in safeguarding the rights of suspects and of accused persons with the hesitant role it plays in reviewing proceedings in the custodial state. The reference made to the role played by the ECtHR *vis-à-vis* national authorities illustrates this point perfectly. Central to the ECtHR's functioning is the organisational 'principle of subsidiarity'. However, the role played by the ECtHR cannot easily be compared with the role played by the ICC which is the Court which finally adjudicates the matter and which encompasses proceedings which are characterised by their fragmentation over several jurisdictions. If the Pre-Trial Chamber is serious about its *primary function* in protecting the rights of the suspects and accused at the pre-trial stage, it should show a willingness to review all pre-trial violations and to remedy every violation.

Furthermore, the obligation incumbent on the competent national authorities to assess whether the proper process has been respected does not extend to the arrest and detention *before* the cooperation request by the Court which are not linked to the proceedings before the Court.²¹² In addition, the Appeals Chamber confirmed that violations occurring prior to the sending of the cooperation request will only be considered by the ICC once a 'concerted action' between the Court and the DRC has been established.²¹³ The Court is not responsible for detention in the custodial state which was not *at the behest* of the tribunal. However, in addition, the Court may stay the proceedings when violations make a fair trial impossible.²¹⁴ Similarly, in the *Katanga and Ngudjolo Chui* case, Pre-Trial Chamber I held that Article 59 (2) "is only applicable to those proceedings that take place after the transmission by the Registrar of the relevant cooperation request for arrest and surrender" and, accordingly that "any alleged prior violations of international human rights standards *vis-à-vis* a suspect [...] that according to the Defence, may prevent this Court from exercising jurisdiction over him,

²¹² ICC, Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-512, PTC I, 3 October 2006, p. 6 (holding that the detention prior to 14 March 2006 was solely related to national proceedings in the DRC).

²¹³ *Ibid.*, p. 9; ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 42. See the detailed discussion, *infra*, Chapter 7, VII, 2.

²¹⁴ Consider the discussion of the ICC practice regarding the stay of proceedings in case a fair trial is no longer possible, *infra*, Chapter 7, VII, 2.

must be raised as a challenge to jurisdiction pursuant to article 19 of the Statute.”²¹⁵ In *Gbagbo*, Pre-Trial Chamber I, somewhat differently, held that Article 59 does not apply “to the period of time before the receipt of the custodial State of the request for arrest and surrender, even where the person may already have been in the custody of that State, and regardless of the grounds for any such prior detention.”²¹⁶ This differs from the Appeals Chamber’s holding that the *sending*, rather than the *receipt* of the arrest and surrender request marks the start of the proceedings under Article 59. However, further on, the Pre-Trial Chamber notes that the transmission of the request for arrest and surrender triggers the obligations under Article 59 ICC Statute, further adding to the confusion.²¹⁷

In the aforementioned *Lubanga* case, the Defence’s principal claim was that the Pre-Trial Chamber ignored human rights breaches before his appearance and “before the directions for the enforcement of the warrant of arrest.” The Appeals Chamber held that there was no evidence to lend credence to the allegations of the appellant where the information provided did not reveal that the process of bringing the person to justice was flawed in any way. “Mere knowledge on the part of the Prosecutor of the investigations conducted by the Congolese authorities is no proof of involvement on his part in the way they were conducted or the means including detention used for this purpose”.²¹⁸ Consequently, no ‘concerted action’ could be established.

The limited role the Pre-Trial Chamber assigned itself in addressing pre-transfer violations of the rights of the suspect has been criticised.²¹⁹ Indeed, only the Court seems to be in the

²¹⁵ See the reference to a confidential decision in ICC, Public Redacted version of the “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings” of 20 November 2009 (ICC-01/04-01/07-1666-Cong-Exp), *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07, T. Ch. II, 3 December 2009, par. 44 (as cited with approval by Trial Chamber II).

²¹⁶ ICC, Decision on the ‘Corrigendum of the Challenge to the Jurisdiction of the International Criminal Court on the Basis of Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute Filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)’, *Prosecutor v. Gbagbo, Situation in Côte d’Ivoire*, Case No. ICC-02/11-01/11-212, PTC I, 15 August 2012, par. 101.

²¹⁷ *Ibid.*, par. 102 (“The Chamber notes that the Registrar transmitted to Côte d’Ivoire the request for arrest and surrender of Mr. Gbagbo on 25 November 2011, triggering the obligations of Côte d’Ivoire under Article 59 of the Statute”).

²¹⁸ ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 42.

²¹⁹ G. SLUITER, Human Rights Protection in the ICC Pre-Trial Phase, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 470.

position to effectively address those violations.²²⁰ Moreover, the inherent risk of the aforementioned interpretation by the Court is that it may lead to a situation whereby the ICC Registrar postpones the sending of the request for arrest and surrender until such time that he or she knows that the person can immediately be surrendered. In this manner, the Court can avoid incurring responsibility for pre-transfer violations of the suspect.

Similar to the *ad hoc* tribunals and the SCSL, the surrender arrangements will involve three parties, to know the national authorities, the Registry, and the host state.²²¹ While it follows from Article 59 ICC Statute that the arrest will be conducted by the national authorities, neither the Statute nor the RPE shed light on the question as to whether and in how far the staff of the OTP may assist and participate in the arrest.²²²

One more difference with the *ad hoc* tribunals and the Special Court is to be noted here. Pre-Trial Chamber I held that the Pre-Trial Chamber, assisted by the Registry (pursuant to Rule 176 (2) ICC RPE and Rule 184 ICC RPE), is the only organ that is competent to make and transmit a cooperation request for arrest and surrender.²²³ Only when “specific and compelling circumstances” exist can the Chamber authorise the Prosecution to transmit a particular cooperation request for an arrest and surrender.²²⁴ At the ICTY, these requests could be transmitted by the Prosecutor. Indeed, it may be recalled that an arrest warrant may, pursuant to Rule 59*bis* ICTY RPE, be addressed to the Prosecutor directly. Moreover, Rule 55 (D) ICTY RPE leaves discretion regarding the organ that should be entrusted with the transmission of cooperation requests.²²⁵

²²⁰ In this regard, SLUITER refers to three compelling reasons for the Court to address *any* violation: (i) offering a remedy for the violation of a right (cf. Article 85 ICC Statute); (ii) to prevent future violations and; (iii) to preserve the integrity of the court proceedings.

²²¹ Rule 184 ICC RPE; Regulations 76 and 77 of the ICC Regulations of the Registry.

²²² Compare with the practice of the *ad hoc* tribunals, *supra*, Chapter 7, II.4.1.

²²³ ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, *Situation in the DRC, Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 117 (annexed to ICC, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the case against Mr. Thomas Lubanga Dyilo, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-8, PTC I, 24 February 2006). Consider also ICC, Informal Expert Paper: Fact finding and Investigative Functions; par. 82 (arguing that the Prosecutor should be empowered to make such request as part of its power, pursuant to Article 54 (3) (e) ICC Statute to “[s]eek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate”).

²²⁴ *Ibid.*, par. 119 (referring to a decision of Pre-Trial Chamber II of 12 July 2005).

²²⁵ Rule 55 (D) ICTY RPE (“*Subject to any order of a Judge or Chamber, the Registrar may transmit a certified copy of a warrant of arrest to the person or authorities to which it is addressed*” (emphasis added)). *Ibid.*, par. 118.

II.5. Indictments/Arrest warrants under seal

Arrest warrants are often not disclosed but issued under seal.²²⁶ The basis for this course of action is to be found in Rule 53 ICTY, ICTR, and SCSL RPE which provides that the Judge confirming the indictment may, in consultation with the Prosecutor, order that the indictment is not to be publicly disclosed until the indictment has been served on the accused or on all accused (compare Rule 74 STL RPE).²²⁷ ICTY Rule 53 (D) additionally provides that this does not prevent the Prosecutor from disclosing the indictment or parts thereof to the authorities of a state or an appropriate authority or international body when he or she considers this to be necessary not to lose an opportunity to secure the possible arrest of an accused.²²⁸ Whereas originally, this possibility was not relied upon in practice, the ICTY Prosecutor (Arbour) decided in 1997 to adopt a new strategy and to request sealed indictments to foster arrests.²²⁹ The importance of this tool lies in its potential to prevent the accused person from absconding or from interfering with victims, witnesses and evidence.²³⁰ One author has argued that the practice of sealed indictments may infringe upon the accused's right to be informed promptly and in detail of the nature and the cause of the charges against him or her.²³¹ However, from a human rights perspective, it is not so much the time between the moment that the charges were confirmed and the communication of the charges to the

²²⁶ ICTY Manual on Developed Practices, Turin, UNICRI Publisher, 2009, p. 47; C. RYNGAERT, Arrest and Detention, in L. REYDAMS, J. WOUTERS and C. RYNGAERT (eds.), International Prosecutors, Oxford, Oxford University Press, 2012, p. 667.

²²⁷ Rule 53 (B) ICTY, ICTR and SCSL RPE.

²²⁸ Rule 53 (D) ICTY, ICTR RPE.

²²⁹ Fourth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/52/375/ - S/1997/729, 18 September 1997, par. 60 ("In response to the dilatoriness of some States to hand over indicted persons to the Tribunal, the Prosecutor decided to implement a new strategy that would lead to their detention and arrest. The Prosecutor requested the Trial Chambers that certain new indictments and certain amendments to existing indictments not be disclosed, that is, remain confidential, and that the names of suspects not be released until they are apprehended. Such indictments were then handed over to those entities which had the authority and opportunity to detain the indicted persons. In June and July 1997, this new strategy resulted in the detention and arrest of two indictees - Slavko Dokmanović and Milan Kovačević"); L. ARBOUR, The Crucial Years, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 397.

²³⁰ C. RYNGAERT, Arrest and Detention, in L. REYDAMS, J. WOUTERS and C. RYNGAERT (eds.), International Prosecutors, Oxford, Oxford University Press, 2012, p. 667. Compare ICC, Decision to Unseal the Warrant of Arrest against Bosco Ntaganda, *Prosecutor v. Ntaganda, Situation in the DRC*, Case No. ICC-01/04-02/06-18, PTC I, 28 April 2008, p. 4 ("public knowledge of the proceedings in this case might result in Bosco Ntaganda hiding, fleeing, and/or obstructing or endangering the investigations or the proceedings of the Court").

²³¹ A question raised by SLUITER. See G. SLUITER, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 1997-1999, Vol. III, Antwerp, Intersentia, 2001, p. 154 (the author notes that the wording of the provisions in the relevant human rights instruments does not suggest that such guarantee would only apply from the moment of arrest).

accused person which is important, but rather the fact that the accused is given sufficient time for the preparation of his or her defence.²³²

Likewise, nothing in Article 58 ICC Statute prevents the use of sealed warrants of arrest.²³³ In practice, warrants are often issued under seal.²³⁴ The warrants of arrest are made public upon their execution. However, the Prosecution sometimes requests that an indictment be made public prior to the effectuation of the arrest. For example, in *Ntaganda*, the Prosecution requested the unsealing based on the facts that (i) the suspect was not longer fighting as top commander of the MRC, (ii) there were reasons to believe that Ntaganda had become aware of the existence of an arrest warrant against him, (iii) protective measures to ensure the adequate protection of witnesses had been taken, (iv) informing international actors of the warrant of arrest could frustrate efforts by Ntaganda to go into hiding in neighbouring countries, and (v) the Congolese authorities were not able to execute the arrest and the unsealing of the warrant of arrest could facilitate this process.²³⁵

II.6. Procedure in case of failure to execute the arrest warrant

In cases where the state to which the warrant for arrest or transfer issued by the *ad hoc* tribunals is directed, is 'unable' to execute the arrest or transfer, it should inform the Registrar of the reasons for this. Clearly, as stated previously, the obligation of states *vis-à-vis* the *ad*

²³² S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, p. 207. The author refers to General Comment No. 13. In this General Comment, the Human Rights Committee held that "the right to be informed of the charge "promptly" requires that information is given in the manner described as soon as the charge is first made by a competent authority. In the opinion of the Committee *this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such* (emphasis added). Consequently, whereas at that moment, a procedural step (the confirmation of the indictment) has already been taken against the person, the person has not yet been publicly named. See HRC, CCPR General Comment No. 13: Article 14 (Administration of Justice) 13 April 1984, par. 8.

²³³ C.K. HALL, Article 58, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1138.

²³⁴ Consider *e.g.* ICC, Decision to Unseal the Warrant of Arrest against Mr. Thomas Lubanga Dyilo and Related Documents, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06, PTC I, 17 March 2006; ICC, Decision to Unseal the Warrant of Arrest against Mathieu Ngudjolo Chui, *Prosecutor v. Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-02/07, PTC I, 7 February 2008; ICC, Decision to Unseal the Warrant of Arrest against Bosco Ntaganda, *Prosecutor v. Ntaganda, Situation in the DRC*, Case No. ICC-01/04-02/06-18, PTC I, 28 April 2008; ICC, Decision to Unseal the Warrant of Arrest against Germain Katanga, *Prosecutor v. Katanga, Situation in the DRC*, Case No. 01/04-01/07, PTC I, 18 October 2007; ICC, Decision to Unseal the Warrant of Arrest against Mr. Jean-Pierre Bemba Gombo, *Prosecutor v. Bemba Gombo, Situation in the CAR*, Case No. ICC-01/05-01/08-5, PTC III, 24 May 2008.

²³⁵ ICC, Decision to Unseal the Warrant of Arrest against Bosco Ntaganda, *Prosecutor v. Ntaganda, Situation in the DRC*, Case No. ICC-01/04-02/06-18, PTC I, 28 April 2008, p. 5.

hoc tribunals is one of result. In cases where no action is undertaken and no report has been made within a reasonable time, the RPE provide for a presumption of a ‘failure’ on the part of the state to execute the arrest warrant or transfer and the Trial Chamber may refer to the President for appropriate action. This action may include reporting the matter to the Security Council.²³⁶

Rule 61 ICTY and ICTR RPE is triggered when the indictment could not be served on the accused within a reasonable time. The Confirming Judge may invite the Prosecutor to report on the measures taken.²³⁷ The procedure may be initiated if the Judge is convinced that (1) all reasonable steps have been taken by the Prosecutor and the Registrar (including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the person to be served resides or was last known to them to be), and (2) the whereabouts of the person remain unknown and all reasonable steps have been taken to ascertain the whereabouts (including via public advertisement). In such case, the Judge will order the Prosecutor to submit the indictment to the Trial Chamber, together with all the evidence that was submitted to the Confirming Judge. The Prosecutor may call and examine witnesses whose statements were submitted to the Confirming Judge and may tender additional evidence.²³⁸ Additionally, the ICTY Trial Chamber may request that the Prosecutor call other witnesses whose statements had been submitted.²³⁹ The accused is not represented during the proceedings.²⁴⁰ The Trial Chamber will make a determination as to whether ‘reasonable grounds’ exist to believe that the person has committed any or all of the charges

²³⁶ Rule 59 (B) ICTY, ICTR and SCSL (with regard to the Sierra Leone authorities) RPE.

²³⁷ Rule 61 (A) ICTY RPE was amended on 18 January 1996. In its original form, Rule 61 did not leave it to the Judge to ‘invite’ the Prosecutor but left the initiative with the Prosecutor.

²³⁸ Rule 61 (B) ICTY and (C) ICTR RPE. Prior to its amendment on 30 January 1995 during the fifth plenary session (IT/32/Rev.3), Rule 61 (B) excluded the possibility of live evidence. The possibility of live evidence responded to the rights of victims to be heard in public. See fn. 244 and accompanying text.

²³⁹ Rule 61 (B) ICTY RPE. A similar *proprio motu* power is not provided for under Rule 61 ICTR RPE.

²⁴⁰ Consider ICTY, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, *Prosecutor v. Karadžić and Mladić*, Case No. IT-95-5-R61 and IT-95-18-R61, T. Ch., 11 July 1996, par. 4; ICTY, Decision Partially Rejecting the Request Submitted by Mr. Igor Pantelić, Counsel for Radovan Karadžić, *Prosecutor v. Karadžić and Mladić*, Case No. IT-95-5-R61 and IT-95-18-R61, T. Ch., 27 June 1996, p. 2 (“considering that Rule 61 proceedings cannot be considered to constitute trial proceedings”); ICTY, Decision Rejecting the Request submitted by Mr. Medvene and Mr. Hanley III, Defence Counsel for Radovan Karadžić, *Prosecutor v. Karadžić and Mladić*, Case No. IT-95-5-R61 and IT-95-18-R61, T. Ch., 11 July 1996; ICTY, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, *Prosecutor v. Rajić and Andrić*, Case No. IT-95-12-R61, T. Ch., 13 September 1996, p. 2.

alleged in the indictment.²⁴¹ Importantly, the Rule 61 procedure is not a trial *in absentia* insofar that there is no finding of guilt.²⁴² Rather, the procedure's purpose is to:

“give the Prosecutor the opportunity to present in open court the indictment against an accused and the evidence supporting the indictment. Rule 61 proceedings therefore are a public reminder that an accused is wanted for serious violations of international humanitarian law. They also offer the victims of atrocities the opportunity to be heard and create a historical record of the manner in which they were treated.”²⁴³

In this latter sense, the proceedings may offer a ‘formal means of redress’ to the victims insofar that it allows them to testify and to have their testimony recorded.²⁴⁴ In general, these proceedings ensure that the tribunal, which lacks direct enforcement powers, “is not rendered ineffective by the non-appearance by the accused and may proceed nevertheless.”²⁴⁵

The tribunal will order an international arrest warrant, and may issue an order to (a) state(s) to adopt provisional measures to freeze the assets of the accused (*proprio motu* or at the Prosecutor's request).²⁴⁶ If the Trial Chamber determines that the failure to serve the arrest warrant is due in part, or entirely, to the lack of cooperation by one or more states, the President may, after consultation with the Judges, notify the Security Council.²⁴⁷

²⁴¹ Rule 61 (C) ICTY and ICTR RPE.

²⁴² ICTY, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, *Prosecutor v. Rajić and Andrić*, Case No. IT-95-12-R61, T. Ch., 13 September 1996, par. 3. The Trial Chamber noted that “[t]he only consequences are the public airing of evidence against the accused and the possible issuance of an international arrest warrant.”

²⁴³ *Ibid.*, par. 2.

²⁴⁴ Second Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/50/365/S/1995/278, 23 August 1995, par. 198. As stated by the Trial Chamber: “When called to appear by the Prosecutor, the victims may use this forum to have their voices heard and to live on in history.” See ICTY, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, *Prosecutor v. Karadžić and Mladić*, Case No. IT-95-5-R61 and IT-95-18-R61, T. Ch., 11 July 1996, par. 3.

²⁴⁵ ICTY, Decision, *Prosecutor v. Martić*, Case No. IT-95-11-R61, T. Ch., 8 March 1996, par. 3; ICTY, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, *Prosecutor v. Nikolić*, Case No. IT-94-2-R.61, T. Ch., 20 October 1995, par. 3.

²⁴⁶ Rule 61 (D) ICTY and ICTR RPE. On the freezing of assets, see *supra*, Chapter 6, II.3. Probably, the issuance of an international arrest warrant may not prove very helpful where the person remains on the territory of the state to which the arrest warrant was first addressed. However, it has been noted that it may be a helpful tool in ‘publicly branding’ an ‘international fugitive’. See S. FURUYA, Rule 61 Proceedings in the International Criminal Tribunal for the Former Yugoslavia, A Lesson for the ICC, in «Leiden Journal of International Law», Vol. 12, 1999, p. 641 (quoting the ICTY Information Memorandum on Rule 61).

²⁴⁷ See *e.g.* the notification in the *Nikolić* case (IT-94-2-R61) on non-cooperation by the Bosnian Serb administration; in the *Rajić* case (IT-95-12-R61) on the non-cooperation by Bosnia and Herzegovina and Croatia; in the *Karadžić* case (IT-95-II-R61; IT-95-18-R61) on the non-cooperation by the FRY and the Republika Srpska and in the *Mrkšić* case (IT-95-13-R61) on the non-cooperation by the FRY.

Rule 61 proceedings fulfill a dual function.²⁴⁸ On the one hand, they serve as an *ex parte* re-confirmation of the indictment in open court, culminating in the determination of whether there are reasonable grounds for believing that the accused has committed the crime, even though this decision is provisional in nature.²⁴⁹ On the other hand, an assessment is made concerning who is responsible for the failure to execute the arrest warrant.

Rule 61 proceedings were never held at the ICTR or the SCSL. At present, this procedure may be referred to in terms of a ‘historical curiosity’.²⁵⁰ Indeed, whereas this procedure was relied upon in the early years of the ICTY, the procedure quickly became obsolete once defendants were surrendered to the custody of the ICTY.²⁵¹ The ICC Statute does not provide for a procedure similar to Rule 61 in case of failure to execute an arrest warrant.²⁵² No distinction is drawn between arrest warrants addressed at individual states and international arrest warrants.²⁵³

²⁴⁸ S. FURUYA, Rule 61 Proceedings in the International Criminal Tribunal for the Former Yugoslavia, A Lesson for the ICC, in «Leiden Journal of International Law», Vol. 12, 1999, p. 642.

²⁴⁹ *Ibid.*, p. 642.

²⁵⁰ W.A. SCHABAS, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone, Cambridge, Cambridge University Press, 2006, p. 383 (the author argues that “Rule 61 was adopted as a compromise intended to assuage critics from continental European justice systems who charged that the lack of an *in absentia* procedure would seriously hamper the work of the Tribunal”).

²⁵¹ Some procedural actors have ventilated strong criticism on Rule 61 proceeding. Notable are the comments by Louise Arbour, who argued: “I believed that recourse to Rule 61 was detrimental to the work of the Prosecutor, and I was never persuaded that its benefits outweighed its deleterious effects. First and foremost, the Rule 61 hearings exposed publicly large parts of the evidence against the accused before he was apprehended. This exposure increased the danger of witness intimidation, tampering with evidence and fabrication of convenient evidentiary responses. It also monopolized important and scarce resources within [the] OTP, with investigators and prosecutors re-examining the case for hearing preparation rather than moving on to developing new cases. Because the hearings were, by definition, *ex parte*, it also gave the trial attorneys, in my view, a false sense of security and confidence in the quality of their case. Evidence always looks better when it is unopposed and unchallenged. In short, I was not favourably exposed to Rule 61 hearings, but the matter was not under my control. I came to believe it would resolve itself if we were successful in our arrest strategy and that I should focus my energies there. Rule 61 is, however, an example of an institutional issue that impacts considerably on the work of the Prosecutor and the internal constraints under which he or she operates.” L. ARBOUR, The Crucial Years, in «Journal of International Criminal Justice», Vol. 2, 2004, pp. 398 – 399. For an overview of Rule 61 proceedings before the ICTY, see ICTY, Third Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/51/292- S/1996/665, 16 August 1996, par. 50 – 61.

²⁵² However, consider the discussion of Article 87 (5) (b) and 87 (7) ICC Statute, *supra*, Chapter 7, II.4.2.

²⁵³ Compare with Rule 84 STL RPE. Where no Rule 61 equivalent is provided for, the Prosecutor may request the Pre-Trial Judge or Trial Chamber to issue an international arrest warrant. Similarly, the ECCC IR do not put restrictions on the issuance of international arrest warrants. See Rule 42 ECCC IR.

III. ARREST IN THE ABSENCE OF AN ARREST WARRANT

III.1. The *ad hoc* tribunals and the SCSL

In cases of urgency, provision is made under the RPE of the *ad hoc* tribunals and the Special Court for the provisional arrest of *suspects* in the absence of a warrant.²⁵⁴ In this regard, ICTR Trial Chamber II referred to “the need to allow for short, provisional detentions of persons under investigation by the Tribunal in order to, for example, preserve physical evidence, avoid escape of a suspect, and/or prevent injury to or intimidation of a victim or witness.”²⁵⁵ Where the *ad hoc* tribunals and the Special Court lack a direct enforcement mechanism, the RPE establish a system which provides for the provisional detention of suspects by a requested state at the behest of the tribunal.²⁵⁶ No explicit power to provisionally arrest suspects is provided for under the Statutes of the different tribunals.²⁵⁷ However, the cooperation obligations incumbent on states do, as explained previously, extend to the arrest of suspects.²⁵⁸ Again, specific legitimate grounds upon which the provisional arrest of persons is allowed are absent.²⁵⁹ Nevertheless, it is remarkable that reference is sometimes made in

²⁵⁴ Rule 40 (i) ICTY RPE (allowing the Prosecutor to request any state to provisionally arrest a suspect or accused. The state should comply, pursuant to its obligations under Article 29 ICTY Statute); Rule 40 (A) (i) ICTR RPE; Rule 40 (A) (i) SCSL RPE. The ICTR Trial Chamber in *Ngirumpatse* noted that, whereas many national jurisdictions require a warrant, the Statute and Rules do not. See ICTR, Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items, *Prosecutor v. Ngirumpatse*, Case No. ICTR-97-44-I, T. Ch. II, 10 December 1999, par. 63.

²⁵⁵ ICTR, Judgement and Sentence, *Prosecutor v. Bizimungu*, Case No. Case No. ICTR-99-50-T, T. Ch. II, 30 September 2011, par. 22.

²⁵⁶ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 42.

²⁵⁷ Whereas some defendants have objected that Rule 40 is unlawful as it finds no basis in the Statute, such claims have been dismissed. Consider *e.g.* ICTR, Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-I, T. Ch. II, 18 November 1998, p. 6 (noting that Rule 40 (*bis*) ICTR RPE does not contradict the Statute (Article 17 – 20 ICTR Statute in particular) but supplements it). The Special Court held that from the absence of any specific reference to the detention of suspects in the SCSL Statute, it cannot be concluded that the detention of suspects is *ultra vires*. See SCSL, Decision on the Urgent Defence Application for Release from Provisional Detention, *Prosecutor v. Kondewa*, Case No. SCSL-2003-12-PT, T. Ch., 21 November 2003, par. 24 - 28 (The Trial Chamber reasons, *inter alia*, that “through the process of incorporation of these Rules, the Statute of ‘The Special Court’, when adopted by legislative authority, did provide for the detention of suspects, as such provisions existed in the said Rules at the time of establishment of the ‘Special Court’”). Similarly, see SCSL, Decision on the Urgent Defence Application for Release from Provisional Detention, *Prosecutor v. Fofana*, Case No. SCSL-2003-11-P[T], T. Ch., 21 November 2003, par. 24 – 28.

²⁵⁸ See Article 29 (2) (d) and (e) ICTY Statute and Article 28 (2) (d) and (e) ICTR Statute respectively. Consider the discussion of these provisions, *supra*, Chapter 7, II.3.1.

²⁵⁹ See ICTY, Decision on the Motions for the Exclusion of Evidence by the Accused, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, TC. II, 25 September 1997, par. 38 (finding that there is nothing in Rule 40 from which it can be inferred that the grounds on which a person can be provisionally arrested are limited. In the wording of the Trial Chamber, such reading “would be an unwarranted fetter on [the Prosecution’s] ability to perform her duties effectively to limit the exercise of her discretionary powers [...]” The Defence had argued

the jurisprudence to such underlying grounds, necessitating the provisional arrest of a suspect.²⁶⁰

III.1.1. Standard of proof for warrantless provisional detention

In *Kajelijeli*, the ICTR Trial Chamber held that the only *threshold* for the arrest of a suspect pursuant to Rule 40 (A) (i) ICTR RPE, follows from the definition of ‘suspects’, according to which it concerns individuals about whom the Prosecutor possesses reliable information, which tends to show that a person may have committed a crime over which the tribunal has jurisdiction. No other standard of proof, such as the existence of ‘probable cause’, exists.²⁶¹ There is no requirement for the Prosecutor to already have initiated proceedings against a suspect prior to requesting his or her provisional arrest pursuant to Rule 40 (A).²⁶² The Trial Chamber held in *Kajelijeli* that whenever a suspect is arrested, there is no requirement for the Prosecutor to have an arrest warrant or to have evidence that the person has committed a crime within the jurisdiction of the Court.²⁶³ The Appeals Chamber disagreed with the Trial

that provisional arrest can only be requested by the Prosecutor for the goal of collecting evidence or in order to prevent the escape of a suspect).

²⁶⁰ For example, in *Ngirumpatse*, the Trial Chamber found that the situation of urgency, pursuant to Rule 40 (A) ICTR RPE, arose from (1) a risk of flight, (2) the possible destruction of evidence and (3) the Prosecutor’s attempt to coordinate the arrest of several suspects by several States and avoid the flight of other suspects. See ICTR, Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items, *Prosecutor v. Ngirumpatse*, Case No. ICTR-97-44-I, T. Ch. II, 10 December 1999, par. 62.

²⁶¹ ICTR, Decision on Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44-I, T. Ch. II, 8 May 2000, par. 32. Consider S.L. RUSELL-BROWN, *Poisoned Chalice?: The Rights of Criminal Defendants Under International Law, During the Pre-Trial Phase*, in «UCLA Journal of International Law and Foreign Affairs», Vol. 8, 2003, pp. 138-140 (arguing that the ‘reliable information’ threshold had *in casu* not been met).

²⁶² ICTR, Decision on Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44-I, T. Ch. II, 8 May 2000, par. 35; ICTR, Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items, *Prosecutor v. Ngirumpatse*, Case No. ICTR-97-44-I, T. Ch. II, 10 December 1999, par. 60.

²⁶³ ICTR, Decision on Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44-I, T. Ch. II, 8 May 2000, par. 34. Compare with ICTR, Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused, *Prosecutor v. Rwamakuba et al.*, Case No. ICTR-98-44-T, T. Ch. II, 12 December 2000, par. 17 (where the Trial Chamber rightly considered that the Prosecutor may consider someone a suspect and request his or her arrest pursuant to Rule 40 even in the absence of supporting evidence amounting to a *prima facie* case, or without evidence satisfying the threshold under Rule 40bis, the Trial Chamber should, in the author’s opinion, subsequently have checked whether the ‘reliable information’ threshold was met *in casu*).

Chamber's conclusion and emphasised that whenever a Rule 40 request is made for the urgent arrest of a suspect, the 'reliable information' threshold should be met.²⁶⁴

III.1.2. Execution of the provisional arrest

Requests for the provisional arrest of a suspect can be made to the state concerned by the Prosecutor either orally or in writing.²⁶⁵ It is because Rule 40 keeps silent on the manner and method in which the arrest has to be executed, that this remains within the requested state's domain.²⁶⁶ Rule 40 ICTY, ICTR, and SCSL RPE do not provide for the right of the suspect to be informed without delay about the reasons for his or her arrest or the right to be promptly brought before a judge.²⁶⁷ The requested state will, following a request to that effect by the Prosecutor, organise, control, and carry out the arrest in accordance with its domestic laws.²⁶⁸ The requested state may or may not require an arrest warrant or impose other legal conditions but those depend on the national state concerned.²⁶⁹

Remarkably, in contrast with Rule 40 ICTY, the ICTR RPE additionally require that the suspect be released if the Prosecutor fails to issue an indictment within 20 days from the moment of *transfer*.²⁷⁰ While it seems clear from the wording that the time limitation should be calculated from the moment of transfer, the ICTR Appeals Chamber has held otherwise.²⁷¹ Nevertheless, this holding is at odds with the ordinary wording of the rule, and should

²⁶⁴ ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 226. *In casu*, the letter of the Prosecution to the authorities of Benin only referred to "compelling and consistent evidence of [the Appellant's] participation in crimes committed in the Republic of Rwanda between 1st January and 31st December 1994."

²⁶⁵ ICTR, Decision on Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44-I, T. Ch. II, 8 May 2000, par. 33; ICTR, Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items, *Prosecutor v. Ngirumpatse*, Case No. ICTR-97-44-I, T. Ch. II, 10 December 1999, par. 54.

²⁶⁶ ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 219.

²⁶⁷ These safeguards deserve our close attention and will be discussed in depth in a subsequent section, see *infra*, Chapter 7, V.

²⁶⁸ Consider *e.g.* ICTR, Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items, *Prosecutor v. Ngirumpatse*, Case No. ICTR-97-44-I, T. Ch. II, 10 December 1999, par. 56.

²⁶⁹ *Ibid.*, par. 56.

²⁷⁰ Rule 40 (D) ICTR RPE, as amended on 12 January 1996.

²⁷¹ The ICTR Appeals Chamber in *Barayagwiza* calculated the period from the moment of the Rule 40 request, but gave no further explanation. See ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 43.

henceforth be rejected.²⁷² In the absence of any determination as to the acceptable length of the detention *prior* to transfer, the ICTR Appeals Chamber determined that this period of detention may not be unreasonable.²⁷³

According to Rule 40 (B) SCSL RPE, the Prosecutor should apply for the transfer of the suspect to the Court pursuant to Rule 40*bis* within 10 days from the arrest. If the Prosecutor fails to make such request, this failure will be sanctioned with release.²⁷⁴ This provision should be preferred because it puts a clear limitation on the period of time a person can be detained in the custodial state, prior to transfer.

III.1.3. Transfer and provisional detention of suspects (Rule 40*bis*)

Rule 40*bis* was later inserted in the ICTY and ICTR RPE, providing an explicit basis for the transfer and detention of suspects at the seat of the tribunals.²⁷⁵ It is also included in the SCSL RPE. According to the ICTR Appeals Chamber, “as an exception, in light of the complexity of the charges faced by accused persons before this Tribunal, provisional detention of a suspect without being formally charged for a maximum of 90 days is warranted as long as the suspect’s rights under Rule 40 and 40*bis* are adhered to.”²⁷⁶ The Rule was adopted to respond to practical difficulties experienced during the investigations by both *ad hoc* tribunals. The ICTR was confronted with a situation in which Cameroon had arrested twelve suspects and the question of their transfer to the tribunal arose before the indictments could be confirmed. This prompted the Prosecutor to seek the amendment of the RPE.²⁷⁷ Similar problems arose at

²⁷² Contrary to the holding of the Appeals Chamber, ICTR Trial Chamber II stated that “the twenty day limit does not start to run from the date on which the order is issued but *from the date on which the suspect is transferred*” (emphasis added). See ICTR, Decision on the Defence Extremely Urgent Motion on *Habeas Corpus* and for Stoppage of Proceedings, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-I, T. Ch. II, 23 May 2000, par. 37. As will be discussed *infra*, Chapter 7, III.1.3, the ICTR Appeals Chamber in *Barayagwiza* gave a similar interpretation to Rule 40*bis* (H) ICTR RPE. Nevertheless, it revised its interpretation in the *Semanza* case. Consequently, it is opined by this author that also the interpretation given by the Appeals Chamber in *Barayagwiza* to Rule 40 should be revised (see fn. 287 - 294 and accompanying text).

²⁷³ ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 231.

²⁷⁴ Rule 40 (C) (ii) SCSL RPE.

²⁷⁵ Rule 40*bis* ICTY RPE, as adopted at the Tenth Plenary Session, 22- 23 April 1996 (IT/32/Rev.8); Rule 40*bis* ICTR RPE, as adopted on 15 May 1996 (ICTR: 3/Rev 2).

²⁷⁶ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 62; ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 229.

²⁷⁷ ICTR, First Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other serious Violations Committed in the

the ICTY, when Bosnia arrested the suspects Djukić and Kršmanović.²⁷⁸ While the provisions adopted by the ICTR and ICTY respectively differ, it has been noted that these differences relate more to form than to substance.²⁷⁹

Pursuant to Rule 40*bis* (A) ICTY, ICTR, and SCSL RPE, the transfer and provisional detention of suspects requires an order from a Judge, at the Prosecutor's request. The grounds on which the request is made should be indicated together with the provisional charge and the material on which the Prosecutor relies.²⁸⁰ The rule applies to situations when the suspect has been detained by the state at the Prosecutor's request under Rule 40 or when he or she is otherwise detained in that state.²⁸¹ Other material conditions include a threshold requiring the existence of a *reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the tribunal has jurisdiction* and specific justifying grounds requiring that the transfer and detention is necessary to prevent escape, to prevent physical or mental injury to or intimidation of a victim or witness, the destruction of evidence, or is otherwise necessary for the conduct of the investigation.²⁸² The provisional detention can

Territory of Neighbouring States between 1 January and 31 December 1994, U.N. Doc. A/51/399; S/1996/778, 24 September 1994, par. 34.

²⁷⁸ General Djukić and Colonel Krsmanović had been transferred to The Hague under Rule 90*bis*, which allows for the transfer of otherwise detained persons whose presence as a *witness* is required at the ICTY. They both had to testify against Karadžić and Mladić. While being in 'witness detention', Djukić was indicted by the Prosecutor. Consequently, he was arrested by Bosnia as a suspect on a request by the Prosecutor pursuant to Rule 40, transferred to The Hague as a witness, only to be indicted and detained in The Hague. See C.J.M. SAFFERLING, *Towards an International Criminal Procedure*, Oxford, Oxford University Press, 2001, p. 146, fn. 492. Consider also ICTY, Third Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, U.N. Doc. A/51/292- S/1996/665, 16 August 1996, par. 69.

²⁷⁹ B. SWART, Commentary, in A. KLIP and G. SLUITER (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 1994-1999*, Vol. II, Antwerp, Intersentia, 2001, p. 198.

²⁸⁰ An exception to the requirement to include a provisional charge and a brief summary of the material upon which the Prosecutor relies is included in Rule 40*bis* (A) ICTY, ICTR and SCSL RPE where the Prosecutor only seeks to interrogate the suspect.

²⁸¹ Rule 40*bis* (B) (i) ICTY, ICTR and SCSL RPE.

²⁸² Rule 40 *bis* (ii) and (iii) ICTY, ICTR and SCSL RPE. Consider in this regard C.J.M. SAFFERLING, *Towards an International Criminal Procedure*, Oxford, Oxford University Press, 2001, p. 144 (the author disposes himself critical of such threshold: "[t]he threshold of 'may have committed a crime' appears to be lower than anything else that allows detention for up to ninety days without a charge. Furthermore, the possibility of ordering detention whenever the judge considers it otherwise necessary for conduct of the investigation seems to be too wide and to grant *carte blanche* for any detention that appears appropriate"). It has been argued by ALAMUDDIN that the Prosecutor of the *ad hoc* tribunals may resort to Rule 40*bis* "including for the purposes of questioning." Such reasoning should be rejected. According Rule 40*bis* (B) (iii) ICTR ICTY and SCSL RPE, such deprivation of liberty should be based on one of the legitimate grounds enumerated. It does not allow for the deprivation of liberty for the sole purpose of interrogation. See A. ALAMUDDIN, *Collection of Evidence*, in

be ordered for a period of up to 30 days *from the day of the transfer* (Rule 40bis (C) ICTR and SCSL RPE speak of a period of 30 days which are to be counted from the day *after* transfer), but can be prolonged twice. The original provision provided for a detention of a maximum of 30 days from the signing of the provisional detention order.²⁸³ The rule was amended as the maximum period of provisional detention may be exceeded before the suspect is transferred to the seat of the tribunal.²⁸⁴ In any case, the total period cannot exceed ninety days.²⁸⁵ If no indictment has been confirmed and an arrest warrant signed at the end of this period, the suspect shall be released or delivered to the authorities of the state.²⁸⁶

This time limitation has given rise to controversy in the case law of the ICTR. Whereas the Trial Chamber in *Barayagwiza* followed the Prosecutor's position that Rule 40bis is not applicable until after the transfer of the suspect to the tribunal's detention unit, the Appeals Chamber gave a different interpretation to the said provision. The Appeals Chamber argued that the purpose of Rule 40bis is to restrict the amount of time a suspect may be detained without being indicted. The Appeals Chamber argued that it cannot "accept that the Prosecutor, acting alone under Rule 40, has an unlimited power to keep a suspect under provisional detention in a State, when Rule 40bis places time limits on such detention if the suspect is detained at the Tribunal's detention unit."²⁸⁷ "The *principle of effective interpretation* mandates that these Rules be read together and that they be restrictively

K.A.A. KHAN, C. BUISMAN and C. GOSNELL, *Principles of Evidence in International Criminal Justice*, Oxford, Oxford University Press, 2010, p. 253.

²⁸³ Rule 40bis (D) ICTY RPE (IT/32/Rev.8); Rule 40bis ICTR RPE (ICTR: 3/Rev 2).

²⁸⁴ No explanation for this amendment was given in the Annual Report: ICTR, Fourth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, U.N. Doc. A/52/375-S/1997/729, 18 September 1997, par. 56, fn. 2. Nevertheless, consider the argumentation by B. SWART, Commentary, in A. KLIP and G. SLUITER (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 1994-1999*, Vol. II, Antwerp, Intersentia, 2001, p. 198.

²⁸⁵ Rule 40bis (H) ICTR and SCSL RPE; Rule 40bis (D) ICTY RPE.

²⁸⁶ Rule 40bis (H) ICTR and SCSL RPE; Rule 40bis (D) ICTY RPE.

²⁸⁷ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 46, 53; ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 233. Note that the Appeals Chamber, while being sympathetic to the workload of the Prosecution at the time, did not accept that as a justification of a provisional detention in Benin without charge for 85 days and detention in Benin without appearance for a Judge for 95 days.

interpreted.”²⁸⁸ Consequently, the time limitation of Rule 40bis also applies to the pre-transfer detention period.²⁸⁹

In a separate opinion, attached to the Appeals Chamber Judgement, Judge Shahabuddeen argued that Rule 40bis cannot be applied to the pre-transfer period of detention as such interpretation conflicts with the clear meaning of the Rule that the procedural guarantees which it provides begin to operate *only from the day after the transfer to the detention unit of the tribunal*.²⁹⁰ He rightly held that the Rule addresses the question of the mode of authorising the transfer of a suspect to the detention unit of the tribunal and the conditions applicable to the detention following the transfer to that unit. It does not address the pre-transfer detention.²⁹¹ Consequently, the interpretation given to Rule 40bis by the Appeals Chamber amounts to legislation, rather than interpretation and changes the substance and purpose of the text.²⁹²

First and foremost, the interpretation given to Rule 40bis clearly contradicts its legislative history and the amendments that have been made thereto, as discussed previously.²⁹³ For this reason, in *Semanza*, the Appeals Chamber revised its interpretation of Rule 40bis (C) and rejected its applicability to pre-transfer detention.²⁹⁴ Whereas the amendment of Rule 40bis clearly did away with any time limitation regarding the period of time that the suspect can be

²⁸⁸ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 46.

²⁸⁹ *Ibid.*, par. 50.

²⁹⁰ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, Separate Opinion of Judge Shahabuddeen, p. 8.

²⁹¹ *Ibid.*, p. 8. Judge Shahabuddeen argued that while the Rule assumes that there will always be an interval between the arrest in the requested state and the transfer to Arusha, the time stipulated will nonetheless begin to run from the transfer of the suspect.

²⁹² *Ibid.*, p. 9. Where the Appeals Chamber based its interpretation on the *ut res magis valeat quam pereat* or ‘effective interpretation’ maxim, Shahabuddeen underscored that the maxim should only be relied upon within reasonable limits, otherwise risking rewriting or reconstructing a treaty.

²⁹³ See *supra* Chapter 7, III.1.3, fn. 275 - 279 and accompanying text.

²⁹⁴ ICTR, Decision, *Prosecutor v. Semanza*, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 91-97. The Appeals Chamber clarified that “in the interests of legal certainty and predictability the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice. Where the interpretation given by the Appeals Chamber in *Barayagwiza* to Rule 40bis was in keeping with the spirit and letter of Rule 40bis as it was originally adopted, “the Appeals Chamber must take into account the abrogative effect of any legislative amendment.” “The principal effect of the 4 July 1996 amendment was to break with the interpretation of Rule 40 bis in the form in which it emerged from the 15 May 1996 text” (*ibid.*, par. 96).

detained in the requested state, this does not imply, as will be argued, that the time a person may spend in the custodial state is not limited.²⁹⁵

Rule 40bis further provides that copies of the request and the order should be served on the suspect. The latter should include the provisional charges, the grounds on which the Judge issued the order, the initial time limitation as well as a statement of the rights of the accused under Rules 42 and 43 of the RPE.²⁹⁶ These documents should be served on the suspect *as soon as possible*.²⁹⁷ When the suspect is transferred to the seat of the tribunal, he or she should be brought before the Judge who confirmed the provisional detention order without delay.²⁹⁸ He or she can submit all (*habeas corpus*) applications relative to the propriety of the detention or release.²⁹⁹ Lastly, the regime regarding the provisional detention of the accused is applied *mutatis mutandis* to the provisional detention of suspects at the tribunal pursuant to Rules 40bis (H) ICTY and 40bis (L) ICTR RPE.

§ Relationship between Rule 40 and Rule 40bis: gaps and overlaps

Some of the tribunals have amended Rule 40 further. The ICTR amended Rule 40, by adding sub-provisions (B) – (D).³⁰⁰ This amendment, predating the introduction of Rule 40bis, allows for a Judge to order, upon request by the Prosecutor, the transfer and detention of a suspect at the seat of the tribunal or at another designated place if the requested state has made clear that, because of a major impediment, it is unable to hold the person under provisional detention or to prevent escape.³⁰¹ If the Prosecutor fails to issue an indictment within 20 days following the transfer, the suspect should be released.³⁰² While a possible overlap may exist with Rule 40bis, this procedure only applies to scenarios of urgency, whereas Rule 40bis applies both to situations in which the Prosecutor has previously issued a request pursuant to

²⁹⁵ For example, as will be argued, the ICTR Appeals Chamber underscored that a transfer and provisional detention request should be made *within a reasonable period of time* in order to ascertain that the suspect is promptly brought before a Judge. See ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 232. See *infra*, Chapter 8, II.2.10.

²⁹⁶ Rule 40bis (D) of the ICTR and SCSL RPE and Rule 40bis (C) ICTY RPE.

²⁹⁷ Rule 40bis (E) ICTR and SCSL RPE. While this requirement is absent in the ICTY provision, such obligation may follow from the application *mutatis mutandis* of Rule 55 ICTY RPE.

²⁹⁸ Rule 40bis (J) ICTR and SCSL RPE; Rule 40bis (F) ICTY RPE. See the detailed discussion of this provision, *infra*, Chapter 7, V. III.

²⁹⁹ Rule 40bis (K) and (L) ICTR and SCSL RPE; Rule 40bis (G) and (H) ICTY RPE.

³⁰⁰ Rule 40 ICTR as amended on 12 January 1996.

³⁰¹ Rule 40 (B) ICTR RPE.

³⁰² Rule 40 (D) ICTR RPE.

Rule 40 and to suspects who are otherwise detained. The threshold for issuing this order is lower than the threshold under Rule 40*bis*, with the only threshold following from the definition of a ‘suspect’. Furthermore, no specific grounds to legitimise the transfer and detention are required. Lastly, the time limitation is stricter than the time limitation under Rule 40*bis*, requiring the Prosecutor to issue the indictment within 20 days after *transfer*, without possibility to extend the period of post-transfer detention.³⁰³

A *lacuna* exists in cases in which the Prosecutor has sent a Rule 40 request, because there is no time limitation for the Prosecutor to apply to the Judge for a Rule 40*bis* order for the transfer and provisional detention of the suspect at the seat of the tribunal. In practice, this gap has led to unacceptable situations in which suspects have spent up to 233 days, or more than seven months in provisional detention, before being transferred to the tribunal.³⁰⁴ As discussed previously, the Special Court filled this important gap in the regulatory framework of the *ad hoc* tribunals by requiring that the Prosecutor, within 10 days following the provisional arrest, applies for an order for the transfer of the suspect to the tribunal’s detention facility. The suspect has to be released in cases where the Prosecutor fails to apply for this order.³⁰⁵

However, this amendment proves not to be entirely satisfactory in light of the non-applicability of the Rule 40*bis* time limitation to the pre-transfer period of detention. Following the application of the SCSL Prosecutor for a Rule 40*bis* order, the suspect may continue to linger in pre-trial detention where Rule 40*bis* SCSL RPE does not limit the period the suspect may spend in detention prior to his or her transfer to the Special Court. This leads to the situation in which neither the Statute nor the RPE of the *ad hoc* tribunals or of the SCSL put a clear limitation on the period of time a person can be detained before being transferred. Consequently, the period a person is detained prior to his or her transfer to the tribunal is left to the diligence of the actors involved and the eventuality of a challenge of a transfer by the suspect.³⁰⁶ It has been noted by SWART that, on this point, the procedural frameworks of the *ad hoc* tribunals and the SCSL deviate from the approach taken by

³⁰³ Rule 40 (D) ICTR RPE.

³⁰⁴ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 45.

³⁰⁵ Rule 40 (C) (ii) SCSL RPE.

³⁰⁶ B. SWART, Arrest and Surrender, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1250.

extradition treaties. Nevertheless, national laws implementing the Statutes of both tribunals often provide that a suspect who has been provisionally arrested pursuant to a request by the tribunal needs to be released if this request is not followed by a request for transfer within a prescribed period of time.³⁰⁷ Furthermore, the ICTR Appeals Chamber held that absent any time indication in Rule 40*bis* regarding the time a person can be detained, this period of detention cannot be unreasonable.³⁰⁸ It will be argued below, that international human rights norms also require that a detention request be made *within a reasonable period of time*.³⁰⁹

The Appeals Chamber underscored that it is not acceptable for the Prosecutor to get around the time limits of Rule 40*bis* and the tribunal's responsibility of ensuring the rights of the suspect by using its powers under Rule 40 to keep the suspect in detention in a cooperating state.³¹⁰

III.2. The International Criminal Court

A provisional arrest can be requested pending the presentation of the request for surrender and the documents supporting the request.³¹¹ Nevertheless, the ICC statute does not make allowance for provisional arrests *in the absence of a judicial authorisation*.³¹² In a sense, the allowance, which is made for provisional arrest under the ICC Statute, is akin to the practice in extradition treaties, which usually provide for the provisional arrest of a person, in

³⁰⁷ *Ibid.*, p. 1250. See e.g. Article 3 of the Dutch legislation implementing the ICTY Statute, which refers to the time limitations in the Extradition Law; Article 3 (3) of the Agreement on Surrender of Persons Between the Government of the United States and the Tribunal; Article 53 (2) of the Belgian Act of 29 March 2004 on Cooperation with the International Criminal Court and the International Criminal Tribunals (the suspect that has provisionally been detained will in any case be released if no indictment has been served on him or her within three months after the arrest warrant by the Investigating Judge has been served on him or her). Consider ICTR, Decision on the Defence Extremely Urgent Motion on *Habeas Corpus* and for Stoppage of Proceedings, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-I, T. Ch. II, 23 May 2000, par. 56 (the Belgian authorities informed the ICTR Registrar that they would be required to release Kanyabashi if no warrant of arrest was served on him).

³⁰⁸ ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 231.

³⁰⁹ See *infra*, Chapter 8, II.2.10.

³¹⁰ ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 233. Through a reference to the Appeals Chamber decision in *Barayagwiza*, the Appeals Chamber seems to again rely on its previous interpretation of Rule 40, which it revised in *Semanza*, see fn. 290 - 294 and accompanying text.

³¹¹ Article 92 ICC Statute. The information required includes information describing the person, sufficient to identify the person as well as information on the person's probable location; a concise statement of the crimes for which the provisional arrest is sought as well as the facts alleged to constitute those crimes; a statement of the existence of a warrant of arrest as well as a statement that a request for surrender will follow.

³¹² Article 58 (5) ICC Statute.

anticipation of the receipt of the extradition request.³¹³ It has been argued that the Statute is still flexible enough, given that the issuance of an arrest warrant is disconnected from the confirmation of the indictment.³¹⁴ Given the importance of the right at stake (the right to liberty), some authors hold that this procedural model should be preferred to a model whereby provisional arrest powers are given directly to the Prosecutor. Such powers ought only to be provided to the Court.³¹⁵ Whereas judicial intervention is doubtless the best guarantee for the protection of the rights of the suspect, such preference may disregard the exigencies of the investigations, and remove some of the flexibility of the system during the early stages of the investigation. This holds especially true where stringent requirements (*e.g.* the existence of a *prima facie* case) have to be met for an arrest warrant to be issued. It should be recalled that under human rights law, the lawfulness requirement does not necessarily presuppose the issuance of a warrant of arrest.³¹⁶ The practice of the Court, however, has revealed that the Court is willing to act quickly, for example in the cases where there is a real likelihood that the suspect would flee.³¹⁷

In cases of urgency, a request for the arrest may be made ‘by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel

³¹³ Compare *e.g.* with Article 9 of the United Nations Model Treaty on Extradition, U.N. Doc. A/RES/45/116, 14 December 1990.

³¹⁴ G. SLUITER, in A. CASSESE (ed.), *The Oxford Companion to International Criminal Justice*, Oxford, Oxford University Press, 2009, p. 251.

³¹⁵ See, *e.g.* C. RYNGAERT, Arrest and Detention, in L. REYDAMS, J. WOUTERS and C. RYNGAERT (eds.), *International Prosecutors*, Oxford, Oxford University Press, 2012, p. 670 (arguing that whereas the *ad hoc* tribunals provided for such provisional arrest powers, later tribunals have abandoned the far-reaching arrest powers of the OTP. However, it should be remarked that whereas prosecutorial provisional arrest powers are more circumscribed in the SCSL RPE, the Special Court did not abandon them).

³¹⁶ Consider *e.g.* ECommHR, *X. v. Austria*, Application No. 775/77, Decision of 18 May 1977, 9 D.R. 210, p. 211 (“This provision [Article 5 (1) (c)] does not stipulate that an arrest can only be effected on the authority of a warrant of arrest issued by a judge. The Convention merely requires in Article 5, paragraph 3 that everyone arrested or detained in accordance with paragraph 1(c) of this Article shall be brought promptly before a judge”). However, a detention that extended over several months without being ordered by a judge or a judicial officer was found by the Court not to be lawful. See ECtHR, *Baranowski v. Poland*, Application No. 28358/95, Reports 2000-III, Judgment of 28 March 2000, par. 57.

³¹⁷ ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08, PTC III, 10 June 2008, par. 4 – 10, as referred to in K. DE MEESTER, K. PITCHER, R. RASTAN and G. SLUITER, Investigation, Coercive Measures, Arrest and Surrender, in H. FRIMAN, S. LINTON, G. SLUITER, S. VASILIEV and S. ZAPALLÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 318. *In casu*, the Pre-Trial Chamber issued a warrant of arrest on only some of the counts in the Prosecutor’s request and considered the issuance of a new warrant of arrest on additional counts at a later stage.

provided for in Article 87, paragraph 1 (a).³¹⁸ The request for the provisional arrest of a person should not be accompanied by supporting evidence.

A limitation in time of the provisional arrest is provided for. If the requested state has not received the request for arrest and surrender and the documents supporting the request within 60 days, the person *may* be released.³¹⁹ In the inclusion of this time limitation unmistakably lays the greatest improvement from the practice of the *ad hoc* tribunals. However, the discretion should, ideally, be removed and the person released from detention. The possibility of consent is provided for if this is allowed for by the laws of the requested state.³²⁰ The release will not prejudice the subsequent arrest and surrender of that person if a request is later made to that extent.³²¹

III.3. Internationalised criminal tribunals

From the internationalised criminal tribunals included in this dissertation, the Special Panels also provided for the possibility, exceptionally, to arrest a suspect in the absence of an arrest warrant. In case of urgency, a person could be arrested without judicial authorisation.³²² Three different scenarios were provided for, to know: (a) where the person was found in the act of committing the crime, (b) where there were reasonable grounds to believe that the suspect had committed a crime and there was an ‘immediate likelihood’ that, before the warrant would be issued, the suspect would flee, destroy, falsify or taint evidence or endanger public safety or the integrity of victims or witnesses, or (c) cases of hot pursuit. The Public Prosecutor had to be informed immediately and had to decide whether further detention was necessary, in which

³¹⁸ Article 96 (1) ICC Statute.

³¹⁹ Rule 188 ICC RPE *juncto* Article 92 (3) ICC Statute. However, note that within that time period, the person may consent to the surrender where such is allowed by the requested state.

³²⁰ Article 92 (3) ICC Statute.

³²¹ Article 92 (4) ICC Statute.

³²² Section 19A.4 (a) – (c) TRCP. In the *Mali Dao* case, an accused person was arrested in the absence of an arrest warrant. The Court reasoned that there was an “immediate likelihood that before a warrant could be obtained the suspect will flee”, where the accused had been arrested on a few meters from the border with West Timor. Such conclusion is doubtful, where the suspect was already detained by the police for another offence (illegal crossing of the border). In such circumstances, what is missing is an element of urgency, which underlies the three distinct scenarios where an arrest can be executed in the absence of an arrest warrant. (Section 19A.4 (a) – (c) TRCP). See SPSC, Decision on the Application for Initial Detention of the Accused Aprecio Mali Dao, *Prosecutor v. Aprecio Mali Dao*, Case No. 18/2003, SPSC, 29 April 2004, par. 40 – 41.

case he had to apply for an arrest warrant.³²³ Underlying these distinct scenarios is an element of urgency.

Likewise, Rule 62 (A) (i) of the STL RPE provides for arrests of suspects or accused persons in the absence of an arrest warrant in cases of urgency. It is for the Prosecutor and not for the Pre-Trial Judge to seek provisional detention.³²⁴ The person will be put in custody ‘in accordance with the laws of that state.’ In addition, the Prosecutor may request that state to take necessary measures to prevent escape, intimidation of victims or witnesses or the destruction of evidence.³²⁵ Different from, and improving the *ad hoc* tribunals’ procedural framework, a strict time limitation in time is provided for insofar that it is required that these urgent measures are followed, within ten days, by an application for the transfer of the person arrested.³²⁶ Reasonable grounds to believe that the person has committed a crime should be present.³²⁷

The Prosecutor may file a reasoned request to the Pre-Trial Judge for an order or request for the transfer of a suspect to the custody of the tribunal and his or her provisional detention.³²⁸ The application should contain a provisional charge and a summary of the material which shows that the person qualifies as a suspect and which justifies detention.³²⁹ The order by the Pre-Trial Judge should include a statement of the rights of the suspect and an indication of the initial time-limitation of the provisional detention.³³⁰ When the Pre-Trial Judge orders the transfer, he or she should be convinced that the person qualifies as a suspect.³³¹ This implies that ‘reasonable grounds to believe that the person has committed a crime’ should be

³²³ Sections 19A.5 and 19A.6 (a) TRCP.

³²⁴ STL, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06, PTJ, 29 April 2009, par. 36 (“the Prosecutor alone is in a position to evaluate whether – and in what timeframe – he is in a position to consider a person a suspect and, if necessary, to indict that person”).

³²⁵ Rule 62 (A) (iii) STL RPE.

³²⁶ Rule 62 (B) STL RPE. An amendment was proposed to provide for an express 90-day time limit for the Pre-Trial Judge to order or request the transfer of the suspect. The amendment was rejected as “the Pre-Trial Judge is already under a general duty to act speedily.” Besides, it was argued that the imposition of such specific deadline may hamper negotiations or cooperation with third states or other entities. See STL, Summary of the Accepted Rule Amendments and some Key Rejected Rule Amendment Proposals Pursuant to Rule 5 (I) of the Special Tribunal for Lebanon’s Rules of Procedure and Evidence (Third Plenary of Judges), November 2010, p. 19.

³²⁷ See the definition of ‘suspect’ in rule 2 STL RPE.

³²⁸ Rule 63 (A) STL RPE.

³²⁹ Rule 63 (A) STL RPE. No provisional charge or summary is required where the suspect is only transferred to be questioned by the Prosecutor.

³³⁰ Rule 63 (C) STL RPE.

³³¹ Rule 63 (B) (ii) STL RPE.

present.³³² Furthermore, the Pre-Trial Judge should consider provisional detention *necessary*, either (1) to prevent escape, (2) to prevent the obstruction or endangerment of the investigation or prosecution by the suspect, including through interference with witnesses or victims or (3) to prevent criminal conduct of a kind of which he is suspected.³³³ A ‘legitimate ground’ is, thus, required which is in line with the procedural frameworks of the *ad hoc* tribunals and the Special Court. While originally the RPE allowed for the deprivation of liberty when such was required for the conduct of the investigation, this ground was removed at the occasion of the third revision of the RPE.³³⁴ Indeed, this ground is too broad and open to abuse. Moreover, it is no ground which is recognised as a ground legitimising the deprivation of liberty under international human rights norms.³³⁵

Similar to the procedural regime of the *ad hoc* tribunals and the Special Court, the detention upon transfer prior to the confirmation of the indictment is strictly limited. Detention can be ordered for a period not exceeding 30 days.³³⁶ Bearing further similarity with the *ad hoc* tribunals and the Special Court, ‘if warranted by the investigation’, the Pre-Trial Judge may extend the provisional detention for another 30 days, following an *inter partes* hearing, upon application by the Prosecutor.³³⁷ A second extension of 30 days presupposes the presence of ‘special circumstances’. In any case, the detention may not exceed 90 days. If by that time, the indictment has not yet been confirmed and an arrest warrant issued, the person should be released or delivered to the requested state.³³⁸

Lastly, as far as the Extraordinary Chambers are concerned, the deprivation of liberty in the absence of an arrest warrant is also allowed for. During their preliminary investigation, the Co-Prosecutors may hold a suspect in police custody (*garde à vue*) ‘for the needs of the inquiry’. This action does not presuppose judicial intervention, the only threshold being that the person should be ‘suspected of having participated in a crime within the jurisdiction of the ECCC as a perpetrator or accomplice’. Police custody is limited in time and may be ordered

³³² See the definition of ‘suspect’ in Rule 2 STL RPE.

³³³ Rule 63 (B) (iii) STL RPE.

³³⁴ Rule 63 (B) (iii) STL RPE as amended. Consider: STL, Summary of the Accepted Rule Amendments and some Key Rejected Rule Amendment Proposals Pursuant to Rule 5 (I) of the Special Tribunal for Lebanon’s Rules of Procedure and Evidence (Third Plenary of Judges), November 2010, p. 22.

³³⁵ See *infra*, Chapter 8, II.3.5.1.

³³⁶ Rule 63 (C) and (D) STL RPE. To be calculated from the day following the transfer of the suspect.

³³⁷ Rule 63 (D) STL RPE.

³³⁸ Rule 63 (D) STL RPE.

for a period of time not exceeding 48 hours, which may be extended once by another 24 hours.³³⁹ The person who is taken into police custody must be brought before the Co-Prosecutors as soon as possible.³⁴⁰ On this occasion, he or she may be assisted by counsel.³⁴¹ At the end of the police custody, the person should be either released or presented before the Co-Investigating Judges.³⁴² The person in police custody should be informed about the reasons for their custody and of his or her rights.³⁴³ No requirement of urgency is explicitly provided for.³⁴⁴ It has been argued that because the Cambodian criminal justice system is weak, judicial intervention for the ordering of police custody would have been preferable, especially outside of the context of urgency.³⁴⁵

IV. AN ALTERNATIVE ROUTE: SUMMONS TO APPEAR

The issuance of a warrant of arrest is not the only manner in which the appearance of the suspect or accused person can be obtained. A summons to appear can be issued. It is appropriate to deal with this issue in the present chapter because a summons to appear impacts upon and interferes with the right to liberty of the person, and because the issuance of a summons to appear functions as an alternative route to the issuance of an arrest warrant.

The ICC Statute has been praised for including this alternative course of action to the issuance of an arrest warrant.³⁴⁶ It puts into effect the principles of proportionality and subsidiarity.³⁴⁷

³³⁹ Rule 51 (3) ECCC IR.

³⁴⁰ Rule 51 (4) ECCC IR.

³⁴¹ Rule 51 (5) ECCC IR. Counsel may meet the person for a maximum of 30 minutes before the person is presented before the Co-Prosecutors.

³⁴² Rule 51 (7) ECCC IR.

³⁴³ Rule 51 (1) ECCC IR and Rule 21 (1) (d) ECCC IR.

³⁴⁴ Rule 51 (2) ECCC IR only provides that the order for police custody may be given orally in case of urgency (and must be put in writing as soon as possible thereafter).

³⁴⁵ Y. KODAMA, *For Judicial Justice and Reconciliation in Cambodia: Reflections upon the Establishment of the Khmer Rouge Trials and the Trials' Procedural Rules*, in «The Law and Practice of International Courts and Tribunals», Vol. 9, 2010, p. 91 (“The author submits that, in a country with a relatively weak judicial system, with the potential risk of police abuse in exercising executive power, control by the judiciary through a warrant or at least practical scrutiny is all the more essential. It is advisable that, if police custody is a compulsory action by the Judicial Police under the Internal Rules, the issuance of a warrant by either the investigating judges or the Pre-Trial Chamber should be required. Otherwise, police custody should be non-compulsory, or, in practice, permissible only in emergencies”).

³⁴⁶ Article 58 (7) ICC Statute. For a dissenting voice, see K.S. GALLANT, *Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition*, in «Criminal Law Forum», Vol. 5, 1994, p. 580 (“While summonses for court appearances are useful in preventing pretrial incarceration or humiliating arrests for misdemeanors, they are inappropriate for persons charged with serious violations of international humanitarian law”).

The practice of the ICC Court reveals that this less intrusive coercive measure may be a viable option in certain instances. Several summonses were issued in the *Situation in Darfur, Sudan*, and in the *Situation in the Republic of Kenya*, leading to the voluntary appearance of several suspects.³⁴⁸ However, it was underscored by the Court that the issuance of a summons to appear does not function as an alternative route available to the Pre-Trial Chamber, upon an application by the Prosecutor for a warrant of arrest. This route is only open to the Chamber when the Prosecutor seeks to secure the attendance of the person through this process.³⁴⁹ However, the principle of subsidiarity, which was previously discussed, implies that the Pre-Trial Chamber should deny the request for a warrant of arrest, when it considers that the issuance of a less intrusive summons to appear would be sufficient (and the issuance of an arrest warrant is not otherwise deemed to be necessary). Put otherwise, if the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and there are certain risks of intimidation of witnesses (*cf.* Article 58 (2) (b) (ii)), which may be excluded by means of the issuance of a summons coupled with certain conditions, the Pre-Trial Chamber should decline to issue an arrest warrant and the necessity requirement embedded in Article 58 (1) (b) ICC Statute will not be satisfied.

However, whereas the ICC's procedural framework purports that pre-trial detention is the exception, the practice shows a different picture whereby the alternative of a summons to appear is treated as the actual exception.³⁵⁰ What is telling in this regard is the language employed by Pre-Trial Chamber I, which wrongly held that what is required is that "the

³⁴⁷ These principles were previously discussed, see *supra* Chapter 6, I.5 and I.6. See also H. FRIMAN, The rules of Procedure and Evidence in the Investigative Stage, in H. FISHER, C. KRESS and S.R. LÜDER (eds.), International and National Prosecution of Crimes under International Law, Berlin, Berlin Verlag, 2001, p. 204.

³⁴⁸ Several suspects appeared before the ICC following the issuance of a summons to appear. Consider in that regard: ICC, Decision on the Prosecutor's Application under Article 58, *Prosecutor v. Abu Garda, Situation in Darfur, Sudan*, Case No. ICC-02/05-02/09, PTC I, 7 May 2009; ICC, Second Decision on the Prosecutor's Application under Article 58, Sudan, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan*, Case No. ICC-02/05-03/09, PTC I, 27 August 2009; ICC, Decision on Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Situation in the Republic of Kenya*, Case No. 01/09-01/11-01, PTC II, 8 March 2011; ICC, Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-01, PTC II, 8 March 2011.

³⁴⁹ ICC, In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, *Prosecutor v. Katanga and Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-572 OA 4, A. Ch., 9 June 2008, par. 13.

³⁵⁰ See the discussion, *infra*, Chapter 8, II.3.

Chamber shall be satisfied that a summons to appear would be equally effective as a warrant of arrest to ensure the person's appearance before the Court.³⁵¹ While the Prosecutor in the case at hand requested a summons to appear or, alternatively, an arrest warrant, it is unclear where this additional requirement of 'equal effectiveness' comes from. According to the Court, "[t]he application of article 58 (7) of the Statute is restricted to cases in which the person can and will appear voluntarily before the Court without the necessity of presenting a request for arrest and surrender."³⁵²

Moreover, the Pre-Trial Chamber routinely examines, when it is requested to issue a summons to appear, whether "the issuance of a warrant of arrest does not appear necessary for the purposes of Article 58 (1) (b)."³⁵³ Consequently, it seems that, prior to the issuance of a summons to appear, the Pre-Trial Chamber checks whether the issuance of an arrest warrant would not be required. Again, while the concerns of the Pre-Trial Chamber may be legitimate, a precondition of 'absence of necessity of an arrest warrant' is alien to Article 58 (7) ICC Statute.³⁵⁴ It is up to the Prosecutor to decide what route to follow and to decide whether the circumstances of the case require a warrant of arrest or a summons to appear.

The Pre-Trial Chamber held that a summons to appear cannot be issued in cases where the person is already deprived of their liberty. This would be contrary to the object and purpose of Article 58 (7) of the ICC Statute.³⁵⁵ Indeed, both the Statute and the Rules make the surrender of a person dependent on the prior issuance of an arrest warrant.³⁵⁶

³⁵¹ ICC, Decision on the Prosecution Application under Article 58 (7) of the Statute, *Prosecutor v. Harun and Kushayb, Situation in Darfur, Sudan*, Case No. ICC-02/05-01/07-1, PTC I, 27 April 2007, par. 116.

³⁵² *Ibid.*, par. 117.

³⁵³ Consider *e.g.* ICC, Summons to Appear for Saleh Mohammed Jerbo Janus, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Janus, Situation in Darfur, Sudan*, Case No. ICC-02/05-03/09-2, PTC I, 27 August 2009, par. 20. This condition surprises. These documents are the 'self-executing documents' issued pursuant to the 'Second Decision on the Prosecutor's Application under Article 58', which does not make a reference to such requirement. Similarly, see ICC, Summons to Appear for Bahr Idriss Abu Garda, *Prosecutor v. Abu Garda, Situation in Darfur, Sudan*, Case No. ICC-02/02-02/09-2, PTC I, 7 May 2009, par. 20.

³⁵⁴ For a divergent view, consider C.K. HALL, Article 58, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1143 – 1144, who argues on Article 58 (7): "[t]he provision draws upon those cases where the circumstances do not support the issuance of a warrant of arrest pursuant to paragraph 1 of this article. The arrest may not appear necessary, e.g. if there are no grounds to believe that the suspect will disappear before the trial will take place" (emphasis added).

³⁵⁵ ICC, Decision on the Prosecution Application under Article 58 (7) of the Statute, *Prosecutor v. Harun and Kushayb, Situation in Darfur, Sudan*, Case No. ICC-02/05-01/07-1, PTC I, 27 April 2007, par. 120.

³⁵⁶ In that regard, the Pre-Trial Chamber noted that the ICC RPE envisage the possibility of temporary transfer of a person (Rule 183), in case a person is being proceeded against or is serving a sentence in the requested state.

For the Pre-Trial Chamber to issue a summons to appear, it should be satisfied (1) that there are reasonable grounds to believe that the person committed the alleged crime and (2) that there are reasonable grounds to believe that a summons is sufficient to ensure the person's appearance.³⁵⁷ A summons to appear can be issued with or without conditions that restrict liberty. What conditions can be imposed depends on domestic law.³⁵⁸ When the Pre-Trial Chamber considers imposing conditions, it should ascertain the national law of the state receiving the summons and impose one or more conditions, including (but not limited to) the ones listed in Article Rule 119 (1) ICC RPE.³⁵⁹ The Pre-Trial Chamber should impose these conditions in keeping with the national law. Conditions that have been imposed include the obligation to refrain from discussing issues related to the charges underlying the summons or the evidence and information presented by the Prosecutor and considered by the Chamber, not to interfere with witnesses or to tamper or interfere with the investigations of the Prosecution, to attend all hearings at the ICC, to refrain from committing crimes or not to leave the premises of the Court (including the location assigned) for the period of the stay in the Netherlands and to comply with the instructions of the Registrar. Since the summons to appear is an alternative to, and is subsidiary to the issuance of, an arrest warrant, conditions imposed should arguably be linked to the justifications for the deprivation and/or limitation of the liberty of the person. Therefore, a fourth condition which is routinely imposed surprises. The Pre-Trial Chamber requires the person that is summoned,

“refrain from making any political statements while within the premises of the Court, including the location assigned to them.”

The disrespect of this condition may lead the Pre-Trial Chamber to the issuance of an arrest warrant. Nevertheless, it is unclear how this condition should be linked up to one of the grounds for the justification of pre-trial detention under Article 58 (1) (b) ICC Statute.³⁶⁰

In two other cases, the Pre-Trial Chamber imposed the condition that the suspects should not have direct or indirect contact with anyone who is believed to be a victim of or to have

However, as noted by the Court, this procedure equally requires the prior issuance of a warrant of arrest (*ibid.*, par. 120 – 121).

³⁵⁷ Article 58 (7) ICC Statute.

³⁵⁸ Article 58 (7) ICC Statute.

³⁵⁹ Rule 119 (5) ICC RPE.

³⁶⁰ On the link between the conditions imposed and the justification for the restriction/deprivation of liberty, see in detail, *infra*, Chapter 8, II.2.8 and II.3.7.

witnessed the crimes for which the suspects were summoned.³⁶¹ The Defence of Muthaura requested that this condition be altered where it “disproportionately interferes with the ability of the suspects to prepare for further court proceedings and their right to a fair trial as it ‘prevents them from contracting directly *defence* witnesses or people they believe to be *defence* witnesses’.”³⁶² While the Single Judge reiterated that all witnesses are witnesses of the Court (and cannot be attributed to one party), she determined that a proper balancing of (i) the right of the Defence to properly prepare a defence, including the right to approach witnesses on the one hand and (ii) the obligation of the Court in protecting witnesses on the other hand was required.³⁶³ Therefore, the Single Judge decided that the Defence had to communicate the name and contact details of the witness it wanted to approach to the VWU, which would then advise on the potential risks and the security arrangements the Defence should obey.³⁶⁴

What are lacking in the Statute and the RPE are rules on how the conditions will be executed and supervised.³⁶⁵ Domestic law applies in the absence of these rules. In this regard, the Pre-Trial reiterated its right to review its finding to issue a summons to appear *proprio motu* or at the request of the Prosecutor, in particular if the suspect does not turn up on the date specified or when he or she does not comply with the conditions imposed.³⁶⁶

³⁶¹ See ICC, Decision on Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Situation in the Republic of Kenya*, Case No. 01/09-01/11-01, PTC II, 8 March 2011, p. 23; ICC, Decision on the Prosecutor’s Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-01, PTC II, 8 March 2011, p. 24.

³⁶² ICC, Decision on Variation of Summons Conditions, *Situation in the Republic of Kenya, Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11-38, PTC II, 4 April 2011, par. 2. Consider also ICC, Corrigendum of the “Decision Establishing Modalities to be Observed when Complying with Summons Conditions, *Situation in the Republic of Kenya, Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11-38-Corr, PTC II, 6 April 2011.

³⁶³ By virtue of Rule 121 ICC RPE, the suspect subject to a summons to appear enjoys the rights under Article 67 ICC Statute.

³⁶⁴ ICC, Decision on Variation of Summons Conditions, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-38, PTC II, 4 April 2011, par. 2; ICC, Corrigendum of the “Decision Establishing Modalities to be Observed when Complying with Summons Conditions, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Situation in the Republic of Kenya*, Case No. ICC-01/09-01/11-38-Corr, PTC II, 6 April 2011, par. 14. No authorisation from the VWU is required.

³⁶⁵ C.K. HALL, Article 58, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1144.

³⁶⁶ ICC, Second Decision on the Prosecutor’s Application under Article 58, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan*, Case No. ICC-02/05-03/09, PTC I, 27 August 2009, par. 35; ICC, Decision on the Prosecutor’s Application under Article 58, *Prosecutor v.*

When the suspects arrive in the host state, pursuant to a summons to appear, the Registrar should ensure that they are informed of their rights under the ICC Statute as soon as practical after their arrival.³⁶⁷

Not only the procedural scheme of the ICC provides for the alternative vehicle of a summons to appear. The more recent STL also provides that a summons to appear may be requested by either party or may be issued by the Pre-Trial Judge *proprio motu* (in the interests of justice).³⁶⁸ Doubtless, the STL's provision should be preferred to Article 58 (7) ICC Statute insofar that it explicitly provides that the Pre-Trial Judge may issue a summons to appear, 'in the interests of justice' if he considers this to be 'more appropriate'.³⁶⁹ This approach is in keeping with the principle of subsidiarity.³⁷⁰ The Extraordinary Chambers also provide for the possibility to summon suspects, charged persons, accused, civil parties, and witnesses.³⁷¹ While the procedural frameworks of the *ad hoc* tribunals and the SCSL do not necessarily prohibit the issuance of a summons to appear, they have not been issued in practice.³⁷²

V. RIGHTS OF THE ARRESTED AND DETAINED PERSON

In the subsequent section, the substantive and procedural rights of the arrested and detained suspects and accused persons which relate to the arrest and surrender or transfer, will be discussed. It is important to keep the different procedural regimes applicable to the provisional arrest and surrender of suspects and to the arrest and surrender of accused persons respectively in mind.

Abu Garda, Situation in Darfur, Sudan, Case No. ICC-02/05-02/09, PTC I, 7 May 2009, par. 32. See Rule 119 (4) ICC RPE.

³⁶⁷ See e.g. ICC, Decision Ensuring the Rights of the Defence for the Purposes of the Initial Appearance Hearing, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Situation in the Republic of Kenya*, PTC II, 30 March 2011.

³⁶⁸ Rule 78 (A) and (B) STL RPE. The Prosecutor may request a summons to appear for a suspect, accused or witness, while the Defence, in turn, can request a summons to appear for a witness (the summons to appear may identify a place other than the seat of the Tribunal for the suspect, accused or witness to appear).

³⁶⁹ Rule 77 (C) STL RPE. According to Rule 77 (D) STL RPE, where a party requests a summons to appear, the Pre-Trial Judge may decide to issue a warrant of arrest.

³⁷⁰ See *supra*, Chapter 6, I.6.

³⁷¹ Rule 41 ECCC IR.

³⁷² K. DE MEESTER, K. PITCHER, R. RASTAN and G. SLUITER, Investigation, Coercive Measures, Arrest and Surrender, in H. FRIMAN, S. LINTON, G. SLUITER, S. VASILIEV and S. ZAPALLÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 315.

V.1. Right to personal liberty

Rather than prohibiting the deprivation of liberty, international human rights law forbids any deprivation of liberty which is *unlawful* or *arbitrary*.³⁷³ In this sense, human rights law requires that the instances in which liberty can be deprived and the applicable procedure are strictly construed. Moreover, it requires that national laws “allow for the independent judiciary to take quick action in the event of arbitrary or unlawful deprivation of liberty by administrative authorities or executive officials.”³⁷⁴ Some international instruments provide for a general exception to the right to personal liberty on condition that the arrest and detention are not arbitrary (the ICCPR, the ACHR and the ACHPR),³⁷⁵ whereas the ECHR provides an exhaustive list of exceptions to the right to liberty.³⁷⁶ The right not to be arbitrarily arrested and detained is also provided for under the constitution of most states.³⁷⁷

³⁷³ See Article 9 (1) ICCPR (“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”); Article 5 (1) ECHR (“No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition”); Article 7 (1) – (3) ACHR (“(1) Every person has the right to personal liberty and security. (2) No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto. (3) No one shall be subject to arbitrary arrest or imprisonment”); Article 6 ACHPR (“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”) Consider also Article 9 UDHR and Principle 2 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Consider also M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd edition), Kehl am Rhein, Engel, 2005, p. 211 (the author notes that “[i]t is not the deprivation of liberty in and of itself that is disapproved of but rather that which is arbitrary and unlawful”).

³⁷⁴ *Ibid.*, pp. 211-212.

³⁷⁵ In this regard, TRECHSEL points to the risk of giving *carte blanche* enabling states to decide in which circumstances they want to detain persons, which is allowed as long as statutes are promulgated which are sufficiently precise to avoid arbitrariness. See S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, p. 408.

³⁷⁶ Article 5 (1) (a) – (f) ECHR.

³⁷⁷ C. BASSIOUNI, *Human Rights in the Context of International Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, in «Duke Journal of Comparative and International Law», Vol. 3, 1993, pp. 261 – 262 (A comparative survey identified such right in at least 119 national constitutions. The author notes that this right is either expressed negatively, prohibiting all forms of arbitrary deprivation of liberty or is expressed as a specific exception to the general right of liberty, listed as a procedural protection).

All international instruments require that any interference with the right to liberty is in accordance with the law. This requirement of lawfulness comprises both a substantial and a procedural element.³⁷⁸ It refers primarily to the requirements under domestic law but equally includes the conditions that derive from the human rights treaties.³⁷⁹ Furthermore, the deprivation of liberty should not be *arbitrary*. Accordingly, the deprivation of liberty should not be “manifestly disproportional, unjust or unpredictable, and the specific manner in which an arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in view of the circumstances of the case.”³⁸⁰ While no explicit prohibition of arbitrariness is provided for under Article 5 (1) ECHR, the ECtHR confirmed that the arbitrary deprivation of liberty can never be lawful and as such included a requirement of the absence of arbitrariness into the requirement of ‘lawfulness’ under article 5 (1) ECHR.³⁸¹ Whereas the Court has never provided a definition of what types of conduct by the national authorities constitute ‘arbitrariness’, the jurisprudence of the ECtHR reveals that whether the

³⁷⁸ Consider *e.g.* the wording of Article 9 (1) ICCPR (“on such grounds, and in accordance with such procedure”) or of Article 5 ECHR (“in the following cases and in accordance with a procedure prescribed by law”).

³⁷⁹ ECtHR, *Winterwerp v. Netherlands*, Communication No. 6301/73, Series A, No. 33, Judgment of 24 October 1979, par. 39, 45 (“the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein”); Similarly, the HRC confirmed, in a string of cases concerning Article 9 (4) ICCPR, that ‘lawfulness’ is not restricted to domestic law. Consider *e.g.* HRC, *Baban v. Australia*, Application No. 1014/2001, U.N. Doc. CCPR/C/78/D/1014/2001, Decision of 6 August 2003, par. 7.2 (“Judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1”).

³⁸⁰ M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd edition), Kehl am Rhein, Engel, 2005, p. 225 (the author notes that the notion is originally based on an Australian proposal and that it, according to the majority of delegates, “contained elements of injustice, unpredictability, unreasonableness, capriciousness and disproportionality, as well as the Anglo-American concept of *due process of law*.” Consider also Commission on Human Rights, Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, U.N. Doc. E/CN.4/826/Rev.1, UN Sales No. 65.XIV.2, 1964, p. 205 (“arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law or (b) under the provisions of a law, the purpose of which is incompatible with the right to liberty and security of person”).

³⁸¹ Consider *e.g.* ECtHR, *Saadi v. the United Kingdom*, Application No. 13229/03, Judgment (Grand Chamber) of 28 January 2008, par. 84 (the Grand Chamber notes that “[c]ompliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness”); ECtHR, *Chahal v. The United Kingdom*, Application No. 22414/93, Reports 1996-V, Judgment (Grand Chamber) of 15 November 1996, par. 118 (“Where the “lawfulness” of detention is in issue, including the question whether “a procedure prescribed by law” has been followed, the Convention [...] requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5 (art. 5), namely to protect the individual from arbitrariness.”); ECtHR, *Mooren v. Germany*, Application No. 11364/03, Judgment (Grand Chamber) of 9 July 2009, par. 78; ECtHR *Öcalan v. Turkey*, Application No. 46221/99, Reports 2005-IV, Judgment (Grand Chamber) of 12 May 2005, par. 83; ECtHR, *Stafford v. The United Kingdom*, Application No. 46295/99, Reports 2002-IV, Judgment (Grand Chamber) of 28 May 2002, par. 63; ECtHR, *Winterwerp v. Netherlands*, Communication No. 6301/73, Series A, No. 33, Judgment of 24 October 1979, par. 39 (lawfulness under Article 5 (1) also encompasses conformity with the purpose of the restrictions permitted under Article 5 (1) ECHR).

deprivation of liberty is arbitrary depends on the form of deprivation of liberty.³⁸² Given that this chapter is primarily concerned with pre-trial deprivation of liberty, including detention with a view to extradition, the following examples of arbitrary arrest and detention, which were discerned by the Court, are relevant. First (1), in cases where there is an element of bad faith or deception on the part of the authorities or where the domestic authorities neglected to apply the relevant legislation correctly, the deprivation of liberty will be considered arbitrary. Also (2) where the order to detain and the execution of the detention do not “genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of article 5 § 1”, and (3) in the absence of some relationship between the ground of deprivation of liberty permitted and relied upon and the place and condition of detention, the deprivation of liberty is considered arbitrary. Further, (4) where in case of detention on remand (Article 5 (1) (c) ECHR), no grounds are given by the judicial authorities in their decisions authorising detention for a prolonged period of time or where the reasons given are ‘extremely laconic’ and without reference to any legal provision which would have permitted the applicant’s detention and (5) where a detention order which had either expired or had been found to be expired had been replaced by the domestic courts too slowly (a period of less than one month has been accepted, while a period of more than one year has been found to render the detention arbitrary), the deprivation of liberty was found to be arbitrary. In case of detention with a view to extradition of deportation, (6) where the detention continues for an unreasonable length of time (the principle of proportionality is limited to that extent in cases of detention pursuant to Article 5 (1) (f) ECHR), the deprivation of liberty is considered to be arbitrary.³⁸³

Surprisingly, the legal frameworks of the *ad hoc* tribunals and the SCSL do not provide a right for suspects and accused persons to be free from unlawful or arbitrary arrest and detention. It has been argued that this absence underlines the need for these tribunals to apply

³⁸² ECtHR, *Mooren v. Germany*, Application No. 11364/03, Judgment (Grand Chamber) of 9 July 2009, par. 77; ECtHR, *Saadi v. the United Kingdom*, Application No. 13229/03, Judgment (Grand Chamber) of 28 January 2008, par. 68, including the relevant jurisprudence cited in the following paragraphs.

³⁸³ ECtHR, *Saadi v. the United Kingdom*, Application No. 13229/03, Judgment (Grand Chamber) of 28 January 2008, par. 69 – 73; ECtHR, *Mooren v. Germany*, Application No. 11364/03, Judgment (Grand Chamber) of 9 July 2009, par. 78 – 81.

the relevant international human rights norms to their full extent, including the relevant jurisprudence.³⁸⁴

Hence, the inclusion of Article 55 (1) (d) into the ICC Statute was praised as a “major advance over the ICTY and ICTR Statutes and Rules.”³⁸⁵ It provides that ‘in respect of an investigation under this Statute, a person [s]hall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute’. Importantly, the broad formulation of the right, as applying to ‘an investigation under this Statute’, implies that it applies both to the Court and to national authorities.

A similar entitlement of every person to be free from arbitrary or unlawful deprivation of liberty was provided for under the TRCP.³⁸⁶ In turn, no explicit provision is made under the statutory framework of the STL or the ECCC for a right for persons to be free from unlawful or arbitrary arrest and detention.

It follows from human rights law that the remedy when a person has been the victim of an unlawful or arbitrary arrest or detention is to release him or her. However, the international criminal tribunals avoid granting this remedy.³⁸⁷ When some rights of the suspect or the accused have been violated, the tribunals do not make a finding that the detention was ‘unlawful’ to avoid granting the remedy of release.³⁸⁸ In fact, such remedy may reveal itself to

³⁸⁴ G. SLUITER, Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 1997-1999*, Vol. III, 2001, p. 152.

³⁸⁵ C.K. HALL, Article 59, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1096.

³⁸⁶ Section 2.3 TRCP (‘No person shall be subjected to arbitrary arrest or detention. No person shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as prescribed in the present regulation and other applicable UNTAET Regulations’).

³⁸⁷ Consider in that regard A. SMEULERS, Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2002-2003*, Vol. XI, 2007, p. 109 (‘[t]he severity of the charges might, however, influence a careful balancing of what remedies can be used in order to repair violations’).

³⁸⁸ C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 660 (in referring to the example of a situation where the tribunal concluded that the right of the suspect to be informed promptly of the nature of the charges against him was violated, the author argues that rather than declaring the situation one of unlawful detention, they avoided doing so. ‘Because of that, neither do they have to explain what kinds of problems come with a strict application of this remedy of release and how they would resolve them’). Consider also B. SWART, Commentary, in A. KLIP and G. SLUITER (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 1994-1999*, Vol. II, Antwerp, Intersentia, 2001, p. 204.

be a *pro forma* remedy, since the UN member states would be under an obligation to, or the ICC could request states to immediately re-arrest the person.³⁸⁹ For this reason, PAULUSSEN argues that rather than automatically releasing the person, the tribunal “should instead simply accord the most appropriate remedy, taking every single aspect of the case into account, not only, among other things, the seriousness of the irregularity, but also the seriousness of the alleged crimes and hence the importance of the continuation of the trial.”³⁹⁰ Such assessment also allows for bringing the Prosecutor’s involvement into the equation.

V.2. The right to be promptly informed of the reasons for the arrest

V.2.1. The *ad hoc* tribunals and the Special Court

A right for the *accused* to be immediately informed upon arrest of the reasons thereof is provided for in the statutory framework of the *ad hoc* tribunals and the Special Court.³⁹¹ Only Rule 55 (E) ICTY RPE requires that the Registrar instruct the national authorities that the indictment and the statement of rights of accused be read *at the time of arrest*. Whereas the SCSL and ICTR RPE require that the arrest warrant, the order for surrender, the indictment and the statement of rights should be served on the accused (and read to him or her in a language he or she understands), there is no qualifier that this should be done at the time of arrest.³⁹² The ICTR Trial Chamber stated that sufficient information about the legal basis for the arrest of the accused can be given at the time of the arrest, or as soon as is practicable immediately following the arrest.³⁹³ Furthermore, Rule 53*bis* ICTY, ICTR, and SCSL RPE provides that the indictment should be personally effected on the accused at the time the person is being taken into the custody of the tribunal or as soon as possible thereafter.

³⁸⁹ C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 658.

³⁹⁰ *Ibid.*, pp. 858 - 859 (the author argues that such would add some ‘flexibility’ to the system). He additionally notes that with internationalised international criminal tribunals, the situation may even more problematic, where third states do not have the same cooperation obligations with the tribunal.

³⁹¹ Article 20 (2) ICTY Statute; Article 19 (2) ICTR Statute (right of the accused to be immediately informed of the charges against him or her upon being taken into custody). A corresponding provision is absent in the SCSL Statute. Besides, Article 21 (4) (a) ICTY Statute, Article 20 (4) (a) ICTR Statute and 17 (4) (a) SCSL Statute provide for the right ‘[t]o be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her’. This latter provision echoes Article 14 (3) (a) ICCPR.

³⁹² Rule 55 (C) (ii) and (iii) ICTR and SCSL RPE.

³⁹³ ICTR, Decision on Musabyimana’s Motion on the Violation of Rule 55 and International Law at the Time of his Arrest and Transfer, *Prosecutor v. Musabyimana*, Case No. ICTR-2001-62-T, T. Ch. II, 20 June 2002, par. 19-21.

No right for *suspects* to be informed without delay about the reasons for their arrest can be found in the Statute of the *ad hoc* tribunals and the SCSL.³⁹⁴ Nevertheless, a requirement to inform the suspect of the provisional charges under which he or she is arrested and detained, and the grounds necessitating provisional arrest and detention, follows from the provisions on the transfer and provisional detention of the suspect at the seat of the tribunal (Rule 40*bis*).³⁹⁵ In contrast, the same right is conspicuously absent in Rule 40 ICTY, ICTR and SCSL RPE. The absence of this right under the procedure of Rule 40 may lead to a gap in the protection of the individual rights of the suspect. Indeed, since a Rule 40*bis* order is often preceded by a prior prosecutorial request under Rule 40, the question rises as to the applicability of the right to be informed of the reasons for the arrest prior to the Rule 40*bis* order, even more so given the absence of any time limitations on the Prosecutor to request a Rule 40*bis* order following a Rule 40 request.³⁹⁶

Nevertheless, the applicability of the said right to suspects has firmly been established in the case law of the *ad hoc* tribunals. The Appeals Chamber underscored that the right to be informed of the reasons of the arrest comes into effect from the moment of arrest and

³⁹⁴ Consider Rule 40 ICTY, ICTR and SCSL RPE. In that regard, the right to be promptly informed of the reasons for the arrest needs to be distinguished from the right of the *accused* to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him (Article 21 (4) (a) ICTY Statute; Article 20 (4) (a) ICTR Statute and Article 17 (4) (a) SCSL Statute) by means of an indictment. The confirmation and service of the indictment may follow sometime after the arrest: see ICTR, Decision, *Prosecutor v. Semanza*, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 78, fn. 104; ICTR, Judgement and Sentence, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. I, 18 December 2008, par. 105.

³⁹⁵ Rule 40*bis* (E) ICTR and SCSL RPE require the Registrar to ensure that copies of (i) the request and (2) the Rule 40*bis* order (which sets out (1) the grounds for the request by the Prosecutor, (2) including the provisional charges and (3) the grounds justifying provisional detention at the seat of the tribunal under Rule 40*bis* (B) (iii) ICTR and SCSL RPE) are served on the suspect and his counsel 'as soon as possible' (consider also Rule 40*bis* (I) ICTR and SCSL RPE, according to which Rule 55 (C) ICTR and SCSL RPE apply *mutatis mutandis*). While a comparable provision is lacking in Rule 40*bis* of the ICTY RPE, the same requirement arguably follows from Rule 40*bis* (E) ICTY RPE *juncto* Rule 55 (E) ICTY RPE. Consider also ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 79, fn. 204: "the focus of the inquiry here is the determination of when the Appellant was actually notified of the general nature of the charges at any time *after* the initial Rule 40 request on 17 April 1996, but *before* the filing of the Rule 40*bis* order" (emphasis in original). Nevertheless, compare: W. SCHOMBURG, *The Role of International Criminal Tribunals in Promoting Respect for Fair Trials*, in «Northwestern Journal of International Human Rights», Vol. 8, 2009, p. 11 (where the author notes that Rule 40*bis* merely obliges the Prosecution to communicate a provisional charge to the Registrar when requesting the transfer and a provisional detention of a suspect. "No reference is made to the rights of a suspect that are triggered upon his arrest." This argumentation seems to be based solely on Rule 40*bis* (A) ICTY, ICTR and SCSL RPE. While it is certainly correct that no right for the suspect to be informed of the reasons of the arrest and detention is provided for, a duty incumbent on the Registrar to serve the Rule 40*bis* order and request on the suspect (informing the suspect of the reasons of his or her arrest) is explicitly provided for in the ICTR and SCSL RPE (and indirectly as far as ICTY Rule 40*bis* is concerned, through the application *mutatis mutandis* of Rule 55 (E) ICTY RPE).

³⁹⁶ See *supra*, Chapter 7, III.1.3.

detention.³⁹⁷ When a request for an arrest pursuant to Rule 40 is made, the suspect should be informed as soon as possible after the request about reliable information why he or she is considered to be a suspect and about provisional charges against him or her.³⁹⁸ The principle of prosecutorial due diligence requires the Prosecutor to request the authorities of the requested state to do so on its behalf.

The tribunals have derived the right from international human rights norms.³⁹⁹ The Appeals Chamber determined in *Barayagwiza* that the right of the suspect to be promptly informed of the charges against him or her serves two distinct purposes.⁴⁰⁰ On the one hand, such right counterbalances the interest of the prosecuting authority in seeking continued detention of the suspect. As such, this information duty ensures the effective realisation of the suspect's right to challenge his or her detention, and affords the suspect the opportunity to deny the offence and obtain his or her release prior to the initiation of the trial proceedings.⁴⁰¹ Secondly, it provides the suspect with the information necessary to prepare his or her defence.

From a conceptual point of view, it is important to clearly distinguish between two rights. At stake in *Barayagwiza* was the right for the suspect to be informed of the reasons for his or her arrest and of any charges in order to enable the suspect to challenge the detention, which should be distinguished from the right to be informed promptly and in detail about the charges.⁴⁰² Logically, at the moment of the arrest of the suspect, at an earlier stage in the criminal investigations, information may be of a more summary nature, less precise.⁴⁰³ The

³⁹⁷ ICTR, Decision, *Prosecutor v. Semanza*, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 78; ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 81-82; ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 226. Notably, where a suspect was already detained, the Appeals Chamber found that the right attaches from the moment the suspect was detained pursuant to a request under Rule 40: ICTR, Decision, *Prosecutor v. Semanza*, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 81.

³⁹⁸ ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 231.

³⁹⁹ In particular, the ICTR Appeals Chamber derived such right from Article 9 (2) ICCPR; Article 5 (2) ECHR and Article 7 (4) ACHR.

⁴⁰⁰ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 80; ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 229.

⁴⁰¹ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 80 (the Appeals Chamber stresses the importance of this underlying purpose, where the prosecuting authority is relying on the serious nature of the charges in arguing for the continued detention of the suspect).

⁴⁰² As underscored by the Appeals Chamber in *Barayagwiza*, the second 'function', to enable the suspect to prepare his or her defence, will require more detailed and specific charges to be provided.

⁴⁰³ HRC, *Mc Lawrence v. Jamaica*, Communication No. 702/96, U.N. Doc. CCPR/C/60/D/702/1996, 18 July 1997, par. 5.9 (noting that the information which should be provided to the accused under article 14 (3) (a) ICCPR is more precise than that for arrested persons under Article 9 (2) ICCPR. So long as Article 9 (3) (including the right to be brought before a judge promptly) is complied with, the details of the nature and cause

‘two functions’ scheme outlined above, as postulated by the Appeals Chamber, risks conflating these different and distinct concepts.⁴⁰⁴

Where the procedural framework and jurisprudence analysed above acknowledge the existence of a right of suspects and accused persons to be promptly informed of the reasons for their arrest, further guidance as to the substance of this right may be sought in international human rights norms and jurisprudence.⁴⁰⁵

First, the ECtHR addressed the right to be promptly informed of the reasons for the arrest in *Fox, Campbell, and Hartley v. The United Kingdom*. In the wording of the Court, Article 5 (2) ECHR “contains the elementary safeguard that any person should know why he is being deprived of his liberty.”⁴⁰⁶ This implies that any person arrested should be informed, in simple, non-technical language that he can understand, about the essential legal and factual grounds for his arrest, in order to be able to exercise his or her right to challenge its lawfulness: “[w]hilst this information must be conveyed ‘promptly’[...], it need not be related in its entirety by the arresting officer at the very moment of the arrest.”⁴⁰⁷ Where Article 9 (2)

of the charge need not necessarily be provided to an accused person immediately upon arrest). See also HRC, *Kelly v. Jamaica*, Communication No. 253/1987, U.N. Doc. CCPR/C/41/D/253/1987, 8 April 1991, par. 5.8. Similarly, in relation to the ECHR, TRECHSEL noted that the information which should be provided to the accused pursuant to Rule 6 (3) (a) ECHR should be more precise than that for arrested persons under Article 5 (2) ECHR. The different purpose the rights serve influences the nature of the information that should be provided. Where the former right according to which everyone charged with a criminal offence should be informed in detail of the nature and cause of the accusations against him serves the purpose of allowing the accused to mount a defence at trial, the former serves the purpose to allow the accused to effectively challenge his or her detention pursuant to Article 5 (4) ECHR. In that regard, Article 6 (3) (a) refers to information ‘in detail’. See S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, pp. 457-458.

⁴⁰⁴ For a concurring view, see S. ZAPPALÀ, *Human rights in International Criminal Proceedings*, Oxford, Oxford University Press, 2003, p. 76.

⁴⁰⁵ As far as international human rights norms are concerned, consider in particular Article 9 (2) ICCPR: “[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him”; Article 5 (2) ECHR: “[e]veryone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him”; Article 7 (4) ACHR: “[a]nyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.” Note that the formulation of this right under the ACHR differs from the other instruments where it seems to apply to detention rather than arrest and where it may be read as presupposing the existence of (a) charge(s). Reference should also be made to HRC, CCPR General Comment No. 8: Right to Liberty and Security of Persons (Art. 9), 30 June 1982, par. 4 (in case of preventive detention, information of the reasons should be given. Consider also Principle 10 of the Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, G.A. Resolution 43/173, U.N. Doc. A/RES/43/173, 9 December 1988 (“[a]nyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him”).

⁴⁰⁶ ECtHR, *Fox, Campbell and Hartley v. United Kingdom*, Application Nos. 12244/86; 12245/86; 12383/86, Series A, No. 182, Judgment of 30 August 1990, par. 40.

⁴⁰⁷ *Ibid.*, par. 40.

ICCPR requires that initial information be provided at the time of the arrest, this information can be limited to a general description of the reasons for the arrest.⁴⁰⁸

The *degree of specificity* necessitated under Article 5 (2) ECHR cannot be described in general terms and requires a factual determination. The issue of whether or not the content and promptness of the information conveyed were sufficient needs to be assessed in each case according to its specific features.⁴⁰⁹ In any case, the information provided should be sufficiently precise to allow the accused to challenge the arrest (*habeas corpus*).⁴¹⁰ Similarly, the HRC held that under Article 9 (2) ICCPR, anyone arrested should be informed sufficiently of the reasons for his arrest “to enable him to take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded.”⁴¹¹ In this regard, it should be reiterated that legitimate grounds are not required for the (provisional) arrest of a suspect or accused, save for the provisional detention of a suspect at the seat of the tribunal (Rule 40*bis* ICTY, ICTR, and SCSL RPE). Obviously, the information that is conveyed to the suspect or to the accused person differs. The suspect who is transferred to the seat of the tribunal will be informed of the grounds for the transfer requested by the Prosecutor, the provisional charges as well as of the grounds justifying the transfer and detention whereas the accused person will be informed of the charges.⁴¹²

Importantly, since the right ultimately serves the purpose of allowing the person to have the lawfulness of his or her detention decided upon speedily, the ECtHR held that Article 5 (2) does not only apply to persons ‘arrested’ but also to persons ‘deprived of [their liberty] by detention’. Consequently, the right equally applies when persons have already been arrested

⁴⁰⁸ M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd edition), Kehl am Rhein, Engel, 2005, p. 229.

⁴⁰⁹ ECtHR, *Murray v. the United Kingdom*, Application No. 14310/88, Series A, No. 300-A, Judgment of 28 October 1994, par. 72; ECtHR, *H.B. v. Switzerland*, Application No. 26899/95, Judgment of 5 April 2001, par. 47; ECtHR, *Conka v. Belgium*, Application No. 51564/99, Reports 2002-I, Judgment of 5 February 2002, par. 50.

⁴¹⁰ ECtHR, *Fox, Campbell and Hartley v. United Kingdom*, Application Nos. 12244/86; 12245/86; 12383/86, Series A, No. 182, Judgment of 30 August 1990, par. 40; ECtHR, *Van der Leer v. The Netherlands*, Application No. 11509/85, Series A, No. 170-A, Judgment of 21 February 1990, par. 28. The right to challenge the arrest will be discussed, *infra*, Chapter 7, V.3.

⁴¹¹ HRC, *Drescher Caldas v. Uruguay*, Communication No. 43/1979, U.N. Doc. CCPR/C/OP/2, 21 July 1983, par. 13.2. Consequently, the HRC held that it was not sufficient to inform Caldas that he was arrested under the prompt security measures without any indication of the substance of the complaint against him.

⁴¹² Consider in particular Rule 40*bis* (E) SCSL and ICTR RPE.

and detained, and when the basis for this arrest and detention subsequently changes.⁴¹³ Hence, when the requested state has already detained a suspect or accused person whose arrest and transfer is sought by an international criminal tribunal (for instance at the behest of a third state), a right for the suspect or accused attaches from the moment the basis for his detention by the requested state changes.

A suspect *should not be informed in a particular form*, nor should this information consist of a complete list of charges held against the suspect.⁴¹⁴ The European Commission for Human Rights held that the information provided can be even less in case of an arrest with a view to extradition, a view which was also adopted by the ECtHR.⁴¹⁵ Consequently, it could be argued that less information is required when a state is requested to provisionally arrest a suspect at the behest of one of the tribunals. Nevertheless, at the same time, the Court reiterated that the accused should be informed in an adequate manner, for him or her to know the reasons for the arrest.⁴¹⁶ In any case the information should be conveyed in a language which is understood by the person.⁴¹⁷ While no such obligation is included in the wording of Article 9 (2) ICCPR, this requirement follows from the jurisprudence of the HRC.⁴¹⁸ Lastly, when suspects are interrogated upon their arrest, this may allow these suspects to infer the reasons for the arrest from these interrogations⁴¹⁹

⁴¹³ ECtHR, *Shamayev and others v. Georgia and Russia*, Application No. 36378/02, Reports 2005-III, Judgment of 12 October 2005, par. 414- 415 (“there is no call to exclude the applicants from the benefits of paragraph 2, as paragraph 4 makes no distinction between persons deprived of their liberty by arrest and those deprived of it by detention”).

⁴¹⁴ ECommHR, *X. v. Germany*, Application No. 8098/77, D.R. 16, Decision of 13 December 1978, p. 111; ECtHR, *Kaboulov v. Ukraine*, Application No. 41015/04, Judgment of 19 November 2009, par. 144.

⁴¹⁵ ECommHR, *K. v. Belgium*, Application No. 10819/84, D.R. 38, Decision of 5 July 1984, p. 230. The Commission seems to reason that, where the suspect had not been arrested pursuant to Article 5 (1) (c) ECHR, insufficiency of information may not affect the broader right to a fair trial under Article 6 ECHR, as these proceedings are not concerned with the determination of a criminal charge; ECtHR, *Kaboulov v. Ukraine*, Application No. 41015/04, Judgment of 19 November 2009, par. 144; ECtHR, *Khudyakova v. Russia*, Application No. 13476/04, Judgment of 8 January 2009, par. 80; ECtHR, *Bordovskiy v. Russia*, Application No. 49491/99, 8 February 2005, par. 56.

⁴¹⁶ ECtHR, *Shamayev and others v. Georgia and Russia*, Application No. 36378/02, Reports 2005-III, Judgment of 12 October 2005, par. 413.

⁴¹⁷ See the wording of Article 5 (2) ECHR, *supra*, Chapter 9, V.2, fn. 405. Consider also ECtHR, *Ladent v. Poland*, Application No. 11036/03, Judgment of 18 March 2008, par. 64.

⁴¹⁸ Nevertheless, the HRC jurisprudence of the HRC seems to reveal that the person who is arrested should be informed in a language he or she understands, see HRC, *Michael and Brian Hill v. Spain*, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997, par. 12.2.

⁴¹⁹ ECtHR, *Fox, Campbell and Hartley v. United Kingdom*, Application Nos. 12244/86; 12245/86; 12383/86, Series A, No. 182, Judgment of 30 August 1990, par. 41.

The procedural regime of the ICTY specifies that the *accused person* can be informed of the indictment and the rights of the accused person either in oral form (in a language he or she understands) or in written form where a translation is served on the accused in a language the accused understands and is able to read.⁴²⁰ The procedural regime of the ICTR and the SCSL provides that the accused is to be informed in oral form.⁴²¹ Regarding the transfer and provisional detention of the suspect pursuant to Rule 40*bis*, the ICTR and SCSL RPE provide that ‘copies of the order (including the provisional charge and the ground justifying the order) and the request by the Prosecutor’ shall be served on the suspect and his or her counsel, without specifying the form in which this should happen.⁴²² Rule 40*bis* of the ICTY RPE refers to Rule 55 on the execution of the arrest of the accused which implies that the suspect may be informed either orally or in written form.⁴²³ This should be done in a language the suspect understands and is able to read respectively.⁴²⁴

However, it is not so much the level of information to be provided to the person arrested but rather the *timing of the information* that has proven to be controversial in international criminal proceedings. The requirement to be informed ‘promptly’ (ECHR) or ‘at the time of the arrest’ (ICCPR) under international human rights law has been more controversial.⁴²⁵ The ECtHR has accepted delays of several hours,⁴²⁶ or 24 hours but found a delay of 76 hours⁴²⁷ or four⁴²⁸ or ten⁴²⁹ days to be in violation of Article 5 (2) ECHR. Similarly, the HRC did not find a violation when there had been a delay of several hours.⁴³⁰ Where a delay of one week

⁴²⁰ Rule 55 (E) and (F) ICTY RPE.

⁴²¹ Rule 55 (C) (ii) and (iii) SCSL and ICTR RPE.

⁴²² Rule 40*bis* (E) ICTR and SCSL RPE.

⁴²³ Rule 40*bis* (E) ICTY RPE *juncto* Rule 55 (E) ICTY RPE.

⁴²⁴ Rule 40*bis* (E) ICTY RPE *juncto* Rule 55 (E) and (F) ICTY RPE.

⁴²⁵ Note that Article 9 (2) ICCPR requires that the information concerning the reasons for the arrest is provided ‘at the time of the arrest’, while the information on the charges should follow ‘promptly’.

⁴²⁶ ECtHR, *Fox, Campbell and Hartley v. United Kingdom*, Application Nos. 12244/86; 12245/86; 12383/86, Series A, No. 182, Judgment of 30 August 1990, par. 42; ECtHR, *Murray v. the United Kingdom*, Application No. 14310/88, Series A, No. 300-A, Judgment of 28 October 1994, par. 78.

⁴²⁷ ECtHR, *Saadi v. the United Kingdom*, Application No. 13229/03, Judgment (Grand Chamber) of 28 January 2008, par. 84.

⁴²⁸ ECtHR, *Shamayev and others v. Georgia and Russia*, Application No. 36378/02, Reports 2005-III, Judgment of 12 October 2005, par. 416.

⁴²⁹ ECtHR, *Rusu v. Austria*, Application No. 34082/02, Judgment of 2 October 2008, par. 43.

⁴³⁰ HRC, *Griffin v. Spain*, Communication No. 493/1992, U.N. Doc. CCPR/C/53/D/493/1992, 4 April 1995, par. 9.2; HRC, *Michael and Brian Hill v. Spain*, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997, par. 12.2.

and of nine days, respectively, was found, the HRC concluded that this was a violation of Article 9 (2) ICCPR.⁴³¹ Longer delays were also held to violate Article 9 (2) ICCPR.⁴³²

In *Semanza*, the Appeals Chamber identified an 18 day gap between the arrest and the moment the suspect was informed of the charges. It concluded that the suspect's right to be promptly informed of the nature of the charges had been violated.⁴³³ A "fitting remedy" was therefore required.⁴³⁴ In *Barayagwiza*, the Appeals Chamber concluded to an 11 months gap between the initial Rule 40 request and the moment he was informed of the general nature of the charges through being shown a copy of the Rule 40*bis* order.⁴³⁵ In its review decision of

⁴³¹ HRC, *Peter Grant v. Jamaica*, Communication No. 597/1994, U.N. Doc. CCPR/C/56/D/597/1994, 22 March 1996, par. 8.1; HRC, *McCordie Morrison v. Jamaica*, Communication No. 663/1995, U.N. Doc. CCPR/C/64/D/663/1995, 25 November 1998, par. 8.2.

⁴³² In *Glenford Campbell v. Jamaica*, the HRC found that detention for 45 days without being informed of the charges constitutes a violation of Article 9(2) ICCPR, see HRC, *Glenford Campbell v. Jamaica*, Communication No. 248/1987, U.N. Doc. CCPR/C/44/D/248/1987, 30 March 1992, par. 6.3. Consider also HRC, *Moriana Hernández Valentini de Bazzano*, Communication No. 5/1997, U.N. Doc., CCPR/C/7/D/5/1977, 15 August 1979, par. 2 and 10 (eight months); HRC, *Monja Jaona v. Madagascar*, Communication No. 132/1982, U.N. Doc. CCPR/C/24/D/132/1982, 1 April 1985, par. 14 (eight months); HRC, *Leopoldo Buffo Carballal v. Uruguay*, Communication No. 33/1978, U.N. Doc. CCPR/C/12/D/33/1978, 27 March 1981, par. 13 (1 year).

⁴³³ ICTR, Decision, *Prosecutor v. Semanza*, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 87. The Appeals Chamber distinguished between two periods where Semanza was held by the authorities of Cameroon *at the behest of the tribunal*. The first period started on 15 April 1996, where the Prosecutor made a Rule 40 request (at that time, Semanza was already arrested since 26 March 1996 on the basis of an international arrest warrant issued by the Rwandese authorities). The first period ended when the Prosecutor informed the authorities in Cameroon on 17 May 1996 that it was no longer interested in proceeding against Semanza. Regarding this first period of detention, the Appeals Chamber established that the earliest available date the suspect was informed of the nature of the crimes was 3 May 1996, the day the Yaoundé Court of Appeal deferred judgement on an extradition request from Rwanda, as the Office of the Public Prosecutor had referred to the request by the Tribunal in its submissions, informing the suspect in substance of the *nature of the charges for which the ICTR Prosecutor sought his arrest*. The Appeals Chamber reasoned that the counsel for Semanza (and based on the counsel/client relationship also Semanza) had received the submission by the Office of the Public Prosecutor at the latest at the moment the verbal request by the Public Prosecutor was made in court (*ibid.*, par. 81 – 87). The second period of detention started with a second Rule 40 request on 21 February 1997 and ended with the transfer of -the then accused- Semanza to the tribunal on 19 November 1997. The Appeals Chamber reasoned that at the moment Semanza was taken into custody he was aware of the nature of the Prosecutor's charges against him where he was informed of them during the first period of detention (*ibid.*, par. 89).

⁴³⁴ ICTR, Decision, *Prosecutor v. Semanza*, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 87.

⁴³⁵ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 85 and 101. While the Appeals Chamber concluded that only 35 days are clearly attributable to the Tribunal (those moments where the suspect was clearly being held at the behest of the Tribunal), the Chamber argued that "the facts remain that the Appellant spent an inordinate amount of time on provisional detention without knowledge of the general nature of the charges against him. *At this juncture, it is irrelevant that only a small portion of that total period of provisional detention is attributable to the Tribunal, since it is the Tribunal – and not any other entity – that is currently adjudicating the Appellant's claims.* Regardless of which other parties may be responsible, the inescapable conclusion is that the Appellant's right to be promptly informed of the charges against him was violated" (emphasis added). As to the facts, similar to the *Semanza* case, Barayagwiza was held by the authorities of Cameroon at the behest of the tribunal during two different periods. The first period started with the first Rule 40 request by the Prosecutor to the authorities of Cameroon (at that time, Barayagwiza was already detained since 15 April 1996, according to the Prosecutor at the request of the Rwandese and Belgian authorities, while the accused contended he was arrested at the request of the Prosecutor) and ended when the ICTR Prosecutor informed the authorities on 16 May 1996 that it would not proceed against Barayagwiza. A

31 March 2000, which is open to criticism, the Appeals Chamber concluded from several “new facts” that the period that Barayagwiza had not been informed of the general nature of the charges was not 11 months but was only 18 days.⁴³⁶ Nevertheless, the Appeals Chamber found this delay to still be in breach of the suspect’s right to be informed without delay of the charges against him.⁴³⁷ In determining the delay in informing the suspect or the accused person, the ICTR has inferred knowledge of the charges by the suspect from the constructive

second period started with the second Rule 40 request on 21 February 1997 (the same day a Cameroon court rejected the extradition request of Rwanda; as a result the court ordered Barayagwiza’s release but he was immediately rearrested at the request of the ICTR Prosecutor) and ended with the transfer to the ICTR on 19 November 1997. While a Rule 40*bis* order for the arrest and transfer of Barayagwiza was signed and filed on 4 March 1997, he was only transferred over eight months later. Consider the ‘Chronology of Events’, *ibid.*, Appendix A.

⁴³⁶ ICTR, Decision (Prosecutor’s Request for Review or Reconsideration), Case No. ICTR-97-19-AR72, A. Ch., 31 March 2000, par. 54-55 (transcripts presented of proceedings before the Cameroonian courts showed that Barayagwiza was already informed of the nature of the crimes by the Prosecutor on 3 May 1996). The Appeals Chamber established a new fact where transcripts of proceedings before the Cameroon courts showed that Barayagwiza knew of the nature of the charges on 3 May 1996. These transcripts show that the appellant opposed his extradition to Rwanda and stated “*c’est le tribunal international qui est compétent.*” Therefore, the Appeals Chamber reasoned, “it may accordingly be presumed that the Appellant was informed of the nature of the crimes he was wanted for by the Prosecutor.”

One author argues that the transcript does not prove that the suspect was *informed* about the general charges on that date. Therefore, he argues that the suspect should presumably have known of the charges prior to 3 May 1996, from the moment of his arrest and, most certainly, from the moment he appeared in court in Cameroon to answer the Rwandan and Belgian extradition requests. See W. SCHABAS, *Barayagwiza v. Prosecutor* in «The American Journal of International Law», Vol. 94, 2000, p. 570. However, it is for the Prosecutor to provide information that the suspect was informed of the reasons for his arrest, as clarified by the Appeals Chamber in the *Kajelijeli* case referred to below (see *infra*, Chapter 7, V.2.1. (§ burden of proof). Therefore, the mere ‘presumption’ that the suspect was informed about the reasons for his arrest at the moment he was taken into custody in the absence of any information, does clearly not suffice. Such argumentation is flawed and should henceforth be rejected.

Besides, it is clear that the statement provided only shows that Barayagwiza understood that the ICTR had jurisdiction over the case. Whereas the statement made by Barayagwiza arguably proves that Barayagwiza knew why he was initially arrested (following an international arrest warrant by Rwanda and Belgium), it does not prove that the suspect knew the reasons why the ICTR sought his arrest. As previously held, the right to be informed about the reasons for the arrest equally applies where the basis for the arrest and detention changes. Besides, in no way does such statement prove that the Prosecutor fulfilled its obligation to inform the suspect of the reasons for his arrest. For a confirming view on this latter point, consider M. MOMENI, *Why Barayagwiza is Boycotting his Trial at the ICTR: LESSONS in Balancing Due Process Rights and Politics*, in «ILSA Journal of International and Comparative Law, Vol. 7, 2000 – 2001, pp. 323 – 324 (arguing that “the new facts did not show that the Prosecutor had fulfilled the obligation to timely inform the Accused of his right.” “They simply showed that Barayagwiza knew the nature of the charges against him in Cameroon in 1996, although not through the actions of the OTP”). Consider also S.B. STARR, *Rethinking “Effective Remedies”: Remedial Deterrence in International Courts*, in «New York University Law Review», Vol. 83, 2008, p. 718 (calling the holding by the ICTR “a remarkable non sequitur.” “Even if Barayagwiza understood which court has sought jurisdiction over his case, that is a far cry from being informed in clear language of the essential legal and factual grounds for his arrest”).

⁴³⁷ ICTR, Decision (Prosecutor’s Request for Review or Reconsideration), Case No. ICTR-97-19-AR72, A. Ch., 31 March 2000, par. 55. The Appeals Chamber added that “this violation is patently of a different order than the one identified in the Decision whereby the Appellant was without any information for 11 months.”

knowledge by his defence counsel. In turn, it derived this constructive knowledge on behalf of the defence counsel from his opposition to a motion for further provisional detention.⁴³⁸

§ *Burden of proof*

In the *Kajelijeli* case, the accused argued that at the time of his arrest, he asked the authorities of Benin to be informed about the reasons of his arrest, only to be told that he would find them out at a later date. Since the Prosecutor failed to rebut this argument, the Appeals Chamber concluded that in the absence of any evidence to the contrary, the right to be informed about the reasons as to why he was deprived of his liberty had been violated.⁴³⁹ This holding is in keeping with the case law of the HRC, which emphasised that “[i]n the absence of any state party information to the effect that the author *was* promptly informed of the reasons of his arrest”, the HRC would have to rely on the statement provided by the accused.⁴⁴⁰ Consequently, it is recommendable to have the arrest proceedings organised in a manner allowing the Chamber to check whether the rights of the suspect or accused to be informed about the reasons for the arrest were respected. However, since the arrests are effectuated by states at the request of the tribunal, the arrest procedure will depend on domestic law. Nevertheless, the modalities of the cooperation request may yet accommodate these concerns.

§ *No right to be ‘promptly’ charged?*

Occasionally, the jurisprudence of the *ad hoc* tribunals refers to the right to be ‘promptly charged’. If the right refers to the time limitations under Rule 40*bis* for charging the suspect, the reference to this right seems to be rather unproblematic. Nevertheless, the ICTR Appeals Chamber, in *Barayagwiza*, seemed to argue the existence of a right to be promptly charged

⁴³⁸ ICTR, Judgement and Sentence, *Prosecutor v. Bizimungu*, Case No. Case No. ICTR-99-50-T, T. Ch. II, 30 September 2011, par. 36.

⁴³⁹ ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 227.

⁴⁴⁰ HRC, *Mc Lawrence v. Jamaica*, Communication No. 702/1996, U.N. Doc. CCPR/C/60/D/702/1996, 18 July 1997, par. 5.5 (noting that “it is [...] not sufficient for the State party simply to reject the author’s allegations as unsubstantiated or untrue. In the absence of any State party information to the effect that the author was promptly informed of the reasons for his arrest, the Committee must rely on Mr. Mc Lawrence’s statement that he was only apprised of the charges for his arrest when he was first taken to the preliminary hearing, which was almost three weeks after the arrest”).

under international human rights law.⁴⁴¹ The case law referred to by the Appeals Chamber refers to instances in which the HRC found that the person has not been “promptly” informed of the charges against him, which is something different than the right to be “promptly” charged.⁴⁴²

V.2.2. The International Criminal Court

The procedural framework of the ICC does not expressly provide for the right of suspects or accused persons to be informed of the reasons for their arrest.⁴⁴³ However, it was discussed previously that pursuant to Article 59 (2) (c) ICC Statute, the competent judicial authority in the custodial state should determine whether the suspect’s rights have been respected. It has been argued that the notion of the ‘rights of the person arrested’ should be understood as including the internationally protected rights of the suspect.⁴⁴⁴ The right of suspects to be informed of the reasons for their arrest is clearly included in this latter category.⁴⁴⁵ Consequently, this right should be respected by the requested state in the execution of the arrest. This obligation follows first from the human rights treaties to which the requested state is a party. Furthermore, as mentioned previously, the ICC RPE provide that the Court should ensure that as soon as the person is arrested by the requested state, he or she will receive a copy of the arrest warrant and of the relevant parts of the Statute. This should be done in a

⁴⁴¹ Consider *e.g.* ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 100 (“We find, therefore, that the Appellant’s right to be promptly charged pursuant to international standards as reflected in Rule 40bis was violated.”); ICTR, Decision, *Prosecutor v. Semanza*, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 91. However, note that in the Semanza Decision, as previously noted, the Appeals Chamber changed its opinion as to the starting point of the right to be promptly charged. See *supra*, Chapter 7, III.1.3.

⁴⁴² For a similar view, see B. SWART, Commentary, in A. KLIP and G. SLUITER (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 1994-1999*, Vol. II, Antwerp, Intersentia, 2001, p. 206.

⁴⁴³ S.L. RUSELL-BROWN, *Poisoned Chalice?: The Rights of Criminal Defendants Under International Law, During the Pre-Trial Phase*, in «UCLA Journal of International Law and Foreign Affairs», Vol. 8, 2003, p. 146 (“nor is it entirely clear whether [the Rome Statute] articulates a right to be informed of the reasons for an arrest at the time of arrest”).

⁴⁴⁴ Consider the discussion *supra*, Chapter 7, II.4.2.

⁴⁴⁵ Consider *e.g.* G. SLUITER, *Surrender of War Criminals to the ICC*, in «The Loyola of Los Angeles International and Comparative Law Review», Vol. 25, 2003, p. 623 (“Commentators have suggested that the drafters essentially had international human rights in mind, especially the arrested person’s right to be informed about the charges and the grounds for detention, as protected by Article 9(2) of the ICCPR”); C.K. HALL, Article 59, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1152 (“The rights referred to in this Subparagraph would include both rights under national law and under international law [...] includ[ing] the suspect’s right to be informed about the charges and the grounds for detention”). Consider however the practice of the ICC with regard to Article 59 (2) ICC Statute, discussed above, *supra*, Chapter 7, II.4.2.

language the person fully understands and speaks.⁴⁴⁶ Notably, the ICC Appeals Chamber has recognised the existence of the right to be informed of the reasons of the arrest “of every individual”.⁴⁴⁷ With regard to accused persons, reference should be made to the related right “to be informed promptly and in detail of the nature, cause, and content of the charge”, as provided for under the Statute.⁴⁴⁸

V.2.3. The internationalised criminal tribunals

As far as the internationalised criminal tribunals are concerned, it should be noted that the STL RPE state that when an arrest warrant is issued, it should be accompanied by the indictment and a statement of the rights of the accused.⁴⁴⁹ These documents should be in a language the accused understands ‘where practicable’. The Registrar should instruct the person or authorities that effectuate the arrest to read the indictment and the statement of the rights of the accused to the accused in a language he or she understands at the moment of the arrest.⁴⁵⁰ As far as the provisional arrest and transfer of *suspects* is concerned, it follows from Rule 63 (A) STL that a request should set forth the basis of the Prosecutor’s application, the provisional charge and the legitimate ground. While it is not expressly provided that the suspect should be informed about the reasons for his or her arrest, the application *mutatis mutandis* of Rule 79 STL RPE arguably implies that the Registrar should instruct the person or authorities effectuating the arrest to have the order or request read to the suspect in a language he or she understands, together with a statement of the rights of suspects.⁴⁵¹ Noteworthy too is Rule 101 (A) STL RPE, which provides that when a suspect, accused person or a detained person is transferred to the tribunal, or when an accused person is arrested upon voluntary appearance, the Pre-Trial Judge or Chamber will inform itself whether the accused has been informed about the crimes for which he stands accused or is

⁴⁴⁶ Rule 117 (1) ICC RPE. See *supra*, Chapter 7, II.4.2.

⁴⁴⁷ ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled “Decision on Application for Interim Release”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-323 OA, A. Ch., 16 December 2008, par. 29 (“It is the human right of every individual to be informed of the grounds and reasons for which the deprivation of his/her liberty is sought”).

⁴⁴⁸ Article 67 (1) (a) ICC Statute.

⁴⁴⁹ Rule 79 (C) STL RPE.

⁴⁵⁰ Rule 79 (E) STL RPE. Alternatively, the indictment and the statement of rights may be served on the accused in a language he or she understands and is able to read (Rule 79 (F) STL RPE).

⁴⁵¹ Rule 63 (E) *juncto* Rule 79 (E) and (F) STL RPE.

suspected and of his or her rights, including his or her right to apply for release.⁴⁵² The TRCP provided that when a suspect was taken into police custody by the SPSC, ‘upon arrest and at the review hearing, the suspect should be informed of the reasons of the arrest and any charges against him and of his rights’.⁴⁵³ Lastly, the ECCC provide for the general right of every person to be informed about any charges against him or her.⁴⁵⁴ During the initial appearance, the charged person brought before the Co-Investigating Judges should be notified of the charges.⁴⁵⁵ No specific right for the *suspect* to be informed of the reasons for his or her arrest is provided for; this is also true for the time when he or she is brought before the Co-Investigating Judges.

V.3. Right to be promptly brought before a judge or ‘judicial officer’

The right of any person detained on a criminal charge to be promptly brought before a judge (or another officer authorised by law to exercise judicial power) is recognised by international human rights instruments.⁴⁵⁶ The importance of this right lies where it ensures that the person deprived of liberty is promptly and physically brought before a judicial officer. As such, according to the ECtHR, the right protects against “arbitrary behaviour, incommunicado detention and ill-treatment,” by means of “expedited judicial scrutiny.”⁴⁵⁷ The right should be distinguished from the right to challenge the lawfulness of the detention (*inter alia* Article 9

⁴⁵² Rule 101 (A) STL RPE.

⁴⁵³ Section 6 (2), Sections 19A.3 and 20.3 TRCP.

⁴⁵⁴ Rule 21 (1) (d) ECCC IR. Consider also Rule 51 (1) ECCC IR.

⁴⁵⁵ Rule 57 (1) ECCC IR.

⁴⁵⁶ The right is to be found in almost identical terms in Article 9 (3) ICCPR (“[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power”), in Article 5 (3) ECHR (“[e]veryone arrested or detained in accordance with the provisions of paragraph 1 (c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power”); Article 7 (5) ACHR (“[a]ny person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power”). Consider also HRC, CCPR General Comment No. 8: Right to Liberty and Security of Persons (Art. 9), 30 June 1982, par. 2 (“[p]aragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be brought “promptly” before a judge or other officer authorized by law to exercise judicial power. More precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days. Many States have given insufficient information about the actual practices in this respect”). The STL Pre-Trial Judge held, *obiter*, that this norm constitutes an international principle of *jus cogens*. See STL, Order Setting a Time Limit for Filing of an Application by the Prosecutor in Accordance with Rule 17 (B) of the Rules of Procedure and Evidence, Case No. CWPTJ/2009/03, PTJ, 15 April 2009, par. 14.

⁴⁵⁷ See e.g. ECtHR, *Medvedev and others v. France*, Application No. 3394/03, Judgment (Grand Chamber) of 29 March 2010, par. 118; ECtHR, *Öcalan v. Turkey*, Application No. 46221/99, Reports 2005-IV, Judgment (Grand Chamber) of 12 May 2005, par. 103; ECtHR, *Brogan and others v. The United Kingdom*, Application Nos. 11209/84; 11234/84; 11386/85, Series A, No. 145-B, Judgment of 29 November 1988, par. 58.

(4) ICCPR; Article 5 (4) ECHR) given its ‘automatic nature’.⁴⁵⁸ Therefore, compliance with Article 5 (3) ECHR cannot be ensured by providing a right to challenge the lawfulness of the detention.⁴⁵⁹ The jurisprudence of the ECtHR clarified what should be understood under an ‘other officer authorised by law to exercise judicial power’. First, what is required is that this officer is independent.⁴⁶⁰ This is a requirement that was equally confirmed by the HRC.⁴⁶¹ Furthermore, the jurisprudence of the ECtHR emphasised that the right encompasses both a *procedural* requirement, to know that the judge or judicial officer should hear the person brought physically before him or her⁴⁶² as well as a *substantial* requirement, since it requires the judicial officer to not only review circumstances in favour of and against detention but also to assess whether the detention in the given case was justified (and thus to consider the merits of the detention).⁴⁶³ Consequently, it is of the utmost importance that the judge or

⁴⁵⁸ Consider *e.g.* ECtHR, *Medvedev and others v. France*, Application No. 3394/03, Judgment (Grand Chamber) of 29 March 2010, par. 122; ECtHR, *McKay v. The United Kingdom*, Application No. 543/03, Reports 2006-X, Judgement (Grand Chamber) of 3 October 2006, par. 34.

⁴⁵⁹ ECtHR, *T.W. v. Malta*, Application No. 25644/94, Judgment (Grand Chamber) of 29 April 1999, par. 47; ECtHR, *Aquilina v. Malta*, Application No. 25642/94, Reports 1999-III, Judgment of 29 April 1999, par. 47.

⁴⁶⁰ The Court held in the *Schiesser* case that ‘independence from the executive and the parties’ does not prohibit that an ‘officer’ is a member of the prosecutor’s office, where he or she only intervenes in the proceedings in an investigative authority and does not act as a Prosecutor. In its later jurisprudence, the Court overturned its previous case law and held that the ‘officer’ of the prosecutorial office could not be considered “independent of the parties.” ECtHR, *Schiesser v. Switzerland*, Application No. 7710/76, Series A, No. 34, Judgment of 4 December 1979, par. 31; ECtHR, *De Jong, Baljet and Van den Brink v. The Netherlands*, Application Nos. 8805/79; 8806/79; 9242/81, Series A, No. 77, Judgment of 22 May 1984, par. 49; ECtHR, *Huber v. Switzerland*, Application No. 12794/8740, Series A, No. 188, Judgment of 23 October 1990, par. 40 – 43. Consider also ECtHR, *Medvedev and others v. France*, Application No. 3394/03, Judgment (Grand Chamber) of 29 March 2010, par. 124 (noting that “[t]he judicial officer must offer the requisite guarantees of independence from the executive and the parties, which precludes his subsequent intervention in criminal proceedings on behalf of the prosecuting authority”). In a similar vein, consider ECtHR, *Nikolova v. Bulgaria*, Application No. 31195/96, Reports 1999-II, Judgment of 25 March 1999, par. 49.

⁴⁶¹ In *Kulomin v. Hungary*, the HRC held that “[T]he Committee considers that it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. In the circumstances of the instant case, the Committee is not satisfied that the public Prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an “officer authorized to exercise judicial power” within the meaning of article 9(3).” See HRC, *Kulomin v. Hungary*, Communication No. 521/1992, U.N. Doc. CCPR/C/50/D/521/1992, 22 March 2006, par. 11.3.

⁴⁶² This procedural requirement encompasses at least three specific elements. First, the judge or ‘other officer authorised by law to exercise judicial power’ should hear the person him or herself (see ECommHR, *Skoogström v. Sweden*, Application No. 8582/79, Decision of 15 July 1983, par. 80 (holding that there can be no total or partial delegation of the powers under Article 5 (3) ECHR)), (2) the person should automatically be brought before the judge or ‘officer’ and (3) the requirement that the judge or officer must hear the person implies that the simple appearance of the person is not sufficient. See D. CHATZIVASSILIOU, *The Guarantees of Judicial Control with Respect to Deprivation of Liberty under Article 5 of the European Convention on Human Rights*, in «ERA Forum», Vol. 5, 2004, p. 511.

⁴⁶³ ECtHR, *Schiesser v. Switzerland*, Application No. 7710/76, Series A, No. 34, Judgment of 4 December 1979, par. 31; ECtHR, *De Jong, Baljet and Van den Brink v. The Netherlands*, Application Nos. 8805/79; 8806/79 and 9242/81, Series A, No. 77, Judgment of 22 May 1984, par. 47; ECtHR, *T.W. v. Malta*, Application No. 25644/94, Judgment (Grand Chamber) of 29 April 1999, par. 41; ECtHR, *Aquilina v. Malta*, Application No.

‘officer’ has the power to order the release of the person.⁴⁶⁴ A decision on detention should set out the facts upon which the decision is based and, thus, be reasoned.⁴⁶⁵

The period of time a person can be held before being brought before a judicial authority depends on the circumstances of the case. In its General Comment No. 8, the HRC clarified that the right to be brought before a judicial authority ‘promptly’ entails that delays should not exceed “a few days.” This led the HRC to find a violation where there had been a four day delay or a longer delay.⁴⁶⁶ On the other hand, a delay of 73 hours was found not to be in violation of Article 9 (3) ICCPR.⁴⁶⁷ The ECtHR found a delay of four days and six hours not to be in compliance with Article 5 (3) ECHR, even in complex cases involving terrorist offences.⁴⁶⁸ Periods of detention of up to four days before being brought before a judge have been accepted by the ECtHR.⁴⁶⁹ The ECtHR underlined that Article 5 (3) ECHR leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision.⁴⁷⁰ Longer periods have exceptionally been accepted, *e.g.*

25642/94, Reports 1999-III, Judgment of 29 April 1999, par. 47; ECtHR, *Medvedev and others v. France*, Application No. 3394/03, Judgment (Grand Chamber) of 29 March 2010, par. 124.

⁴⁶⁴ ECtHR, *Ireland v. The United Kingdom*, Application No. 5310/71, Judgment of 18 January 1978, par. 199; ECtHR, *Schiesser v. Switzerland*, Application No. 7710/76, Series A, No. 34, Judgment of 4 December 1979, par. 31.

⁴⁶⁵ See *e.g.* ECtHR, *Hood v. The United Kingdom*, Application No. 27267/95, Reports 1998-VIII, Judgment of 18 February 1999, par. 60.

⁴⁶⁶ HRC, *Freemanle v. Jamaica*, Communication No. 625/1995, U.N. Doc. CCPR/C/68/D/625/1995, 24 March 2000, par. 7.4 (in the absence of any justification, the HRC found a violation where there was a four days delay); HRC, *Kurbanov v. Tajikistan*, Communication No. 1096/2002, U.N. Doc. CCPR/C/79/D/1096/2002, 6 November 2003, par. 7.2; HRC, *Kennedy v. Trinidad and Tobago*, Communication No. 845/1998, U.N. Doc. CCPR/C/74/D/845/1998, 26 March 2002, par. 7.6; HRC, *Mc Lawrence v. Jamaica*, Communication No. 702/1996, U.N. Doc. CCPR/C/60/D/702/1996, 18 July 1997, par. 5.6 (one week in a capital case); HRC, *Lobban v. Jamaica*, Communication No. 797/1998, U.N. Doc. CCPR/C/80/D/797/1998, 16 March 2004, par. 8.3 (11 days); HRC, *Casafranca de Gomez v. Peru*, Communication No. 981/2001, U.N. Doc. CCPR/C/78/D/981/2001, 22 July 2003, par. 7.2. (22 days); HRC, *Jones v. Jamaica*, Communication No. 585/1994, U.N. Doc. CCPR/C/62/D/585/1994, 6 April 1998, 9.3 (ten weeks) and HRC, *Kelly v. Jamaica*, Communication No. 253/1987, U.N. Doc. CCPR/C/41/D/253/1987, 8 April 1991, 5.6 (five weeks).

⁴⁶⁷ HRC, *Van der Houwen v. The Netherlands*, Communication No. 583/1994, U.N. Doc. CCPR/C/54/D/583/1994, 14 July 1995, par. 4.2.

⁴⁶⁸ ECtHR, *Brogan and others v. The United Kingdom*, Application Nos. 11209/84; 11234/84; 11386/85, Series A, No. 145-B, Judgment of 29 November 1988, par. 62; ECtHR, *De Jong, Baljet and Van den Brink v. The Netherlands*, Application Nos. 8805/79; 8806/79; 9242/81, Series A, No. 77, Judgment of 22 May 1984, par. 52 – 54 (seven, eleven and six days respectively); ECtHR *Öcalan v. Turkey*, Application No. 46221/99, Reports 2005-IV, Judgment (Grand Chamber) of 12 May 2005, par. 104 – 105 (seven days).

⁴⁶⁹ ECtHR, *Taş v. Turkey*, Application No. 24396/94, Judgment of 14 November 2000, par. 86. Where the national law provides for a shorter period and such period is ignored, there is no violation of Article 5 (3). However, there would be a violation of Article 5 (1) ECHR where the deprivation of liberty would be unlawful.

⁴⁷⁰ ECtHR, *Brogan and others v. The United Kingdom*, Application Nos. 11209/84; 11234/84; 11386/85, Series A, No. 145-B, Judgment of 29 November 1988, par. 121; ECtHR, *Pantea v. Romania*, Application No. 33343/96, Judgment of 3 June 2003, par. 240.

when the arrest took place at sea, and it was ‘materially impossible’ to bring the detainee before the judge faster.⁴⁷¹ None of the international (regional) human rights instruments provide for a precise time limitation.

V.3.1. The *ad hoc* tribunals and the Special Court

As far as the *ad hoc* tribunals and the Special Court are concerned, the procedural norms which guarantee the right to be promptly brought before a judge upon arrest depend on two familiar variables, to know (1) the place of detention (in the requested state or at the seat of the tribunal) and, (2) in cases where the person is detained at the seat of the tribunal, upon the status of the person (suspect or accused person).

It has been argued previously that the procedure of the *ad hoc* tribunals and the Special Court with regard to the provisional arrest of suspects at the urgent request of the Prosecutor (‘Rule 40 requests’) does not provide the suspect with any procedural rights upon his or her arrest by the requested state (or by an international organisation). However, when the suspect is transferred and provisionally detained at the seat of the tribunal, the suspect will, as previously mentioned, be brought, without delay, before the Judge who previously confirmed the Rule 40*bis* order.⁴⁷² This Judge will ensure that the rights of the suspect have been respected. In the *Bagosora* case, the Trial Chamber determined that there had been a 27-day gap between the transfer of the then suspect Kabiligi and his first appearance before a Judge (pursuant to Article 40*bis* (J) ICTR RPE). According to the Trial Chamber, this amounted to a delay, in violation of Rule 40*bis* (J) ICTR RPE, requiring an appropriate remedy. However, the Chamber noted that where the Defence only raised this issue in its closing brief, this “indicates that any prejudice suffered by Kabiligi is at most minimal.”⁴⁷³ Furthermore, the

⁴⁷¹ ECtHR, *Rigopoulos v. Spain*, Application No. 37388/97, Reports 1999-II Judgment of 12 January 1999; ECtHR, *Koster v. Netherlands*, Application No. 12843/87, Series A, No. 221, Judgment of 28 November 1991, par. 24; ECtHR, *Medvedyev and others v. France*, Application No. 3394/03, Judgment (Grand Chamber) of 29 March 2010, par. 130 – 131.

⁴⁷² Rule 40 *bis* (F) ICTY RPE and Rule 40 *bis* (J) ICTR and SCSL RPE. For an example, see ICTR, *Prosecutor v. Renzaho*, Minutes of Hearing Pursuant to Rule 40 *bis* (J) of the Rules of Procedure and Evidence, Case No. ICTR-97-31-DP, Judge, 3 October 2002.

⁴⁷³ ICTR, Judgement and Sentence, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. I, 18 December 2008, par. 89 – 90; ICTR, *Prosecutor v. Bagosora et al.*, Judgement, Case No. ICTR-98-41-A, A. Ch., 14 December 2011, par. 31. Compare ICTR, Judgement and Sentence, *Prosecutor v. Bizimungu*, Case No. ICTR-99-50-T, T. Ch. II, 30 September 2011, par. 54 (“The Chamber has some reservations that the initial appearances by Bizimungu after his transfer to the Tribunal comported with the requirement that he be brought, without delay, before a Judge as set forth in Rule 40 *bis* (J). Nevertheless, duty counsel raised no objections on

Trial Chamber stated that the failure to promptly bring a challenge “has also prevented the development of a full record which would allow the Chamber to properly determine to what extent the delay is attributable to the Tribunal as opposed to any waiver of the right or other circumstances attributable to the Defence.”⁴⁷⁴ The Trial Chamber subsequently determined that Kabiligi’s right to counsel had been violated during the initial period of his detention. This is not without importance where “[o]ne of the key purposes of bringing a suspect promptly before a judge after his transfer is to ensure that his rights are being respected.”⁴⁷⁵ As far as the delay in the initial appearance before a judge is concerned, the Trial Chamber concluded that the appropriate remedy was the formal recognition that this violation occurred.⁴⁷⁶

The procedural regime is flawed insofar that, as previously held, there is no time limitation on the period that the suspect may spend in detention in the requested state.⁴⁷⁷ However, an obligation for the tribunals to provide for a right to be promptly brought before a judge or a ‘judicial officer’ in Rule 40 proceedings derives from the international human rights norms discussed previously, as has been acknowledged by the ICTR Appeals Chamber.⁴⁷⁸ Furthermore, likewise, this obligation is incumbent upon the national authorities of the requested state, since this obligation follows from international human rights treaties that they are bound to respect.⁴⁷⁹

The ICTR Appeals Chamber in *Kajelijeli* found that the detention in Benin for 95 days without being promptly brought before a Judge (either an ICTR Judge or a Judge from the requested state) was “clearly unlawful” and was in violation of the suspect’s rights under the

this basis. Furthermore, the Bizimungu Defence, raising the issue after the close of the case, has not demonstrated any resulting material prejudice warranting a remedy”).

⁴⁷⁴ ICTR, Judgement and Sentence, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. I, 18 December 2008, par. 90.

⁴⁷⁵ *Ibid.*, par. 91.

⁴⁷⁶ *Ibid.*, par. 97.

⁴⁷⁷ See *supra*, Chapter 7, III.1.3.

⁴⁷⁸ ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 219 (“[t]he Appeals Chamber notes that the Statute and Rules of the Tribunal are silent with regard to the manner and method in which an arrest of a suspect is to be effected by the cooperating State under Rule 40 [...] no mention is made of ensuring the suspect’s right to be promptly informed of the reasons for his or her arrest or the right to be promptly brought before a Judge. *It is for the requested State to decide how to implement its obligations under international law*” (emphasis added)).

⁴⁷⁹ Consider *e.g. ibid.*, par. 220 (“the cooperating State still remains under its obligation to respect the human rights of the suspect as protected in customary international law, in the international treaties to which it has acceded, as well as in its own national legislation” (footnote omitted)).

Statute and under international human rights law.⁴⁸⁰ Consequently, the Appeals Chamber attributed responsibility for this violation to the Prosecutor. According to the Chamber, the Prosecutor failed to make a request, within a reasonable time, pursuant to Rule 40 and Rule 40*bis* for the provisional arrest and transfer of the suspect to the tribunal.⁴⁸¹ When the suspect, Kajelijeli (then accused), was transferred to the tribunal, he was also not brought before a Judge promptly. The Appeals Chamber referred to the underlying purposes of the right, including the right to be promptly informed of the provisional charges, to ascertain the identity of the suspect, to ensure that the rights of the suspect have been respected in detention and to give an opportunity to the suspect to voice any complaints.⁴⁸² While the Chamber acknowledged that the Prosecutor was not solely responsible for the violation of the rights of the suspect, it recalled that the suspect had been apprehended, arrested, and detained at the request of the Prosecutor.⁴⁸³

In this sense, the Appeals Chamber confirmed the attribution of pre-transfer violations to the Prosecutor and established the existence of a ‘shared burden’ between the requested state and the tribunal with regard to the safeguarding of the rights of the suspect in international cooperation in criminal matters.

“A Judge of the requested State is called upon to communicate to the detainee the request for surrender (or extradition) and make him or her familiar with any charge, to verify the suspect’s identity, to examine any obvious challenges to the case, to inquire into the medical condition of the suspect, and to notify a person enjoying the confidence of the detainee and consular officers. It is however not the task of that Judge to inquire into the merits of the case. He or she would not know the reasons for the detention in the absence of a provisional or final arrest warrant issued by the requesting State or the Tribunal. This responsibility is vested with the judiciary of the requesting State, or in this case, a Judge of the Tribunal, as they bear principal responsibility for the deprivation of liberty of the person they requested to be surrendered.”⁴⁸⁴

⁴⁸⁰ ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 231-233.

⁴⁸¹ *Ibid.*, par. 231-232, 252.

⁴⁸² *Ibid.*, par. 232.

⁴⁸³ In particular, the Appeals Chamber refers to a decision of the Constitutional Court of Benin, where it found that the detention in Benin was in violation of Article 18 (4) of the Constitution, which stipulates that “no one can be held for a period beyond 48 hours without a decision from a Magistrate to whom the person is presented, this timeframe can only be exceeded exceptionally as provided for by law and that cannot exceed a period of eight days.”

⁴⁸⁴ *Ibid.*, par. 221.

From this follows a *dual obligation* for the Prosecution to, on the one hand, include a notification to the judiciary of the requested state in its request for provisional arrest, or at least, a clause reminding the national authorities to bring the suspect promptly before a judge or ‘officer’ and, on the other hand, to notify the tribunal to enable the Judge to furnish the requested state with a provisional arrest and transfer order.⁴⁸⁵

The ICTR Appeals Chamber confirmed, in *Rwamakuba*, that when the person arrested and detained is an *accused*, he or she equally enjoys the right to be promptly brought before the Judge.⁴⁸⁶ In cases where the person arrested and transferred is an accused, the RPE of the *ad hoc* tribunals and the Special Court provide that the accused should be brought before a Judge or a Trial Chamber ‘without delay’, and should be formally charged.⁴⁸⁷ The provision is flawed where it provides the accused with such right ‘upon transfer’.⁴⁸⁸ It does not encompass a right for the accused to be brought before a judge in the requested state. Since this right follows from international human rights norms, the Prosecution should instruct the national authorities to ensure this right.⁴⁸⁹ Furthermore, its application to suspects which are already detained at the UN Detention Centre (as suspects) is not crystal clear. While, as previously explained, a right for suspects which are transferred to the tribunal to be brought before a judge is provided under Rule 40*bis* ICTY, ICTR, and SCSL RPE, it should be made clear that Rule 62 also applies to this category of defendants, upon confirmation of the indictment. However, this is not clear from the formulation of the provision (‘upon transfer’).

⁴⁸⁵ *Ibid.*, par. 222.

⁴⁸⁶ In the case at hand, the accused had been arrested and detained by the Namibian authorities from 2 August 1995 until 7 February 2000. Whereas the OTP on 22 December 1995 requested the Namibian authorities to keep Rwamakuba in custody, it informed the authorities on 18 January 1996 that they did not have sufficient evidence against Rwamakuba. He was subsequently released. On 29 August 1998, an indictment was confirmed against him and an order for his arrest and transfer was issued. He was re-arrested in Namibia on 21 October and transferred to the tribunal on 22 October 1998. See ICTR, Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused, *Prosecutor v. Rwamakuba et al.*, Case No. ICTR-98-44-T, T. Ch. II, 12 December 2000, p. 2.

⁴⁸⁷ See Rule 62 ICTY, ICTR and SCSL RPE, which is based on Article 20 (3) ICTY Statute and Article 19 (3) ICTR Statute. According to the Appeals Chamber, the assistance of counsel is ideal for the purpose of the initial appearance. See ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 248.

⁴⁸⁸ Rule 62 (A) ICTY, ICTR and SCSL RPE.

⁴⁸⁹ Compare S. TRECHSEL, Rights in Criminal Proceedings under the ECHR and the ICTY Statute – A Precarious Comparison, in B. SWART, A. ZAHAR and G. SLUITER (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford, Oxford University Press, 2011, p. 163 (“My proposal would be to link to the arrest warrant a request to the arresting state that the arrestee be brought promptly before a judge there”).

As noted by the ICTR Appeals Chamber, the purpose of the initial hearing is not limited to the entering of a plea. On this occasion, the accused must be made familiar with the charges, his or her identity should be checked, obvious challenges to the case should be examined, the medical condition of the accused should be checked and a person enjoying the confidence of the detainee as well as consular officers should be notified.⁴⁹⁰ Furthermore, a date for a sentencing hearing without delay in case of a guilty plea may also be scheduled. However, neither Rule 62 nor international human rights norms indicate a specific period of time after which the delay becomes excessive. In *Semanza*, the accused was transferred to the tribunal on 19 November 1997, only to have his initial appearance on 16 February 1998, or a time lapse of 89 days.⁴⁹¹ When the accused requested that his initial appearance be postponed thirteen days, the Appeals Chamber found that this request had the effect of a waiver of the right to be brought before a Trial Chamber without delay and be formally charged.⁴⁹² This reasoning is flawed insofar as Rule 62 ICTR RPE reflects the human right to be promptly brought before a judge or a judicial officer and insofar as it deviates from established human rights jurisprudence which holds that the right to be brought before a judge promptly cannot be waived.⁴⁹³ Nevertheless, a similar reasoning was adopted by the Trial Chamber in *Bagosora*, where 125 days had passed between the confirmation of the indictment of Kabiligi (who was already detained at the seat of the tribunal pursuant to Rule 40bis) and his initial appearance pursuant to Rule 62 ICTR RPE. The Trial Chamber found that the 125 day delay was not attributable to the tribunal because Kabiligi's counsel had objected to the first date proposed. This objection together with the failure to bring a claim for nine years suggested, according to the Trial Chamber, a waiver of this right.⁴⁹⁴ In *Kajelijeli*, the Appeals Chamber

⁴⁹⁰ ICTR, Decision on Appeals against Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-A, A. Ch., 13 September 2007, par. 28; ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 250. The obligation to inform a person enjoying the confidence of the detainee is *inter alia* provided for in Article 92 of the Standard Minimum Rules for the Treatment of Prisoners, as adopted in 1957 and approved by ECOSOC Resolution 663 C (XXIV), 31 July 1957 and Resolution 2076 (LXII), 13 May 1997, U.N. Doc. E/5988, 1977. The obligation to inform consular officers derives from Article 36 (B) of the Vienna Convention on Consular Relations as adopted in Vienna on 24 April 1963 and entered into force on 19 March 1967, United Nations Treaties Series, Vol. 596, p. 261.

⁴⁹¹ ICTR, Decision, *Prosecutor v. Semanza*, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 107.

⁴⁹² *Ibid.*, par. 108-111; consider the dissent of Judge Lal Chand Vohrah, who argued that the waiver of thirteen days does not imply a waiver of the extra 76 days: ICTR, Decision, *Prosecutor v. Semanza*, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, Declaration by Judge Lal Chand Vohrah, par. 10.

⁴⁹³ S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, p. 506 (noting that where the right to be promptly brought before a judge or 'officer' cannot be waived, such "highlights a general distrust of the police authorities and concerns as to whether such a waiver would truly be voluntary").

⁴⁹⁴ ICTR, Decision, *Prosecutor v. Semanza*, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 78, fn. 104; ICTR, Judgement and Sentence, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. I, 18 December 2008, par. 93.

found a 211-day delay between transfer and initial appearance to constitute “extreme undue delay”.⁴⁹⁵ Since the accused is entitled to an expeditious trial that fully respects his rights, he is entitled to a remedy.⁴⁹⁶ In *Barayagwiza*, a delay of 96 days existed between the transfer of the accused and his initial appearance, without there being any evidence that he was afforded the opportunity to appear before an independent judge during the period of provisional detention. The Appeals Chamber concluded that a violation of the right to be brought before a judge *without delay*, had occurred pursuant to Rule 62 and Articles 19 and 20 ICTR Statute as well as pursuant to ‘internationally recognised human rights standards’.⁴⁹⁷ In the *Bagosora et al.* case, Trial Chamber I, while noting that the delay was less excessive than in the *Rwamakuba* and the *Kabiligi* cases, found a delay of 28 days in holding the initial appearance of Bagosora to be in violation of his right to be brought before a judge without delay.

As far as the ICTY is concerned, TRECHSEL concluded, on the basis of 125 cases, that the average time for an initial appearance is four-and-a-half days, with delays of up to 62 days.⁴⁹⁸

In *Kajelijeli*, the ICTR Appeals Chamber rejected arguments that the difficulties in the assignment of counsel were responsible for the delay of the initial appearance and held that “[i]t constitutes a violation of Rule 44bis (D) of the Rules and provision 10bis of the Directive on the Assignment of Defence Counsel not to assign duty counsel, in spite of ongoing efforts to assign counsel of choice, *in light of the outstanding initial appearance*.”⁴⁹⁹ Indeed, Rule 44bis (D) provides that whenever an accused or suspect, transferred pursuant to Rule 40bis, is unrepresented at any time after being transferred to the tribunal, the Registrar will summon duty counsel as soon as practicable until counsel is engaged or assigned.⁵⁰⁰ Similarly, where

⁴⁹⁵ ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 250.

⁴⁹⁶ *Ibid.*, par. 253.

⁴⁹⁷ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 71. However, the Appeals Chamber added that this violation does not result in the Tribunal losing jurisdiction over the case. Judge Shahabuddeen disagreed with such finding and argued that Rule 62 “is susceptible of the interpretation that non-compliance would result in loss of jurisdiction, on the view that jurisdiction was granted by the Statute to the Tribunal subject to defeasance for non-observance of certain fundamental principles stated or implied by the Statute.” See *ibid.*, Separate Opinion of Judge Shahabuddeen (subheading 1. Post-transfer delay).

⁴⁹⁸ S. TRECHSEL, Rights in Criminal Proceedings under the ECHR and the ICTY Statute – A Precarious Comparison, in B. SWART, A. ZAHAR and G. SLUITER (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford, Oxford University Press, 2011, p.163 (the author adds that for 37 cases, there was a delay of four days and that for 31 of these cases, the duration was between two and nine days).

⁴⁹⁹ ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 245.

⁵⁰⁰ It was noted by an ICTR Trial Chamber that an inconsistency exists between the right to counsel under Rules 40bis (I) and 44bis (D) ICTR Statute, which only apply after transfer, while Rule 45bis sets forth that Rules 44 and 45 (on the qualifications and assignment of counsel) apply to “any person detained under the authority of the

the Trial Chamber in *Rwamakuba* found a delay of four months and a half between the transfer and the initial appearance of the accused to be mainly attributable to the difficulties in having counsel assigned, the Chamber subsequently concluded to the Registrar's failure to have duty counsel appointed, which led to a violation of Rule 62 ICTR RPE and Article 20 (4) (c) (right to be tried without undue delay).⁵⁰¹ However, the request for immediate and unconditional release was dismissed because the delay did not cause *Rwamakuba* 'serious and irreparable damage' and due to the absence of other violations.⁵⁰²

Remarkably, some case law followed a different approach. In *Kanyabashi*, ICTR Trial Chamber II concluded that the *function* and *purpose* of the initial appearance before the Trial Chamber is not to ensure the lawfulness for the continuous detention of the accused.⁵⁰³ While the Trial Chamber acknowledged that the wording of the Rule 62 is similar to international provisions guaranteeing the right to be promptly brought before a judge, the Chamber held that these provisions do not apply to the setting of the *ad hoc* tribunals. Consequently, the interpretation given to "without delay" should not necessarily be the same as the interpretation given to "promptly" in Article 9 (3) ICCPR and other similar provisions.⁵⁰⁴ The Chamber reasoned that the procedural set-up differs from that in national societies in that Judges are involved in the arrest and detention of an accused through the confirmation of the indictment and the issuance of arrest warrants and orders for transfer.⁵⁰⁵ The international provisions of Article 9 (3) ICCPR, Article 5 (3) ECHR are, according to the Trial Chamber, based on national criminal justice systems where the judicial organs do not play a role in the arrest of individuals. In these criminal justice systems, the municipal law needs those provisions to

tribunal". Hence, arguably, a right to counsel also exists prior to transfer, from the moment the person is under the constructive custody of the ICTR. See ICTR, Decision on Protais Zigiranyirazo's Motion for Damages, *Prosecutor v. Zigiranyirazo*, T. Ch. III, 18 June 2012, par. 27 – 28 ("the Chamber would propose that the Judges of the Tribunal consider whether Rules 40bis (I) and 44bis (D) are consistent with Rule 45bis at the next opportunity").

⁵⁰¹ ICTR, Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused, *Prosecutor v. Rwamakuba et al.*, Case No. ICTR-98-44-T, T. Ch. II, 12 December 2000, par. 36 and 43; ICTR, Decision on Appeal against Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba et al.*, Case No. ICTR-98-44C-A, A. Ch., 13 September 2007, par. 17; ICTR, Judgment, *Prosecutor v. Rwamakuba et al.*, Case No. ICTR-98-44C-T, T. Ch. III, 20 September 2006, par. 217.

⁵⁰² ICTR, Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused, *Prosecutor v. Rwamakuba et al.*, Case No. ICTR-98-44-T, T. Ch. II, 12 December 2000, par. 44.

⁵⁰³ ICTR, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-I, T. Ch. II, 23 May 2000, par. 63.

⁵⁰⁴ *Ibid.*, par. 63.

⁵⁰⁵ *Ibid.*, par. 63.

place the executive action under judicial control after arrest and detention of individuals and to minimise the unlawful deprivation of the individual's right to liberty.⁵⁰⁶

This interpretation by the Trial Chamber is misguided and is based on a partial reading of the jurisprudence of the ECtHR and the HRC. The ECtHR has emphasised in its jurisprudence that, whereas the main goal of the stated right is to protect the individual from arbitrary interferences with his or her right to liberty, the obligation *equally applies* when an arrest warrant has been issued by a judicial authority.⁵⁰⁷ When the initial detention was ordered by a domestic court, this does not preclude the subsequent application of the right to be promptly brought before a judge when, *inter alia*, the defendant was not heard when his detention was being considered.⁵⁰⁸ Similarly, Article 9 (3) ICCPR applies “regardless of whether a person has been arrested on the basis of a court order or due to action taken directly by executive authorities [...]”⁵⁰⁹

V.3.2. The International Criminal Court

At the ICC, Article 59 (2) ICC Statute guarantees the protection of the right to be promptly brought before the ‘competent judicial authority’ in the custodial state. This provision has already been analysed at length.⁵¹⁰ While the express right for the suspect to be brought before a competent judicial authority is a remarkable improvement, bearing the flawed jurisprudence of the ICTR in particular in mind, it is in the referral to national law that the primary threat to the potential of this procedural mechanism lies. Indeed, the *chapeau* of Article 59 (2) refers back to the law of the custodial state.

Firstly, what is to be understood under ‘competent judicial authority’ under Article 59 (2) ICC Statute needs to be clarified. This concept should be understood in a normative way. Hence,

⁵⁰⁶ *Ibid.*, par. 62.

⁵⁰⁷ ECtHR, *McGoff v. Sweden*, Application No. 9017/80, Series A, No. 83, Judgment of 26 October 1984, par. 27 (emphasis added).

⁵⁰⁸ ECtHR, *Milošević v. Serbia*, Application No. 31320/05, Judgment of 28 July 2009, par. 52; ECtHR, *Vrenčev v. Serbia*, Application No. 2361/05, Judgment of 23 September 2008, par. 67.

⁵⁰⁹ M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd edition), Kehl am Rhein, Engel, 2005, pp. 230-231.

⁵¹⁰ See *supra*, Chapter 7, II.4.2.

appearance before a competent *judicial* authority is required.⁵¹¹ This concept should be interpreted in light of relevant international human rights norms, including Article 9 (3) ICCPR, Article 5 (3) ECHR or Article 7 (5) ACHR.⁵¹² Indeed, it follows from Article 21 (3) ICC Statute that the provisions of the Statute should be interpreted in light of internationally recognised human rights. Consequently, and secondly, the ‘competent judicial authority’ should be independent. Thirdly, this authority should respect the procedural and substantial requirements that were outlined above.⁵¹³

It has been explained previously how it follows from human rights law that the judicial officer before which the detained person is brought should have the power to review the merits of the detention and to order release. However, it follows from Article 59 (4) ICC Statute that it is not open to the competent judicial authority to determine whether the warrant of arrest was properly issued in accordance with Article 58 ICC Statute. Hence, the scope of this right seems too narrow to satisfy international human rights norms. Nevertheless, the power to review the legality of the arrest warrant is reserved to the Pre-Trial Chamber by virtue of Rule 117 (2) and (3) ICC RPE. Still, the accordance of this mechanism with international human rights norms remains uncertain. First and central to the right to be promptly brought before a judge or a judicial officer is the ‘automatic nature’ of this right. This feature seems absent insofar as the suspect arrested in the custodial state should *apply* to the Pre-Trial Chamber to have the legality of the warrant of arrest reviewed. The usefulness of the proceedings before the Pre-Trial Chamber depends on the suspect being informed of the possibility of such challenge and on the cooperation by the custodial state.⁵¹⁴ Moreover, the power to order release seems absent from Article 59 (2) ICC Statute. Whereas interim release can be ordered in exceptional circumstances,⁵¹⁵ this implies that the re-arrest of the suspect remains possible.⁵¹⁶ It does not seem open to the competent judicial authority to order the final release

⁵¹¹ In this regard, it should be noted that the other provisions of Article 59 ICC Statute refer to the ‘competent authority’.

⁵¹² C.K. HALL, Article 59, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1150 (noting the similarity between Article 59 (2) ICC Statute and international human rights norms); W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 718; B. SWART, *Arrest Proceedings in the Custodial State*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1252.

⁵¹³ See *supra*, Chapter 7, V.III.

⁵¹⁴ G. SLUITER, *Human Rights Protection in the ICC Pre-Trial Phase*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 469, fn. 24.

⁵¹⁵ See *infra*, Chapter 7, V.3.

⁵¹⁶ *Ibid.*, p. 469.

of the suspect.⁵¹⁷ At this point, the limited role the Pre-Trial Chamber takes upon itself in reviewing the proceedings in the custodial state should be recalled.⁵¹⁸

Once the person is transferred to the ICC (or appears voluntarily pursuant to a summons), Article 60 (1) ICC Statute guarantees the right to be promptly brought before a judge or a ‘judicial officer’, since it provides that the Pre-Trial Chamber should satisfy itself that the person has been informed of the crimes which he or she allegedly committed, the rights he or she enjoys under the Statute (Article 55 ICC Statute)⁵¹⁹ and his or her right to apply for interim release pending trial. No time limitation is included in the provision. Nevertheless, Rule 121 (1) ICC RPE clarifies that the suspect should appear ‘promptly upon arriving at the Court’.

V.3.3. The internationalised criminal tribunals

Lastly, as far as the internationalised criminal tribunals are concerned, the following provisions ensure the right to be promptly brought before a judge or a judicial officer. Firstly, before the SPSC, upon arrest, the person had to be brought before the Investigating Judge within 72 hours and a review hearing was organised.⁵²⁰ Disturbingly, it seems that this requirement was not always respected in practice.⁵²¹ During this hearing, the lawfulness of the

⁵¹⁷ Consider however the argumentation that release should be possible in exceptional cases, *supra*, Chapter 7, II.4.2.

⁵¹⁸ See *supra*, Chapter 7, II.4.2.

⁵¹⁹ Note that according to Rule 121 (1) ICC RPE, the rights under Article 67 ICC Statute are guaranteed, ‘subject to the provisions of articles 60 and 61’.

⁵²⁰ Sections 6.2 (e) and 20 (1) TRCP.

⁵²¹ The Court found no violation of these provisions where the Prosecution “tried twice to have a hearing within 72 hours.” Consequently, the obligation to organise the review hearing within 72 hours is fulfilled where the Prosecutor made a ‘genuine effort’ to schedule such hearing, but the hearing did not take place. In fact, the accused had been arrested *twice*. First, the accused was arrested on 21 April 2004 for an ordinary offence (illegally trespassing the border). On the 24th, while the accused was detained, he was ‘arrested’ a second time by an investigator on the basis of the charges in the indictment filed before the SPSC. The review hearing was only organised on 27 April, or seven days after the deprivation of liberty. However, in assessing the 72 hours limitation, the Court only calculated the time from the second ‘arrest’. Even in that latter case, it seems that the review hearing did not take place within 72 hours where the Court reasoned that the Prosecution “tried twice to have a hearing within 72 hours,” which seems to imply that a genuine effort by the Prosecutor to respect the 72 hours time limit would suffice. Consider SPSC, Decision on the Application for Initial Detention of the Accused Apreccio Mali Dao, *Prosecutor v. Apreccio Mali Dao*, Case No. 18/2003, SPSC, 29 April 2004, par. 42. See also S. KATZENSTEIN, Hybrid Tribunals: Searching for Justice in East Timor, in «Harvard Human Rights Journal», Vol. 16, 2003, p. 253 (“Until relatively recently, the accused have been routinely detained beyond the seventy-two-hour limit and before their preliminary hearings. Some of the accused have been left in prisons for months or even years while awaiting trial”); JSMP, Dili District Court: Final Report, November 2003, p. 33 (<http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN014017.pdf>, last visited 15 January 2014) (“In the period of monitoring, JSMP came to know about numerous cases in which the accused was only

arrest and ensuing detention was reviewed. On this occasion, the legal representative had to be present, if they had been appointed or retained.⁵²² Victims had the right to be heard at the review hearing.⁵²³ The Investigating Judge could confirm the arrest and order detention, release the suspect or order substitute restrictive measures.⁵²⁴ This order could be appealed by the parties.⁵²⁵ The family had to be notified of the detention as soon as practicable, which requirement is missing in the procedural frameworks of other international(ised) criminal tribunals. This safeguard protects against arbitrary arrests.⁵²⁶ Furthermore, upon arrest, the suspect enjoyed the right to contact a relative or a close friend and to be visited by this person.⁵²⁷

At the STL, the transferred *suspect* should be brought before the Pre-Trial Judge without delay.⁵²⁸ Similarly, when the *accused* has been arrested pursuant to an arrest warrant, the accused should be brought before the Judge or Trial Chamber without delay to be formally charged.⁵²⁹ In line with the procedural framework of the *ad hoc* tribunals and the SCSL, no general right for the suspect or accused to be promptly brought before a national judge or judicial officer upon arrest and prior to transfer, is provided for. After the Prosecutor requested the Lebanese judicial authority seized with the case of the attack against Prime Minister Rafiq Hariri and others to defer its competence, and to submit a list of all persons detained in connection with the investigation to the Pre-Trial Judge,⁵³⁰ the Prosecutor was

presented for the “initial detention hearing (72 hour hearing)” after the expiration of the time period. Two main reasons for the hearings not occurring within the requisite time were: (1) the difficulties experienced by police in transporting suspects from outside of Dili and, (2) a lack of investigating judges present at the court, especially at weekends”).

⁵²² Section 20.1 TRCP.

⁵²³ Section 12.3 TRCP.

⁵²⁴ Section 20.6 TRCP.

⁵²⁵ Section 21 (3) TRCP.

⁵²⁶ Section 19A.9 TRCP. No such safeguard is provided for in the procedural frameworks of other international(ised) criminal tribunals. Besides, such safeguard does not seem to be afforded in practice by these institutions. Consider in this regard the following excerpt from the testimony of an investigator in the *Sesay* case (SCSL). Q. [...] Mr Sesay is crying in the interview and he says: “You know, I said, what got me so shattered, when you asked me about my children, because presently they don’t even know my whereabouts. You know, that caused me to cry.” Do you remember that? A. [investigator] Yes, I do. Q. Why didn’t his children know his whereabouts? A. That’s the day of the arrest. Q. Yes. Well, isn’t it customary, I think in most jurisdictions, to give an accused or a suspect a phone call so he can inform his family where he is? A. We didn’t know where the family was. Q. Well, why didn’t you at this point say to him: “Let’s stop the interview. I don’t want to take unfair advantage of you. Let’s inform your family where you are. They must be worried”? Why did you not do it? A. I did not do it. See SCSL, Trial Transcript, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15, T. Ch. I, 13 June 2007, p. 65.

⁵²⁷ Section 6.2 (b) TRCP.

⁵²⁸ Rule 63 (F) STL RPE.

⁵²⁹ Rule 98 (A) STL RPE.

⁵³⁰ Article 4 (2) STL Statute and Rule 17 (A) STL RPE.

under the obligation to file an application with the Pre-Trial Judge ‘as soon as possible’ indicating whether or not he requests the continued detention of the persons on the list. The Pre-Trial Judge held that this provision should also be interpreted in light of the right to be promptly brought before a judge and on that basis reduced the time proposed by the Prosecutor to file his application.⁵³¹

Finally, as far as the ECCC are concerned, a distinction should again be drawn. A suspect may already be in police custody (*garde à vue*) during the preliminary inquiry.⁵³² This police custody is limited in time and may not exceed 48 hours (which may be extended once by another 24 hours).⁵³³ Whereas the person who is taken into police custody must be brought before the Co-Prosecutors as soon as possible, and enjoys the assistance of counsel on this occasion, this does not safeguard the right to be promptly brought before a judge or a judicial officer where the Co-Prosecutors, being themselves a party in the proceedings, lack the necessary independence.⁵³⁴ At the end of the police custody, the person should either be released or be presented before the Co-Investigating Judges for an ‘initial appearance’.⁵³⁵

When a suspect, a charged person or an accused person is deprived of his or her liberty pursuant to an arrest warrant (*mandat d’amener*) or a charged person or an accused person pursuant to an arrest and detention order, that person should immediately be presented before the Co-Investigating Judges. If this is not possible, the person should be placed in detention and the rules on the police custody apply *mutatis mutandis*.⁵³⁶ Therefore, the person should be brought before the Co-Investigating Judges ‘as soon as possible’ and in any case before the end of the 48 hours period (which may be extended by 24 hours). This provision applies, notwithstanding the more stringent conditions for persons deprived of liberty pursuant to an arrest warrant (*mandat d’amener*) as provided for under the Cambodian code of criminal procedure.⁵³⁷

⁵³¹ STL, Order Setting a Time Limit for Filing of an Application by the Prosecutor in Accordance with Rule 17 (B) of the Rules of Procedure and Evidence, Case No. CWPTJ/2009/03, PTJ, 15 April 2009.

⁵³² See *supra*, Chapter 7, III.3.

⁵³³ Rule 51 (3) ECCC IR.

⁵³⁴ Consider the discussion of the requirements of a ‘judicial officer’ under human rights law as previously discussed. See *supra*, Chapter 7, V.3.

⁵³⁵ Rule 51 (7) ECCC IR.

⁵³⁶ Rule 45 (4) ECCC IR.

⁵³⁷ Consider Article 193 of the Cambodian code of criminal procedure (“If, due to the circumstances, the cited individual cannot be brought before the investigating judge immediately after the arrest, that person shall be brought to the police unit or military police office in the detention center or prison. That person shall be

When, upon arrest, the person is brought before the Co-Investigating Judges who can order provisional detention, the question arises as to whether the *dual role* of the Co-Investigating Judges in the Extraordinary Chamber's procedural scheme casts doubts as to their impartiality. On the one hand, they conduct the judicial investigation and, on the other hand, they rule on provisional detention and on the extension of that detention.⁵³⁸ The Co-Investigating Judges held that 'international law principles' do not reveal the existence of one single approach regarding the determination of the authority which is responsible for ordering provisional detention. All that is required by international human right norms is that the person arrested or detained on a criminal charge be brought before a judge or judicial officer, offering guarantees of independence and impartiality.⁵³⁹ They reminded that their role in the proceedings is different from the role of the parties and that they are 'judges' in their own right.⁵⁴⁰ The fact that they are charged with ordering provisional detention "does not objectively affect their impartiality or give rise to the appearance of bias."⁵⁴¹

V.4. The right to challenge the lawfulness of detention (*habeas corpus*)

V.4.1. The *ad hoc* tribunals and the Special Court

§ Nature of the right

With the exception of Rule 40 *bis* (G) ICTY RPE and 40 *bis* (K) ICTR and SCSL RPE (which apply only to suspects where an order for the provisional transfer and detention has been issued),⁵⁴² no express provision is made under the Statute or the RPE of the *ad hoc tribunals* for a right to challenge the legality of the deprivation of liberty. However, the ICTR Appeals

presented to the investigating judge or to his substitute *on the following day at the latest*. If on that following day, the appearance does not occur, the cited person shall be released in liberty" (emphasis added).

⁵³⁸ ECCC, Order on Extension of Provisional Detention, *Prosecutor v. Khieu Samphan*, Case No. 002/14-08-2006, OCIJ, 18 November 2008, par. 19. Such procedural scheme is in accordance with the Cambodian code of criminal procedure. Consider Article 206 of the New Code of Criminal Procedure of Cambodia.

⁵³⁹ ECCC, Order on Extension of Provisional Detention, *Prosecutor v. Khieu Samphan*, Case No. 002/14-08-2006, OCIJ, 18 November 2008, par. 21. See the discussion of the case law of the ECtHR, *supra*, Chapter 7, V.3., fn. 428.

⁵⁴⁰ *Ibid.*, par. 22. Pursuant to Article 5 (2) ECCC Agreement, the Co-Investigating Judges should be persons of a high moral character, should be impartial and integer and should possess the qualifications that are required in their respective countries of appointment for appointment to such office. According to Article 5 (3), Co-Investigating Judges should be independent in the performance of their functions and not receive instructions from any government or any other source. Consider also Article 25 of the ECCC Law.

⁵⁴¹ *Ibid.*, par. 22.

⁵⁴² Compare: J. R.W.D. JONES, C. CARLTON-HANCILES, H. KAH-JALLOW and I. YILLAH, The Special Court for Sierra Leone: a Defence Perspective, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 219.

Chamber established that a *writ of habeas corpus* in the sense of “the notion that a detained individual shall have recourse to an independent judicial officer for review of the detaining authority’s act is well established by the Statute and the RPE.”⁵⁴³ Whereas the ICTR Appeals Chamber referred to the ‘writ of *habeas corpus*’, referring to the ‘right to challenge the lawfulness of the deprivation of liberty’ is to be preferred, as the former term refers to a legal procedure, known by certain common law jurisdictions, which possesses a broader meaning than the way it is normally used at the international level.⁵⁴⁴ Furthermore, no prerogative writs, in the sense of documents issued in the name of the Sovereign ordering a defendant to carry out a particular action, exist in international criminal proceedings.⁵⁴⁵ The *ad hoc* tribunals and the SCSL have the power and procedure to resolve challenges to the lawfulness of the detention of a detainee, as firmly established by their case law.⁵⁴⁶ It allows the person

⁵⁴³ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 88 (the Appeals Chamber noted that “[a]lthough neither the Statute nor the Rules specifically address *writs of habeas corpus* as such the notion that a detained individual shall have recourse to an independent judicial officer for review of the detaining authority’s acts is well-established by the Statute and Rules.” “Moreover, this is a fundamental right and is enshrined in international human rights norms.” The Appeals Chamber argued that the *habeas corpus* right derives, *inter alia*, from Article 19 and 20 ICTR Statute and from Rule 40bis (J) ICTR RPE); ICTR, Decision, *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 112. A similar reasoning can be found in ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 29; ICTY, Decision on Preliminary Motions, *Prosecutor v. Milošević*, Case No. IT-99-37-PT, T. Ch., 8 November 2001, par. 38 – 40. Consider also e.g. ICTR, Decision on the Defence Motion for the Release of the Accused, *Prosecutor v. Nshamihigo*, Case No. ICTR-2001-63-I, T. Ch. I, 8 October 2001, par. 5.

⁵⁴⁴ ICTR, Decision on the Defence Extremely Urgent Motion on *Habeas Corpus* and for Stoppage of Proceedings, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-I, T. Ch. II, 23 May 2000, par. 28. Consider also L. MAY, *Habeas Corpus and the Normative Jurisprudence of International Law*, in «Leiden Journal of International Law», Vol. 23, 2010, p. 304 (arguing that in international criminal procedural law, the concept of *habeas corpus* is much narrower construed than in some common law countries, such as the United States). See also G.-J. KNOOPS, Commentary, in A. KLIP and G. SLUITER (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 2000-2001*, Vol. VI, Antwerp, Intersentia, 2003, pp. 217, 219 (the author somewhat confusingly first argues that “as a matter of positive law”, the Trial Chamber adopted the view that *habeas corpus* extends to all ‘constitutional challenges’, thereby including such rights as the right to be promptly informed of the reasons for the arrest or the right to be tried without undue delay. Later, the author holds that the ICTR limited the scope *ratione materiae* of *habeas corpus* to the legality of detention).

⁵⁴⁵ See ICTY, Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brđanin, *Prosecutor v. Brđanin*, Case No. IT-99-36, T. Ch. II, 8 December 1999, par. 5; ICTR, Decision on the Defence Extremely Urgent Motion on *Habeas Corpus* and for Stoppage of Proceedings, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-I, T. Ch. II, 23 May 2000, par. 22-28. See also S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, p. 463 (arguing that “[t]he use of terms that have, or are at least perceived to have, strong ties to a specific legal order or national legal tradition can prove remarkably problematic”).

⁵⁴⁶ Consider e.g. ICTY, Decision on Application for Leave to Appeal (Provisional Release) by Hazim Delić, *Prosecutor v. Delalić*, Case No. IT-96-21, a bench of the App. Ch., 22 November 1996, par. 6 (while the bench of the Appeals Chamber argued that the defendant has a right to challenge the lawfulness of his detention and deprivation of liberty, providing him or her with an effective judicial remedy for any alleged violation of the right to liberty, an ‘effective’ remedy does not require that the application has to succeed); ICTY, Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brđanin, *Prosecutor v. Brđanin*, Case No. IT-99-36, T. Ch. II, 8 December 1999, par. 5; ICTR, Decision on Musabyimana’s Motion on the Violation of Rule 55 and

detained to have the legality of the detention reviewed by the judiciary.⁵⁴⁷ This right should be distinguished from the right to apply for provisional release.⁵⁴⁸ The right applies to all persons, *irrespective whether they are detained by a State or by the tribunal*.⁵⁴⁹

The absence of an express provision in the statutory framework of the *ad hoc* tribunals and the SCSL is striking in light of the fundamental character of this procedural right to review the lawfulness of the deprivation of liberty,⁵⁵⁰ as evidenced by various international human rights norms.⁵⁵¹ It has been labelled an “internationally recognised standard regarding the rights of accused.”⁵⁵² The importance of the right lies where it serves to protect substantive rights, such as the right against arbitrary or unlawful deprivation of liberty.⁵⁵³

International Law at the Time of his Arrest and Transfer, *Prosecutor v. Musabyimana*, Case No. ICTR-2001-62-T, T. Ch. II, 20 June 2002, par. 25.

⁵⁴⁷ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 88; ICTR, Decision, *Prosecutor v. Semanza*, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 112. In this way, as acknowledged by the ICTR Trial Chamber in *Kanyabashi*, the notion of *habeas corpus* in international criminal proceedings is limited to a review of the legality of the proceedings. See ICTR, Decision on the Defence Extremely Urgent Motion on *Habeas Corpus* and for Stoppage of Proceedings, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-I, T. Ch. II, 23 May 2000, par. 28.

⁵⁴⁸ SCSL, Ruling on the Application for the Issue of a Writ of *Habeas Corpus* Filed by the Applicant, *Prosecutor v. Brima*, Case SCSL-03-66-PT, T. Ch., 22 July 2003, p. 2.

⁵⁴⁹ In *Barayagwiza*, the ICTR Appeals Chamber does not make any distinction on the basis of the location where the person is being detained (see ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 88). As noted by one author, this holding by the Appeals Chamber is to be welcomed. Where States are, pursuant to the Statutes of the *ad hoc* tribunals, under an unconditional obligation to cooperate, the recourse the arrested person could have to the national courts of the requested state *would virtually never constitute an effective remedy*. See B. SWART, Commentary, in A. KLIP and G. SLUITER (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 1994-1999*, Vol. II, Antwerp, Intersentia, 2001, p. 201.

⁵⁵⁰ In this regard, PAULUSSEN clarifies that the term ‘deprivation of liberty’ should be understood as encompassing a review not only of the detention but also of the arrest. See C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, pp. 161 – 163. Note in this regard that Article 7 (6) of the ACHR is clearer than similar provisions in other human rights treaties where it expressly refers to the lawfulness of ‘arrest or detention’.

⁵⁵¹ Consider Article 8 of the UDHR; Article 9 (4) of the ICCPR; Article 5 (4) of the ECHR; Article 7 (6) of the ACHR and Article 7 (1) (a) ACHPR. In *Barayagwiza*, the Appeals Chamber refers to the definition that was given by the Inter-American Court of Human-Rights as: “[a] judicial remedy designed to protect personal freedom and physical integrity against arbitrary decisions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered.” See IACtHR, *Habeas Corpus* in Emergency Situations (Arts. 27(2), 25(1) and 7(6) of the American Convention of Human Rights), Advisory Opinion OC-8/87, 30 January 1987, par. 33.

⁵⁵² ICTY, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, *Prosecutor v. Simić*, Case No. IT-95-9, T. Ch., 18 October 2000, Separate Opinion of Judge Robinson, par. 3 (referring to paragraph 104 of the Secretary-General’s Report setting out the Statute). Compare L. MAY, *Habeas Corpus and the Normative Jurisprudence of International Law*, in «Leiden Journal of International Law», Vol. 23, 2010, p. 304 (arguing that the ICTR decisions recognise *habeas corpus* as a fundamental, *jus cogens*, right, giving it the status of fundamental international law).

⁵⁵³ *Ibid.*, p. 304 (“There is in my view a significant difference between the recognition that people have a substantive right not to be arbitrarily incarcerated, and the procedural right to what is necessary to enforce the substantive right through a review to determine if one has been arbitrarily incarcerated”).

Based on these human rights norms, the Appeals Chamber repeatedly expressed its concerns that such motions were not heard by the tribunal.⁵⁵⁴ When a *habeas corpus* motion is filed the tribunal has the duty to hear it and rule upon it without delay.⁵⁵⁵ If the motion is filed, but is not subsequently heard by the tribunal, a fundamental right of the accused has been violated.⁵⁵⁶ The confirmation of the indictment and the fact that the initial appearance has taken place, does not excuse the failure to resolve the motion.⁵⁵⁷

§ Procedure

In *Brđanin*, the ICTY Trial Chamber held that where the tribunal has to resolve challenges to the lawfulness of the deprivation of liberty, these challenges should be entertained through Rule 72 ICTY RPE when they amount to a challenge of jurisdiction or through Rule 73 in other cases.⁵⁵⁸ The SCSL seems to have taken a different approach. The SCSL entertained on the notion of *habeas corpus* in the *Brima* case.⁵⁵⁹ Single Judge Itoe considered that the writ of *habeas corpus* cannot be found in the Statute or the RPE, but that the entertaining of this writ is dictated by the imperative of “universally ensuring the respect of human rights and

⁵⁵⁴ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 90 (“The Appeals is troubled that the Appellant has not been given a hearing on his writ of *habeas corpus*”); ICTR, Decision, *Prosecutor v. Semanza*, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 113-114.

⁵⁵⁵ ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 29; ICTY, Decision on Preliminary Motions, *Prosecutor v. Milošević*, Case No. IT-99-37-PT, T. Ch., 8 November 2001, par. 340 (stating that it is one of the “essential features” of the right that it “should be heard as promptly as possible”).

⁵⁵⁶ ICTR, Decision, *Prosecutor v. Semanza*, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 113.

⁵⁵⁷ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 90.

⁵⁵⁸ ICTY, Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brđanin, *Prosecutor v. Brđanin*, Case No. IT-99-36, T. Ch. II, 8 December 1999, par. 5-6 (“The Tribunal certainly does have both the power and the procedure to resolve a challenge to the lawfulness of a detainee’s detention. With respect, it did not need the decision of the Appeals Chamber of the ICTR to establish the existence of such a power. A detained person whose case has been assigned to a Trial Chamber has recourse to the Tribunal in order to challenge the lawfulness of his detention by way of [a] motion pursuant to Rule 72 of the Rules of Procedure and Evidence (“Rules”) if the application amounts to a challenge to jurisdiction, or pursuant to Rule 73 id it does not”). See also *e.g.* ICTR, Decision on Musabyimana’s Motion on the Violation of Rule 55 and International Law at the Time of his Arrest and Transfer, *Prosecutor v. Musabyimana*, Case No. ICTR-2001-62-T, T. Ch. II, 20 June 2002, par. 25.

⁵⁵⁹ SCSL, Ruling on the Application for the Issue of a Writ of *Habeas Corpus* Filed by the Applicant, *Prosecutor v. Brima*, Case SCSL-03-66-PT, T. Ch., 22 July 2003, p. 6.

liberties” and establishing its *inherent power* to do so.⁵⁶⁰ Nevertheless, Judge Itoe acknowledged that this motion can alternatively be brought under Rule 73 SCSL RPE.⁵⁶¹

The provision for *habeas corpus* challenges under Rule 40 *bis* (G) ICTY RPE and 40 *bis* (K) ICTR and SCSL RPE requires that challenges to the propriety of the provisional detention or the suspect’s release should be heard by the three Judges and not only by the Judge that signed the Rule 40*bis* order.⁵⁶²

§ *Duty of diligence*

In the *Semanza* case, after determining that the failure of the Trial Chamber to hear the *habeas corpus* writ filed amounts to a violation of a fundamental right of the accused, the Appeals Chamber declined to offer a remedy. According to the Appeals Chamber, while the Defence originally filed its ‘writ’ on 29 September 1997, the Defence failed to follow up on it.⁵⁶³ This is in violation of the defence counsel’s *duty of diligence*.⁵⁶⁴ The Appeals Chamber found that where the results sought by the writ were achieved shortly thereafter, by the confirmation and by the transfer of the accused, the violation *did not cause material prejudice* as required by Rule 5.⁵⁶⁵

⁵⁶⁰ *Ibid.*, p. 7. See H. FRIMAN, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the Special Court for Sierra Leone 2003 – 2004, Vol. IX, Antwerp, Intersentia, 2006, p. 346.

⁵⁶¹ SCSL, Ruling on the Application for the Issue of a Writ of *Habeas Corpus* Filed by the Applicant, *Prosecutor v. Brima*, Case SCSL-03-66-PT, T. Ch., 22 July 2003, p. 7.

⁵⁶² As noted by the SCSL Trial Chamber in SCSL, Decision on the Urgent Defence Application for Release from Provisional Detention, *Prosecutor v. Kondewa*, Case No. SCSL-2003-12-PT, T. Ch., 21 November 2003, par. 29; SCSL, Decision on the Urgent Defence Application for Release from Provisional Detention, *Prosecutor v. Fofana*, Case No. SCSL-2003-11-P[T], T. Ch., 21 November 2003, par. 29. In both cases, the Trial Chamber noted that the provision provides “a reinforced guarantee of fairness” where it requires that the decision on arbitrary arrest and detention should be made by all three Judges of the Trial Chamber.

⁵⁶³ The Appeals Chamber underlined that “[i]t is therefore apparent that the Appellant became interested in the fate of his writ of *habeas corpus* only after the Appeals Chamber’s 3 November 1999 Decision in the *Barayagwiza* case”: ICTR, Decision, *Prosecutor v. Semanza*, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 118.

⁵⁶⁴ Such duty derives from the ICTR Code of Professional Conduct’s Article 6: “Counsel must represent a client diligently in order to protect the client’s best interests. Unless representation is terminated, Counsel must carry through to conclusion all matters undertaken for a client within the scope of his legal representation (emphasis added).”

⁵⁶⁵ ICTR, Decision, *Prosecutor v. Semanza*, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 124. Note the Declaration of Judge Lal Chand Vohrah, who strongly disagrees with the majority and argues that where ignoring the writ was found to be in violation of the defendant’s rights, a remedy should be available. The Judge disagrees with attributing the primary responsibility to counsel for the accused and states that “when an accused is defending himself against charges of genocide, crimes against humanity or war crimes before the Tribunal, he should not also be required to diligently ensure that the Tribunal is not itself contributing to a violation of his rights as that should rest with the Tribunal.” See ICTR, Decision, *Prosecutor v. Semanza*, A. Ch.,

§ Scope of the judicial review

International human right norms require that the *habeas corpus* writ be heard, irrespective of the underlying legality or illegality of the initial detention.⁵⁶⁶ The ECtHR held that where the right is limited to the *lawfulness* of the deprivation of liberty, this lawfulness should be interpreted in a broad sense, not only referring to the domestic legislation, but also in light of the requirements of the Convention, the general principles laid therein and the aim of the restrictions of Article 5 (1) ECHR.⁵⁶⁷ Similarly, the HRC held that the lawfulness requirement should be interpreted in a broad sense, allowing the court to order release not only when the detention is unlawful in terms of the domestic law but also when the detention is incompatible with the requirements of Article 9 (1) ICCPR.⁵⁶⁸ However, the ECtHR has emphasised that the right to challenge the lawfulness of detention is not of such a scope as to empower the court to substitute its own discretion in all aspects of the case, including questions of pure expediency.⁵⁶⁹

Several accused before the ICTY have tried, as part of a challenge of the lawfulness of the arrest, to have the court reconsider the evidence that was put before the Confirming Judge at the moment of the confirmation of the indictment to prove that there was not a sufficient evidentiary basis for the arrest. Whereas the *ad hoc* tribunals have refused such requests to review the evidentiary basis for the challenged arrest⁵⁷⁰, it has been questioned whether this holding does not deny the suspect or accused the right to challenge the lawfulness of the arrest

Case No. ICTR-97-20-A, A. Ch., 31 May 2000, Declaration by Judge Lal Chand Vohrah, par. 11-12. Consider also C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 557 (“it appears that the Appeals Chamber is trying to turn the ICTR’s own fault [...] into a fault of the Defence because the latter has not sufficiently stressed the importance of this writ for his case. Is this not the world turned upside-down?”).

⁵⁶⁶ See, for example, ECtHR, *Wilde, Ooms and Versyp v. Belgium*, Application Nos. 2832/66; 2835/66; 2899/66, Series A, No. 12, Judgment of 18 June 1971, par. 73; ECtHR, *Winterwerp v. Netherlands*, Application No. 6301/73, Series A, No. 33, Judgment of 24 October 1979, par. 53. Regarding Article 9 (4) ICCPR, consider M. NOWAK, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edition), Kehl am Rhein, Engel, 2005, p. 235.

⁵⁶⁷ See e.g. ECtHR, *Chahal v. The United Kingdom*, Application No. 22414/93, Reports 1996-V, Judgment of 15 November 1996, par. 127; ECtHR, *A and others v. The United Kingdom*, Application No. 3455/05, Judgment of 19 February 2009, par. 202.

⁵⁶⁸ HRC, *A. v. Australia*, Communication No. 560/93, U.N. Doc. CCPR/C/59/D/560/1993, 3 April 1997, par. 9.5 and the concurring individual opinion of Mr. Bhagwati; HRC, *C. v. Australia*, Communication No. 900/99, U.N. Doc. CCPR/C/76/D/900/1999, 28 October 2002, par. 8.4.

⁵⁶⁹ ECtHR, *A and others v. The United Kingdom*, Application No. 3455/05, Judgment of 19 February 2009, par. 202.

⁵⁷⁰ ICTY, Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brdanin, *Prosecutor v. Brdanin*, Case No. IT-99-36, T. Ch. II, 8 December 1999, par. 16.

with respect to the ‘reasonable suspicion requirement’, especially in light of the absence of a periodic detention review procedure.⁵⁷¹ In *Talić*, Judge Hunt held that where the accused had been arrested upon an arrest warrant, which requires the confirmation of the indictment and the existence of a *prima facie* case, the ECtHR case law “does not call for any further examination by the Tribunal of the reasonableness of the decision to arrest and detain the accused.”⁵⁷² This would imply the review of the decision taken by the Confirming Judge by way of appeal for which the Trial Chamber does not have the power.⁵⁷³

However, the ECtHR has underlined that the court should not only have the possibility to examine the compliance with the procedural requirements set out in the domestic law but also the *reasonableness of the suspicion* on which the arrest was based and the legitimacy of the purpose pursued by the arrest and detention. Indeed, the persistence of a ‘reasonable suspicion’ that the accused person has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention.⁵⁷⁴ The *ad hoc* tribunals and the Special Court deny the accused the right to challenge the lawfulness of his or her arrest, based on the absence of a reasonable suspicion justifying the deprivation of liberty in the first place, by relying on the confirmation procedure.

⁵⁷¹ G. MCINTYRE, *Defining Human Rights*, in G. BOAS and W.A. SCHABAS (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Brill Academic Publishers, Leiden, 2003, p. 210 (arguing that it is clear from the jurisprudence of the ICTY that “the process of confirming the indictment prior to the arrest of an accused has been interpreted as subsuming the right to challenge the lawfulness of the arrest on that basis”). See also H. FRIMAN, *Commentary*, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the Special Court for Sierra Leone 2003 – 2004*, Vol. IX, Antwerp, Intersentia, 2006, p. 347.

⁵⁷² ICTY, *Decision on Motion for Release, Prosecutor v. Talić*, Case No. IT-99-36/1-T, T. Ch. II, 10 December 1999, par.17.

⁵⁷³ *Ibid.*, par. 17.

⁵⁷⁴ ECtHR, *Brogan and others v. The United Kingdom*, Application Nos.11209/84; 11234/84; 11386/85, Series A, No. 145-B, Judgment of 29 November 1988, par. 65 (“the applicants should have had available to them a remedy allowing the competent court to examine not only compliance with the procedural requirements set out in [domestic law] but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention”); ECtHR, *Ilijkov v. Bulgaria*, Application No. 33977, Judgment of 26 July 2001, par. 94; ECtHR, *A And others v. The United Kingdom*, Application No. 3455/05, Judgment of 19 February 2009, par. 204; ECtHR, *Fox, Campbell and Hartley v. United Kingdom*, Application Nos. 12244/86; 12245/86; 12383/86, Series A, No. 182, Judgment of 30 August 1990, par. 44. Nevertheless, it should be noted that where the right to be promptly brought before a judge culminates in a decision ordering or confirming the detention of the person, the judicial control of the lawfulness under Article 5 (4) is incorporated in this initial decision. Contrary to the right envisaged in Article 5 (3), the judicial control of the lawfulness should be renewed ‘at regular intervals’ (ECtHR, *De Jong, Baljet and Van den Brink v. The Netherlands*, Application Nos. 8805/79; 8806/79; 9242/81, Series A, No. 77, Judgment of 22 May 1984, par. 57; M. NOWAK, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edition), Kehl am Rhein, Engel, 2005, p. 235.

In other decisions, where the accused challenged the continued detention and applied for provisional release, pursuant to ‘pre-amendment’ Rule 65 (B) ICTY RPE⁵⁷⁵, the ICTY allowed for a revision of the material on which basis the indictment was confirmed.⁵⁷⁶ The Trial Chamber noted that the ‘reasonable suspicion’ requirement under human rights law is substantially similar to the terminology used in Rule 47 (A) ICTY RPE and the *prima facie* standard for the confirmation of the indictment.⁵⁷⁷ Moreover, the Trial Chamber referred to Articles 5 (4) ECHR and 9 (4) ICCPR and the fact that the detention of the accused must be reviewed to assure that the reasons justifying the detention remain valid. This led the Trial Chamber to review the Prosecution’s case in a cursory manner, to determine whether the accused had demonstrated the absence of reasonable suspicion.⁵⁷⁸ It has been argued that only by providing the possibility to review the reasonable grounds on which the arrest and detention are based, can the right to challenge the deprivation of liberty provided for by the case law of the *ad hoc* tribunals and the SCSL be in conformity with international human rights norms. Nevertheless, it should be noted that this approach adopted in the second set of decisions (on motions for provisional release) deviates from international human rights norm in one crucial respect. It effectively puts the burden to prove the absence of reasonable suspicion on the suspect or the accused. While there is no direct case law on the onus of proof under Article 5 (4) ECHR, it is implicit in the jurisprudence of the ECtHR that the burden to prove that an individual satisfies the requirements for compulsory detention is on the authorities.⁵⁷⁹

⁵⁷⁵ Under which provision the Trial Chamber had to establish the presence of ‘exceptional circumstances’. See in more detail, *infra*, Chapter 8, II.1.

⁵⁷⁶ ICTY, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, T. Ch., 25 September 1996, par. 21; ICTY, Decision on Provisional Release, *Prosecutor v. Drljača et al.*, Case No. IT-97-24-PT, T. Ch., 20 January 1998, par. 15 - 21.

⁵⁷⁷ ICTY, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, T. Ch., 25 September 1996, par. 23.

⁵⁷⁸ *Ibid.*, par. 24. ICTY, Decision on Provisional Release, *Prosecutor v. Drljača et al.*, Case No. IT-97-24-PT, T. Ch., 20 January 1998, par. 16 and 21. The burden of proof to show the absence of reasonable suspicion was put on the accused. Besides, the Trial Chamber allowed the accused to adduce evidence additional to the evidence on which basis the indictment was confirmed, in accordance with the requirement under human rights law that the review should be judged according to the circumstances and facts known at the time of the review. See *ibid.*, par. 24. It has been argued that where reasonable grounds for suspecting that the applicant for provisional release has committed the crime(s) are lacking, the accused may not only request for provisional release but also the rejection of the indictment, given the similarity with the standard for the confirmation of the indictment. See A.-M. LA ROSA, A Tremendous Challenge for the International Criminal Tribunals: Reconciling the Requirements of International Humanitarian Law with those of Fair Trial, in «International Review of the Red Cross», No. 321, 1997.

⁵⁷⁹ ECtHR, *Hutchison Reid v. The United Kingdom*, Application No. 50272/99, Reports 2003-IV, Judgment of 20 February 2003, par. 70-71.

The arrested person may also consider turning to the *authorities of the state requested* to execute the (provisional) arrest to challenge the detention. In that regard, it should be mentioned that Article 5 (4) ECHR *juncto* Article 5 (1) (f) ECHR explicitly provides for the right of the person deprived of his or her liberty to turn to the courts of the requested state for relief in extradition cases.⁵⁸⁰ This review may, nonetheless, be narrow. Indeed, it should be noted that the extent of the judicial review under Article 5 (4) ECHR is not identical for every sort of deprivation of liberty listed in Article 5 (1) ECHR.⁵⁸¹ Article 5 (1) (f) ECHR does not require that detention with a view to deportation can reasonably be considered necessary (cf. Article 5 (1) (c) ECHR). All that is required is that action is being taken with a view to deportation. Hence, Article 5 (4) ECHR does not require that the domestic courts have the power to review whether the underlying decision to extradite could be justified under national or convention law.⁵⁸² Furthermore, it should be noted that the obligation on states to comply with arrest warrants and requests for the provisional detention of suspects is *unconditional* in nature.⁵⁸³ Consequently, the usefulness of this recourse to the national courts to challenge the lawfulness of the deprivation of liberty can strongly be doubted.⁵⁸⁴

§ Requirement of speediness

In the cases of *Semanza* or *Barayagwiza*, challenges to the deprivation of liberty were filed but not subsequently heard by the tribunal. This is a clear violation of international human rights norms. Article 5 (4) ECHR requires that a challenge regarding the lawfulness of the deprivation of liberty should be dealt with speedily. The ICCPR requires that the court decide on the lawfulness of the detention without delay.⁵⁸⁵ However, the speediness-requirement

⁵⁸⁰ B. SWART, Commentary, in A. KLIP and G. SLUITER (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 1994-1999*, Vol. II, Antwerp, Intersentia, 2001, p. 205 (noting that there are good reasons for providing the arrested person with a judicial remedy against his or her arrest in traditional extradition law where normally much discretion is left to the requested state how to execute the request).

⁵⁸¹ As noted *e.g.* by D. CHATZIVASSILIOU, *The Guarantees of Judicial Control with Respect to Deprivation of Liberty under Article 5 of the European Convention on Human Rights*, in «ERA Forum», Vol. 5, 2004, p. 503.

⁵⁸² Consider, *mutatis mutandis*, ECtHR, *Chahal v. The United Kingdom*, Application No. 22414/93, Reports 1996-V, Judgement (Grand Chamber) of 15 November 1996, par. 128 (with regard to deportation).

⁵⁸³ See *supra*, Chapter 7, II.3.2.

⁵⁸⁴ B. SWART, Commentary, in A. KLIP and G. SLUITER (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 1994-1999*, Vol. II, Antwerp, Intersentia, 2001, p. 205.

⁵⁸⁵ Article 9 (4) ICCPR.

should be considered in light of the special circumstance of each case.⁵⁸⁶ Factors such as the conduct of the applicant and the way the authorities have handled the case may be taken into consideration.⁵⁸⁷ For example, a period of 23 days between the lodging of the request and the decision was not found to satisfy the speediness requirement by the ECtHR.⁵⁸⁸ A delay of three months between the filing of a challenge and the decision was found to be too extended ‘in principle’ by the HRC.⁵⁸⁹

§ Other requirements

This right to challenge the legality of the deprivation of liberty arises immediately after the arrest or detention. The right is fully independent from the right to be brought promptly before the Judge upon arrest.⁵⁹⁰ The ECtHR held that there cannot be any delay.⁵⁹¹ In addition, given its remedial character, international human rights norms require that the challenge be *effective*, in the sense that the judicial authority should possess the competence to order release.⁵⁹² If the deprivation of liberty is found to be unlawful, the person should be released.⁵⁹³ Other requirements follow from the requirement that the remedy should be ‘of a judicial nature’.⁵⁹⁴ While Article 5 (4) ECHR is silent on the right to have the assistance of counsel in order to challenge the legality of the detention, the ECtHR has clarified that where Article 5 (4) proceedings are judicial in nature, some form of legal assistance may be required

⁵⁸⁶ ECtHR, *Sanchez-Reisse v. Switzerland*, Application No. 9862/82, Series A, No. 75, Judgment of 21 October 1986, par. 55.

⁵⁸⁷ See e.g. ECtHR, *Navarra v. France*, Application No. 13190/87, Judgment of 23 November 1993, par. 27.

⁵⁸⁸ ECtHR, *Rehbock v. Slovenia*, Application No. 29462/95, Judgment of 28 November 2000, par. 85-86.

⁵⁸⁹ HRC, *Torres v. Finland*, Communication No. 291/19 88, U.N. Doc. CCPR/C/38/D/191/1988, 2 April 1990, par. 7.3. The HRC declined to find a violation of Article 9 (4) ICCPR as it did not know the reasons for the judgement only being issued that late.

⁵⁹⁰ ECtHR, *De Jong, Baljet and Van den Brink v. The Netherlands*, Application Nos. 8805/79; 8806/79; 9242/81, Series A, No. 77, Judgment of 22 May 1984, par. 57.

⁵⁹¹ *Ibid.*, par. 58-59.

⁵⁹² HRC, *A. v. Australia*, Communication No. 560/93, U.N. Doc. CCPR/C/59/D/560/1993, 3 April 1997, par. 9.5. Consider e.g. ECtHR, *Khaydarov v. Russia*, Application No. 21055/09, Judgment of 20 May 2010, par. 137 (“[t]hat review should be capable of leading, where appropriate, to release”); ECtHR, *Abdolkhani and Karimnia v. Turkey*, Application No. 30471/08, Judgment of 22 September 2009, par. 139.

⁵⁹³ Consider e.g. B. SWART, Commentary, in A. KLIP and G. SLUITER (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 1994-1999*, Vol. II, Antwerp, Intersentia, 2001, p. 204.; M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd edition), Kehl am Rhein, Engel, 2005, p. 236 (noting that “if the court finds that detention is unlawful, it is under an obligation to order the immediate release of the person concerned”); C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 161.

⁵⁹⁴ ECtHR *Öcalan v. Turkey*, Application No. 46221/99, Reports 2005-IV, Judgment (Grand Chamber) of 12 May 2005, par. 66; ECtHR, *Winterwerp v. The Netherlands*, Application No. 6301/73, Series A, No. 33, Judgment of 24 October 1979, par. 60.

where the detained person is unable to defend him or herself.⁵⁹⁵ The HRC has also linked the right to challenge the deprivation of liberty with access to *legal representation*.⁵⁹⁶ Whereas a right for the accused to be assisted by counsel is provided for,⁵⁹⁷ the *ad hoc* tribunals and the SCSL only provide for this right where the suspect is questioned.⁵⁹⁸ When an order for the detention and transfer of a suspect has been made, Rule 40*bis* (G) ICTY RPE (Rule 40*bis* (K) ICTR and SCSL RPE) expressly refers to the possibility for the suspect's counsel to challenge the legality of the deprivation of liberty, falling short of providing the provisionally detained with the assistance of counsel *as of right*. In a similar vein, Rule 44*bis* (D) ICTR RPE on the assignment of duty counsel is limited where it only applies after the transfer of a suspect or accused person to the tribunal pursuant to Rule 40*bis*.⁵⁹⁹ Lastly, it is important that the detained person is heard in person⁶⁰⁰ and that an oral hearing is required when a person is detained on remand.⁶⁰¹ Consequently, it will be important for the tribunal, when a challenge is brought pursuant to Rule 72 or 73 ICTY, ICTR or SCSL RPE, to provide for an oral hearing.⁶⁰² Since the proceedings should be of an adversarial nature, equality of arms between the Prosecutor and the detained person should be ensured.⁶⁰³ As noted previously, and in deviation from international human rights norms, it follows from the jurisprudence of the tribunals that the burden of proof in challenges to the lawfulness of arrests lies with the suspect or accused person.⁶⁰⁴

⁵⁹⁵ ECtHR *Öcalan v. Turkey*, Application No. 46221/99, Reports 2005-IV, Judgment (Grand Chamber) of 12 May 2005, par. 70; ECtHR, *Bouamar v. Belgium*, Application No. 9106/80, Series A, No. 129, Judgment of 29 February 1988, par. 62; ECtHR, *Lebedev v. Russia*, Application No. 4493/04, Judgment of 25 October 2007, par. 77 (note the partly dissenting opinion of Judges Kovler, Hajiyev and Jebens, arguing that there were no 'special circumstances' in the case at hand, calling for mandatory legal assistance).

⁵⁹⁶ HRC, *Berry v. Jamaica*, Communication No. 330/88, U.N. Doc. CCPR/C/50/D/330/1988, 7 April 1994, par. 11.1.

⁵⁹⁷ Article 21 (4) (d) ICTY Statute; 20 (4) (d) ICTR Statute and Article 17 (4) (d) SCSL Statute.

⁵⁹⁸ Rule 42 (A) (i) and (B) ICTY, ICTR and SCSL RPE.

⁵⁹⁹ See the discussion *supra*, Chapter 7, V.3.1, fn. 500 and accompanying text.

⁶⁰⁰ ECtHR *Öcalan v. Turkey*, Application No. 46221/99, Reports 2005-IV, Judgment (Grand Chamber) of 12 May 2005, par. 68; ECtHR, *Winterwerp v. The Netherlands*, Application No. 6301/73, Series A, No. 33, Judgment of 24 October 1979, par. 60.

⁶⁰¹ See *e.g.* ECtHR, *Wloch v. Poland*, Application No. 27785/95, Reports 2000-XI, Judgment of 19 October 2000, par. 126; ECtHR, *Nikolova v. Bulgaria*, Application No. 31195/96, Reports 1999-II, Judgment of 25 March 1999, par. 58.

⁶⁰² Consider in that regard the general practice not to hear oral arguments on preliminary motions prior to trial, unless good reason is shown for its need in the particular case. See ICTY, Decision on Defence Preliminary Motion on the Form of the Indictment, *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, T. Ch. II, 24 February 1999, par. 65.

⁶⁰³ ECtHR, *Sanchez-Reisse v. Switzerland*, Application No. 9862/82, Series A, No. 75, Judgment of 21 October 1986, par. 51; ECtHR, *Garcia Alva v. Germany*, Application No. 23541/94, Judgment of 13 February 2001, par. 39.

⁶⁰⁴ ICTY, Decision on Appeal by Stefan Todorović against the Oral Decision of 4 March 1999 and the Written Decision of 25 March 1999 of Trial Chamber III, Case No. IT-95-9-AR.73.2, A. Ch., 13 October 1999, p. 3 (finding no error where the Trial Chamber determined that "the Motion does not contain sufficient factual and

V.4.2. The International Criminal Court

The ICC Statute also does not explicitly provide for the possibility to challenge the lawfulness of the deprivation of liberty (*habeas corpus*). Only a protection against arbitrary or unlawful arrest or detention is included in Article 55 (1) (d) ICC Statute. However, the right to obtain compensation for unlawful arrest or detention (Article 85 ICC Statute), arguably, implies the existence of a right to challenge the legality of the arrest.⁶⁰⁵

The right to effectively contest the deprivation of liberty has been recognised by the ICC Appeals Chamber.⁶⁰⁶ It follows from Article 60 (2) ICC Statute that in the context of an application for interim release, the Pre-Trial Chamber should review the conditions of Article 58 (1) ICC Statute, and this review should not only include a review of the justification for the provisional detention but should also be a review of the existence of ‘reasonable grounds’ (pursuant to Article 58 (1) (a) ICC Statute).⁶⁰⁷ Consequently, a review of the lawfulness of the *detention* is provided for in Article 60 (2) ICC Statute.

The jurisprudence of the ICC equally confirmed that Article 60 (2) “provides the detainee with an early opportunity to contest *his or her arrest* and sequential detention.”⁶⁰⁸ More generally, the Appeals Chamber held that “[t]he human right to have judicial review of a decision affecting his liberty is entrenched in article 60 of the Statute.”⁶⁰⁹ In that sense, the Appeals Chamber confirmed “[t]hat the provisions of the Statute relevant to detention, like

legal material, and in particular does not provide a statement as to the factual circumstances of his arrest”); S. LAMB, *The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia*, in «The British Yearbook of International Law», Vol. 70, 2000, p. 208; Ö. ÜLGEN, *The ICTY and Irregular Rendition of Suspects*, in «The Law and Practice of International Courts and Tribunals», Vol. 3, 2003, p. 465 (“The burden of proof for establishing irregularities lies with the Defence”).

⁶⁰⁵ S. ZAPPALÀ, *Human Rights in International Criminal Proceedings*, Oxford, Oxford University Press, 2003, p. 77.

⁶⁰⁶ ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled “Decision on Application for Interim Release”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-323 OA, A. Ch., 16 December 2008, par. 32. Consider also paragraph 20 of the Dissenting Opinion of Judge Pikis to the same decision.

⁶⁰⁷ On applications for interim release pursuant to Article 60 (2) ICC Statute, see in detail, *infra*, Chapter 8, II.3.

⁶⁰⁸ ICC, In the Appeal by Mathieu Ngujolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, *Prosecutor v. Katanga and Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-572 (OA 4), A. Ch., Case No. ICC-01/04-01/07-572 (OA 4), 9 June 2008, par. 12 (emphasis added).

⁶⁰⁹ ICC, Decision on the Admissibility of the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled “Decision sur la confirmation des charges” of 29 January 2007, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-926 (OA 8), A. Ch., 13 June 2007, par. 13 (footnote in the original omitted).

every other provision of it, must be interpreted and applied in accordance with “internationally recognized human rights.”⁶¹⁰

However, as underlined by Judge Pikis in a dissenting opinion, Article 60 (2) ICC Statute does not envisage a review of the legality or correctness of the initial decision that authorised arrest, but requires the Pre-Trial Chamber to decide *anew*, whether the detention of the person can find justification in law, by reference to the criteria of Article 58 (1) ICC Statute.⁶¹¹ Therefore, whereas international human rights norms provide for the right of the detainee to challenge his or her deprivation of liberty, including both the arrest and detention, an application for provisional release does not guarantee the right afforded by these norms to the full extent.

The equality of arms requirement under human rights law with regard to *habeas corpus* proceedings, which was mentioned previously, also encompasses a requirement that access be granted to those documents in the investigation file which are essential in order to effectively challenge the lawfulness of the deprivation of liberty.⁶¹² The Prosecutor should “not only disclose the general tenor of the evidence relied upon but the evidence itself.”⁶¹³ This issue arose in the *Bemba* case. In its decision of 16 December 2008, the Appeals Chamber acknowledged the jurisprudence of the ECtHR and held that “in order to ensure both equality of arms and an adversarial procedure, the Defence must, to the largest extent possible, be granted access to documents that are essential in order effectively to challenge the lawfulness

⁶¹⁰ Cf. Article 21 (3) ICC Statute. Consider ICC, In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, *Prosecutor v. Katanga and Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-572 (OA 4), A. Ch., 9 June 2008, par. 15.

⁶¹¹ ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled “Decision on Application for Interim Release”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-323 OA, A. Ch., 16 December 2008, Dissenting Opinion of Judge Pikis, par. 23. See *infra*, Chapter 8, II.3.

⁶¹² ECtHR, *Lamy v. Belgium*, Application No. 10444/83, Judgment of 30 March 1989, Series A. No. 151, par. 29; ECtHR, *Nikolova v. Bulgaria*, Application No. 31195/96, Reports 1999-II, Judgment of 25 March 1999, par. 63; ECtHR, *Wloch v. Poland*, Application No. 27785/95, Reports 2000-XI, Judgment of 19 October 2000, par. 127; ECtHR, *Garcia Alva v. Germany*, Application No. 23541/94, Judgment of 13 February 2001, par. 39; ECtHR, *Mooren v. Germany*, Application No. 11364/03, Judgment (Grand Chamber) of 9 July 2009, par. 124.

⁶¹³ ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled “Decision on Application for Interim Release”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-323 OA, A. Ch., 16 December 2008, Dissenting Opinion of Judge Pikis, par. 29 (referring to ECtHR, *Mooren v. Germany*, Application No. 11364/03, Judgment 13 December 2007, par. 96, as endorsed in ECtHR, *Mooren v. Germany*, Application No. 11364/03, Judgment (Grand Chamber) of 9 July 2009, par. 125).

of detention, bearing in mind the circumstances of the case.”⁶¹⁴ The right to disclosure is not unqualified, and is limited by (1) the need to ensure the protection of victims and witnesses and (2) the need to safeguard the ongoing investigation. Furthermore, (3) priority should be given to “those documents that are essential for the person to receive in order effectively to challenge the lawfulness of detention.”⁶¹⁵ Arguably, the ECtHR adopted a more stringent approach to disclosure as a prerequisite to effectively challenge the lawfulness of the detention, as acknowledged by Judge Pikiš. Where the ECtHR acknowledged legitimate concerns, such as the prevention of tampering with evidence or the undermining of the course of justice, it held that “this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence.”⁶¹⁶ Hence, “information which is essential for the assessment of the lawfulness of the person’s detention should be made available in an appropriate manner to the suspect’s lawyer.”⁶¹⁷

The Appeals Chamber concluded that the Pre-Trial Chamber did not err when it decided on an application for interim release at a point at which not all documents and evidence had yet been disclosed, given that the Pre-Trial Chamber had ensured that Bemba was provided with the material underpinning the warrant of arrest “in as timely a manner as possible.”⁶¹⁸ The Appeals Chamber noted that the person can raise arguments in relation to interim release at a point when he or she has not yet received full disclosure in order to have the issue decided

⁶¹⁴ ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled “Decision on Application for Interim Release”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-323 OA, A. Ch., 16 December 2008, par. 32. The limitation in the granting of access, included in the wording ‘to the largest extent possible’ is drawn from the decision of the ECtHR in the *Migoñ v. Poland* case. See ECtHR, *Migoñ v. Poland*, Application No. 24244/94, Judgment of 25 June 2002, par. 55 (“in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial, such as the right to adversarial procedure” (emphasis added)).

⁶¹⁵ ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled “Decision on Application for Interim Release”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-323 OA, A. Ch., 16 December 2008, par. 33. Note that Rule 121 (3) ICC RPE imposes disclosure obligations on the Prosecutor, prior to the confirmation hearing, *vis-à-vis* the suspect.

⁶¹⁶ ECtHR, *Lieztow v. Germany*, Application No. 24479/94, Reports 2001-I, Judgment of 13 February 2001, par. 47.

⁶¹⁷ Consider *e.g. ibid.*, par. 47 - 48; ECtHR, *Garcia Alva v. Germany*, Application No. 23541/94, Judgment of 13 February 2001, par. 42 - 43; ECtHR, *Migoñ v. Poland*, Application No. 24244/94, Judgment of 25 June 2002, par. 80. See ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled “Decision on Application for Interim Release”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-323 OA, A. Ch., 16 December 2008, Dissenting Opinion of Judge Pikiš, par. 30.

⁶¹⁸ *Ibid.*, par. 38-40.

upon speedily by the Pre-Trial Chamber. In this case, the suspect may file a new application for interim release once the disclosure process has been completed.⁶¹⁹

The periodic review mechanism provided for under Article 60 (3) ICC Statute is also relevant for the present discussion. The ECtHR held that a periodic review mechanism can also satisfy the requirements of Article 5 (4) ECHR.⁶²⁰

According to Article 59 (3) ICC Statute, upon arrest by the requested state, the suspect holds the right to apply for provisional release to the competent authority in the custodial state.⁶²¹ However, since the competent authority does not hold the power to review the lawfulness of the warrant of arrest, this procedure seems not to be in line with the right to challenge the lawfulness of the detention. Nevertheless, a right to challenge the lawfulness of the deprivation of liberty pending surrender to the ICC is provided for where such *habeas corpus* right is included in Rule 117 (3) ICC RPE, which confers the general competence to hear challenges to the legality of the arrest warrant to the Pre-Trial Chamber.

Notably, in the *Katanga and Ngudjolo* cases, both the Trial Chamber and the Appeals Chamber declined to look into the lawfulness of the initial detention of Katanga, because the motion was filed too late. This is regretful because it arguably prevented Katanga from exercising his right to challenge the lawfulness of his detention.⁶²² This issue will be dealt with in a subsequent section.⁶²³

⁶¹⁹ *Ibid.*, par. 39-40.

⁶²⁰ ECtHR, *Egmez v. Cyprus*, Application No. 30873/96, Reports 2000-XII, Judgment of 21 December 2000, par. 94 (“It is not excluded that a system of automatic periodic review of the lawfulness of the detention by a court may ensure compliance with the requirements of Article 5 § 4”); ECtHR, *Megyeri v. Germany*, Application No. 13770/88, Series A, No. 237-A, Judgment of 12 May 1992, par. 22.

⁶²¹ The right of the suspect to apply for interim release pending surrender to the ICC will be discussed in detail, *infra*, Chapter 8, II.3.

⁶²² C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 992 (“However, the refusal of the judges in the Katanga case to look into the motion of the suspect challenging the lawfulness of his pre-trial arrest and detention, for the only reason that the motion was filed too late, might perhaps be interpreted as a violation of this right and thus of the ICC law”).

⁶²³ See *infra*, Chapter 7, VII.

V.4.3. The internationalised criminal tribunals

Laudable was the express provision of the procedural remedy of *habeas corpus* in the TRCP.⁶²⁴ The Dili District Court was competent to decide on such petitions filed.⁶²⁵ A strict time limitation was provided for where, upon the assignment of the petition to a Judge, it had to be heard within 24 hours.⁶²⁶ However, this time limitation was not always respected in practice.⁶²⁷ This express provision was a remarkable improvement when compared to the procedural framework of the international criminal tribunals, notwithstanding their recognition of this right in their respective practices. Through such proceedings, every person was entitled to the substantial remedy of immediate release in cases where any arrest or detention was found to be unlawful.⁶²⁸ This automatic entitlement stands in stark contrast with the jurisprudence of the international criminal tribunals, which reserves this remedy to the exceptional scenario where breaches of the rights of the suspect or the accused constitute an abuse of process or render a fair trial impossible.⁶²⁹ In explaining such difference, regard should be had to the different characteristics of the SPSC *vis-à-vis* the international criminal tribunals. First and foremost, the SPSC do not have to rely on states or international organisations in the execution of arrests.

Where Section 47.2 TRCP provides that 'unlawful arrest or detention' means any arrest or detention made in violation of this or other UNTAET Regulations, it should be read as including international human rights norms. As argued previously, an arrest and detention may be in accordance with the law and still be considered arbitrary.⁶³⁰

Regrettably, the Extraordinary Chambers and the STL do not follow the example set by the SPSC. A *habeas corpus* right is not expressly provided for in their respective procedures.⁶³¹

⁶²⁴ Section 47 TRCP.

⁶²⁵ Section 47 (3) TRCP.

⁶²⁶ Section 47 (4) TRCP.

⁶²⁷ JSMP, Dili District Court: Final Report, November 2003, p. 41 (<http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN014017.pdf>, last visited 15 January 2014).

⁶²⁸ Section 47 (1) and 47 (7) TRCP.

⁶²⁹ See *infra*, Chapter 7, VII.

⁶³⁰ See *supra*, Chapter 7, V.1.

⁶³¹ As far as the Extraordinary Chambers are concerned, it is to be noted that the Article 12 ECCC Agreement, which outlines that the Extraordinary Chambers will exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, only refers to Article 14 and 15 ICCPR, leaving out Article 9 ICCPR. Whereas the residual application of Cambodian Law (which should be in accordance with the ICCPR) may resolve this omission, it has been argued that a risk exists that the Judges consider the ECCC agreement to

VI. IRREGULARITIES IN THE EXECUTION OF THE ARREST

Apart from the examples provided above, other instances of unlawful or arbitrary arrest and detention have emerged in the practice of the international(ised) criminal tribunals. A closer look at the jurisprudence of the ICTY reveals that it has, on different occasions, been confronted with instances in which the accused was ‘irregularly’ rendered to the jurisdiction of the court. These ‘irregularities’ include a vast array of potential scenarios that relate either to acts that occurred before the actual arrest, to the arrest itself, to the pre-transfer detention or to the transfer itself.⁶³² The present subsection focuses on certain irregularities which relate to the effectuation of the arrest. Different forms of irregularities may occur in relation to the arrest of a suspect or accused by the international criminal tribunals.⁶³³ These forms of irregular arrests have the fact that they encompass a violation of the right of the suspect or the accused not to be arbitrarily arrested or detained in common.⁶³⁴ In general, three main scenarios can be established. First, (1) a suspect or accused may be *forcibly abducted*, whereby state agents or private individuals arrest a suspect or accused person in another state and abduct the person to their state in order to prosecute him or her.⁶³⁵ Alternatively, (2) the person may be *lured* into a state in which he or she can be arrested and prosecuted or from where he or she can be extradited to the state that is willing to prosecute the person. Lastly, (3) the accused or suspect can be brought before the court following a *disguised*

be *lex specialis* and the omission to be deliberate. See G. SLUITER, Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers, in «Journal of International Criminal Justice», Vol. 4, 2006, pp. 316 – 317.

⁶³² C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 31.

⁶³³ One could more generally refer to forms of “irregular rendition”. See e.g. R.J. CURRIE, *Abducted Fugitives before the International Criminal Court: Problems and Prospects*, in «Criminal Law Forum», Vol. 18, 2007, p. 349; Ö. ÜLGEN, *The ICTY and Irregular Rendition of Suspects*, in «The Law and Practice of International Courts and Tribunals», Vol. 3, 2003, p. 441 (the author defines ‘irregular rendition’ as the “apprehension of an accused against his/her free will by coercive or covert means, such as abduction and luring, and without the consent of the State in which he/she is present”).

⁶³⁴ H. VAN DER WILT, *Het Joegoslavië Tribunaal en het beginsel male captus, bene judicatus*, in «Delikt & Delinkwent», Vol. 18, 2004, p. 276.

⁶³⁵ Such abduction clearly entails a violation of international law. Consider PCIJ, S.S. ‘LOTUS’ (France v. Turkey), Series A, No. 10, 7 September 1927; ICJ, Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium), Judgment, 14 February 2000, ICJ Reports 2000. Consider also the Corfu Channel case, recognising that “respect for territorial sovereignty is an essential foundation of international relations.” See ICJ, Corfu Channel (United Kingdom v. Albania), Merits, Judgment, 9 April 1949, ICJ Reports 1949, p. 35. An abduction by definition involves the use of force or the threat to use of force by the forum state. See C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 39 (noting that situations of luring and abduction may not always easily be distinguished). According to BASSIOUNI, three issues are involved in the process of an abduction, to know (i) disruption of the world public order; (ii) an infringement on the sovereignty and territorial integrity of another state and (iii) a violation of the human rights of the unlawfully seized person. See M.C. BASSIOUNI, *International Extradition*, United States Law and Practice (5th ed.), Oxford, Oxford University Press, 2007, p. 276.

extradition.⁶³⁶ These forms of irregular deprivation of liberty violate the right not be unlawfully or arbitrarily deprived of liberty, but are not limited to them alone. Some of these forms also violate the principle of state sovereignty or the rule of law.⁶³⁷

It will be shown that the international criminal tribunals' jurisprudence does not consider all irregular deprivations of liberty to be illegal.⁶³⁸ Furthermore, when the ICTY was confronted with abductions and the luring of defendants, the tribunal has not refused to exercise jurisdiction and has "adopted a limited reading of the circumstances under which a court may refuse to exercise jurisdiction over a defendant who has been abducted."⁶³⁹

In *Dokmanović*, the ICTY Trial Chamber determined that the accused had been lured into Eastern Slovenia, distinguishing 'luring' from 'forcible abduction' and holding that the former "is consistent with principles of international law and [...] sovereignty."⁶⁴⁰ SCHARF rejected the distinction drawn by the Trial Chamber (between 'luring' and 'forcible abductions') where he considered it to be artificial and where it "may needlessly discourage future apprehensions undertaken by NATO and UN troops in the territory of the former Yugoslavia."⁶⁴¹

⁶³⁶ H. VAN DER WILT, *Het Joegoslavië Tribunaal en het beginsel male captus, bene judicatus*, in «Delikt & Delinkwent», Vol. 18, 2004, p. 276. According to BASSIOUNI, a disguised extradition is a means "by which to achieve extradition through other processes, which are lawful but sometimes used abusively." See M.C. BASSIOUNI, *International Extradition, United States Law and Practice* (5th ed.), Oxford, Oxford University Press, 2007, p. 203. PAULUSSEN argues that it refers to the situation where "a mechanism, set up for other purposes, is unlawfully used to make an impossible extradition possible or to make a possible, but, for example, too slow or expensive extradition quicker or cheaper. See C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 35.

⁶³⁷ E. VAN SLIEDREGT, *Arresting War Criminals; Male Captus Bene Detentus, Human Rights and the Rule of Law*, in W.A.M. VAN DIJK and J.I. HOVENS (eds.), *Arresting War Criminals, Wolf Legal Productions*, Nijmegen, 2001, pp. 75 – 79. For a detailed analysis, see C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, pp. 41 - 125.

⁶³⁸ Ö. ÜLGEN, *The ICTY and Irregular Rendition of Suspects*, in «The Law and Practice of International Courts and Tribunals», Vol. 3, 2003, p. 458.

⁶³⁹ A. SRIDHAR, Note: *The International Criminal Tribunal for the Former Yugoslavia's Response to the Problem of Transnational Abduction*, in «Stanford Journal of International Law», Vol. 42, 2006, p. 350.

⁶⁴⁰ ICTY, *Decision on the Motion for Release by the Accused Slavko Dokmanović, Prosecutor v. Mrkšić et al.*, Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 57. The Trial Chamber acknowledged that "it may be difficult to distinguish the abduction of a person from the coerced luring of such a person." However, it added that "on the continuum between force and fraud, the Trial Chamber does not believe that the accused was coerced in a way that would justify our comparing the case at bar to a forcible abduction or kidnapping case" (emphasis in original). See *ibid.*, par. 57, fn. 73.

⁶⁴¹ M.P. SCHARF, *The Prosecutor v. Slavko Dokmanović: Irregular Rendition and the ICTY*, in «Leiden Journal of International Law», Vol. 11, 1998, p. 369 (the author argues that similar to abductions, the luring operation violated the sovereignty of the FRY where an agent of the OTP physically entered its territory with the purpose of engaging in a law enforcement activity without the FRY's permission and that, contrary to the argumentation of the Trial Chamber, most national states do not distinguish between 'abduction by fraud' and 'abduction by

As discussed above, international human rights law forbids any deprivation of liberty which is *unlawful* or *arbitrary*.⁶⁴² In this regard, the Trial Chamber first determined that Dokmanović had been arrested lawfully, in accordance with the procedures established in the Statute and the RPE.⁶⁴³ The Trial Chamber sought further guidance in the case law of the ECtHR with regard to luring and abduction. Normally, forms of *forcible abduction* are viewed by the human rights supervisory bodies to be a human rights violation.⁶⁴⁴ The ECtHR was confronted with a situation comparable to that of Dokmanović when Mr. Stocké was arrested and detained in Germany through the trickery of a French police informant, who lured him into boarding an airplane bound for Luxembourg which landed in Germany (where Mr. Stocké was sought for violations of the conditions of his provisional release for suspected tax offences).⁶⁴⁵ The ECtHR determined that there had not been a violation of Article 5 (1) ECHR. Central to the Court's finding was the determination that it had not been established whether the German authorities had been involved in the luring.⁶⁴⁶ The Commission had suggested that if the German authorities would have been involved in the return, against Mr. Stocké's will, and without the consent of the state in which he resided, a violation of Article 5 (1) ECHR could have occurred.⁶⁴⁷ Hence, the case law of the ECtHR on this point may be interpreted as providing that in cases where the Prosecution is involved in the luring operation (as was arguably the case in *Dokmanović*), one should conclude to a violation of Article 5 (1) ECHR).⁶⁴⁸ Alternatively, in *Bozano v. France*, Mr. Bozano, who had been convicted in

force'). Consider also H. VAN DER WILT, *Het Joegoslavië Tribunaal en het beginsel male captus, bene judicatus*, in «Delikt & Delinkwent», Vol. 18, 2004, p. 293 (arguing that only a 'gradual difference' exists); R.J. CURRIE, *Abducted Fugitives before the International Criminal Court: Problems and Prospects*, in «Criminal Law Forum», Vol. 18, 2007, pp. 363 - 364 (arguing that such view "seems strained, founded as it was on the controversial view that luring is not a sovereignty violation." "[L]uring largely amounts to disguised extradition"); G.-J.A. KNOOPS, *Surrendering to the International Criminal Court: Contemporary Practice and Procedures*, Ardsley, Transnational Publishers, 2005, p. 245 ("it can be held that the Trial Chamber's position, differentiating between abduction by force and abduction by fraud, is not a persuasive one and bears no legal authority." "In effect, this distinction permits *de facto* forms of abuse of process").

⁶⁴² See *supra*, Chapter 7, V.1.

⁶⁴³ ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 60 – 61 ("In determining whether Mr. Dokmanović was arrested in accordance with the standards enunciated in Article 5(1) of the ECHR and Article 9(1) of the ICCPR, therefore, the Tribunal's own Statute and Rules must first be revisited to see if the accused was arrested in a non-arbitrary way in "accordance with procedures prescribed by law" – namely in accordance with the law of the Tribunal").

⁶⁴⁴ R.J. CURRIE, *Abducted Fugitives before the International Criminal Court: Problems and Prospects*, in «Criminal Law Forum», Vol. 18, 2007, p. 360.

⁶⁴⁵ ECtHR, *Stocké v. Germany*, Application No. 1175/85, Series A, No. 199, Judgment of 19 March 1991.

⁶⁴⁶ *Ibid.*, par. 54.

⁶⁴⁷ ECommHR, *Stocké v. Germany*, Application No. 1175/85, Report of 12 October 1989, par. 168.

⁶⁴⁸ A. SMEULERS, Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2002-2003*, Vol. XI, 2007, p. 109.

absentia in Italy, was abducted by French plain-clothed officers to Switzerland, from where he was extradited to Italy. The ECtHR found that the deprivation of liberty was unlawful (under Article 5 (1) (f) ECHR) and incompatible with the ‘right of security’ under Article 5 (1) ECHR, since it amounted to a disguised form of extradition to circumvent a negative court order.⁶⁴⁹ Nevertheless, the decision by the ECtHR did not have any influence on the proceedings against Bozano in Italy.⁶⁵⁰ Lastly, the *Öcalan* case concerned the abduction of the leader of the PKK from Kenyan soil (where he had found refuge in the Greek embassy) by Turkish officials.⁶⁵¹ The ECtHR’s Grand Chamber found no violation of Article 5 (1) ECHR where the sovereignty of the refuge state was not violated and where no extradition agreement or other cooperative agreement had been violated. The ECtHR considered that “even an atypical extradition could not as such be seen as being contrary to the Convention, “provided that the legal basis for the order for the fugitive’s arrest is an arrest warrant issued by the authorities of the fugitive’s State of origin.”⁶⁵² However, this decision can be criticised because it is difficult to see how this deprivation of liberty could be in ‘accordance with a procedure prescribed by law’⁶⁵³ Indeed, no formal procedure for extradition between Turkey and Kenya exists. In turn, likewise, the HRC concluded to a violation of Article 9 (1) ICCPR where the deprivation of liberty encompassed the cross-boundary abduction of persons.⁶⁵⁴

⁶⁴⁹ ECtHR, *Bozano v. France*, Application No. 9990/82, Series A, No. 111, Judgment of 18 December 1986, par. 60.

⁶⁵⁰ A. SMEULERS, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2002-2003, Vol. XI, 2007, p. 110; H. VAN DER WILT, Het Joegoslavië Tribunaal en het beginsel *male captus, bene judicatus*, in «Delikt & Delinkwent», Vol. 18, 2004, p. 286.

⁶⁵¹ ECtHR *Öcalan v. Turkey*, Application No. 46221/99, Reports 2005-IV, Judgment (Grand Chamber) of 12 May 2005.

⁶⁵² *Ibid.*, par. 89.

⁶⁵³ S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, p. 433 (commenting on the judgment of the first section).

⁶⁵⁴ HRC, *López Burgos v. Uruguay*, Communication No. R.12/52, U.N. Doc. CCPR/C/13/D/52/1979, 29 July 1981, par. 13 (the author of the complaint stated that her husband was abducted from Brazil to Uruguay by members of the Uruguayan security and intelligence forces. Before concluding that the abduction constituted an arbitrary arrest and detention, the Committee held that where the abduction was committed on foreign soil by Uruguayan agents, the ICCPR could be applied extraterritorially); HRC, *Celiberti de Casariego v. Uruguay*, Application No. 56/1979, U.N. Doc. CCPR/C/13/D/56/1979, 29 July 1989, par. 11 (the complainant was abducted from Brazil with the aid of the Brazilian police and brought to Uruguay); HRC, *Almeida de Quinteros et al. v. Uruguay*, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2, 21 July 1983, par. 13 (where an Uruguayan national (daughter of the applicant) was abducted from the premises of the Venezuelan embassy in Uruguay by policemen, the HRC concluded to a violation of Article 9 ICCPR); HRC, *García v. Ecuador*, Communication No. 319/1988, U.N. Doc. CCPR/C/43/D/319/1988, 5 November 1991, par. 6.1 (a Colombian citizen had been abducted from Ecuador to the U.S. at the behest of the U.S., notwithstanding in the existence of a valid extradition treaty between Ecuador and the U.S.).

In *Dokmanović* the Trial Chamber concluded that the ECtHR and the HRC “discuss illegality of arrest in relation to violations of specific, established procedures for obtaining custody of a suspect (often relating to an extradition treaty) or in relation to forcible kidnapping, which has been considered manifestly arbitrary.”⁶⁵⁵ The Trial Chamber consequently noted that no extradition treaty exists between the ICTY and UNTAES (where neither of them is a state) and that no ‘long-standing, detailed arrangement’ existed detailing the transfer of accused persons, comparable to an extradition treaty.⁶⁵⁶ This analysis is not convincing. First, the fact that no formal extradition treaty or cooperation agreement exists between the tribunal and UNTAES should not come as a surprise, since the arrest and transfer of suspects and accused persons to the ICTY does not constitute extradition.⁶⁵⁷ Nevertheless, as noted by SCHARF, where no request for surrender was addressed to the FRY (but the arrest warrant was immediately transmitted to UNTAES pursuant to Rule 59bis ICTY RPE), the same concerns could be raised as in the situation where the tribunal would have circumvented an established extradition treaty.⁶⁵⁸ It is true, as discussed previously, that the resorting to Article 59bis is not problematic in itself, as it offers an alternative route to arrest pursuant to Rule 55 ICTY RPE. However, what is more problematic is the method of arrest relied upon. Whereas addressing the arrest warrant to UNTAES was in compliance with the procedures established, this does not entail a licence to lure Dokmanović from the territory of the FRY.⁶⁵⁹ Rather than resorting

⁶⁵⁵ ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 67.

⁶⁵⁶ *Ibid.*, par. 67.

⁶⁵⁷ G. SLUITER, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 1997-1999, Vol. III, 2001, p. 156.

⁶⁵⁸ M.P. SCHARF, The Prosecutor v. Slavko Dokmanović: Irregular Rendition and the ICTY, in «Leiden Journal of International Law», Vol. 11, 1998, p. 376; confirming, see G. SLUITER, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 1997-1999, Vol. III, 2001, p. 153. However, as rightly noted by VAN DER WILT, extradition treaties cannot easily be compared to the unqualified cooperation obligations incumbent on states in relation to the ICTY. VAN DER WILT further argues that in the absence of its own police force, the tribunal should be more tolerant where states do not live up to their cooperation obligations and accused persons are otherwise brought before it. Directing an order to the FRY for the arrest of Dokmanović is in such scheme rather a courtesy, and the states should accept minor intrusions of their sovereignty for their failure to live up to their cooperation obligations. See H. VAN DER WILT, Het Joegoslavië Tribunaal en het beginsel *male captus, bene judicatus*, in «Delikt & Delinkwent», Vol. 18, 2004, pp. 293 – 294; Consider also S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in «The British Yearbook of International Law», Vol. 70, 2000, p. 232 (noting that “the extradition regime has no counterpart in relations between the Tribunal and Member States”).

⁶⁵⁹ C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, pp. 393, 395.

to luring, a request to the FRY should have been made to arrest and transfer Dokmanović to the ICTY. Consequently, the arrest of Dokmanović may well be considered unlawful.⁶⁶⁰

When the Trial Chamber subsequently looked to national case law, it concluded that there was ‘strong support’ in national systems for the idea that the luring of a person into another jurisdiction to effect his or her arrest does not entail an abuse of the rights of the suspect or an abuse of process.⁶⁶¹ While noting that the analysis of domestic case law reveals several instances in which luring was found to be a violation of an international law principle or of the rights of the suspect, the Trial Chamber argued that in these instances there had either been (1) the circumvention of an established extradition treaty or (2) the use of unjustified violence against the accused.⁶⁶² Additionally, there was nothing about the arrest that would shock the conscience and there had not been any “cruel, inhumane and outrageous conduct” which would have required dismissal.⁶⁶³ Regrettably, the Trial Chamber did not consider it necessary to clarify the circumstances under which the tribunal may exercise jurisdiction over a defendant that had been *illegally* obtained from abroad.⁶⁶⁴

⁶⁶⁰ G. SLUITER, Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 1997-1999*, Vol. III, Antwerp, Intersentia, 2001, p. 153 (noting that such conclusion does not necessarily entail that the accused should be released from custody); C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 395; A. SMEULERS, Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2002 - 2003*, Vol. XI, Antwerp, Intersentia, 2007, p. 109. *Contra*, see S. LAMB, *The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia*, in «The British Yearbook of International Law», Vol. 70, 2000, pp. 202 – 203.

⁶⁶¹ ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 68.

⁶⁶² *Ibid.*, par. 74. LAMB adds ‘official collusion’ to this list. See S. LAMB, *The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia*, in «The British Yearbook of International Law», Vol. 70, 2000, p. 231.

⁶⁶³ ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 75. In *Toscanino*, a U.S. Court of Appeals established the principle that a court should divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the “Government’s deliberate, unnecessary and unreasonable invasion of the accused’s constitutional rights.” See *United States v. Toscanino*, 500 F.2d 267 (Court of Appeals, 2nd Circuit), 15 May 1974, at 275. As such, it forms an exception to the ‘Ker-Frisbie rule’, which will be explained further on (*infra*, Chapter 7, VI, fn. 688 - 689 and accompanying text). Later jurisprudence has interpreted the *Toscanino* rule as implying that jurisdiction should be declined only in case of “cruel, outrageous and inhuman treatment” “raising the level of outrageousness” which “shocks the conscience” (consider *e.g.* the *Lujan* and *Yunis* cases: U.S. ex rel. *Lujan v. Gengler*, 510 F.2d 62 (Court of Appeals, 2nd Circuit), 8 January 1975, at 65 and U.S. v. *Yunis*, 981 F. Supp. 909 (United States district Court, District of Columbia), 23 February 1988, at. 915. PAULUSSEN has argued that such *Toscanino* seems broader and “does not seem to require such high standard.” See C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 199.

⁶⁶⁴ ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 78 (the Court reasoned that it did not have to address this issue (which had been raised by the Prosecutor and the defence) where it had determined that the “method of

When the Defence also reasoned that the sovereignty of the FRY had been violated, the Trial Chamber concluded that the arrest had not taken place on the territory of the FRY, given that he was lured into Croatian territory. At the same time, when the Trial Chamber hinted that there could have been a violation insofar that the accused was lured by another state, it referred to the vertical relationship between the ICTY and the FRY.⁶⁶⁵ Nevertheless, it is difficult to ignore that there had been a physical intrusion on the FRY territory and, thus, a violation of the sovereignty of the FRY.⁶⁶⁶

The decision has been lauded insofar as it does not look only at the tribunal's own procedures, but makes a "full review" of the right to liberty and security, including whether the national authorities executing the arrest (or the international forces involved in it) have respected the national procedure (or the relevant procedures of the international forces).⁶⁶⁷ In this manner, the Trial Chamber gives due regard to how the arrest was effectuated by UNTAES.

arrest and detention was justified and legal" (emphasis in original)). The issue was addressed by SLUITER where he held that "if the Chamber had decided that his luring was unlawful, as it should have, release would clearly have been an inappropriate and disproportionate remedy. Financial compensation or a (minor) reduction of the sentence in case of a conviction would have been more in line with the nature of the violation." See G. SLUITER, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 1997-1999, Vol. III, Antwerp, Intersentia, 2001, p. 154.

⁶⁶⁵ ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, par. 67. The Trial Chamber referred to the earlier holding in the *Blaškić* case where the Trial Chamber held that the ICTY was created as a subsidiary organ of a specialised nature to the Security Council. Consequently, "[a]n order within the International Tribunal's mandate, addressed to a State, as with any compulsory action taken by the Security Council itself, in no way offends the sovereignty of that State." See ICTY, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoena Duces Tecum, *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, T. Ch. II, 18 July 1997, par. 51.

⁶⁶⁶ M.P. SCHARF, The Prosecutor v. Slavko Dokmanović: Irregular Rendition and the ICTY, in «Leiden Journal of International Law», Vol. 11, 1998, p. 374 (noting that agents of states are not allowed to execute police operations in other states, whether amounting to arrest or not); R.J. CURRIE, Abducted Fugitives before the International Criminal Court: Problems and Prospects, in «Criminal Law Forum», Vol. 18, 2007, p. 354 (confirming that a state may not execute police or criminal enforcement powers on the territory of another state without that state's permission) and p. 364 (holding that "[t]he better view may be that the force of the Security Council's exercise of Chapter VII powers that underpins the ICTY's function effectively trumps any sovereignty concerns, particular with regard to the defaulting state"). Note that the latter part of the argument may not entirely be correct, where it seems incorrect to label the FRY the 'defaulting state' in the absence of any request directed to it by the ICTY to arrest Dokmanović (although it would have been unlikely that the FRY would effect such arrest); Ö. ÜLGEN, The ICTY and Irregular Rendition of Suspects, in «The Law and Practice of International Courts and Tribunals», Vol. 3, 2003, p. 456 (noting that the luring, similar to forcible abduction, involved "a degree of physical presence in a territory").

⁶⁶⁷ C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, pp. 389, 401. Consider also *ibid.*, p. 390 (the author argues that if violations occurred, they must be considered and remedied, where these "occurred in the context of their case"); G. SLUITER, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 1997-1999, Vol. III, Antwerp, Intersentia, 2001, pp. 155 – 156.

An issue of forcible abduction subsequently arose in the *Todorović* case. Todorović claimed to have been forcibly abducted from the FRY by four individuals who handed him over into the custody of SFOR at the Tuzla Air Force base on the territory of Bosnia and Herzegovina.⁶⁶⁸ The accused filed several motions to order SFOR to disclose certain documents to him, a request that was eventually honoured by the Trial Chamber.⁶⁶⁹ Whereas both parties raised the issue of the illegality of the arrest, the Trial Chamber did not rule on this issue in its decision. Soon after this decision, the accused entered into a plea agreement with the Prosecutor. Consequently, the issue of the effect of the irregular arrest for the proceedings, including its effect on the tribunal's jurisdiction, remain unanswered.⁶⁷⁰ Notable is the argument put forward by both SFOR and the Prosecution that the motion should be dismissed where even *if* the contentions of Todorović were accepted to be true, Todorović would not be entitled to the relief sought (release). The Trial Chamber dismissed this argument holding that only the disclosure would allow Todorović to present all the evidence and make it possible for the Trial Chamber to decide whether he is entitled to the remedy sought.⁶⁷¹ Indeed, as noted by the Trial Chamber, it could only decide on the appropriate remedy provided that the evidence was complete.⁶⁷²

The ICTY was first able to address the question as to what the consequences of an irregular rendition are and whether it impedes the exercise of *in personam* jurisdiction by the tribunal

⁶⁶⁸ Consider *e.g.* G. SLUITER, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2000 - 2001, Vol. V, Antwerp, Intersentia, 2001, p. 287.

⁶⁶⁹ ICTY, Sentencing Judgment, *Prosecutor v. Todorović*, Case No. IT-95-9/1-S, T. Ch., 31 July 2001, par. 2; ICTY, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, *Prosecutor v. Simić*, Case No. IT-95-9, T. Ch., 18 October 2000, pp. 25 – 27. For an overview of these motions, see C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, pp. 409 – 412 and S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in «The British Yearbook of International Law», Vol. 70, 2000, pp. 205 – 209.

⁶⁷⁰ Several authors have sought to analyse in depth the arguments made by the Prosecutor and the Defence in the *Todorović* case. Consider *e.g.* J. SLOAN, *Prosecutor v. Todorović*: Illegal capture as an Obstacle to the Exercise of International Criminal Jurisdiction, in «Leiden Journal of International Law», Vol. 16, 2003, pp. 85 – 113; S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in «The British Yearbook of International Law», Vol. 70, 2000, pp. 205 – 213; C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, pp. 407 – 429.

⁶⁷¹ ICTY, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, *Prosecutor v. Simić*, Case No. IT-95-9, T. Ch., 18 October 2000, par. 59. SLOAN noted that notwithstanding the OTP's argumentation that the facts were not in dispute (where the OTP seemed to agree to the Defence allegations 'at their highest'), it seemed obvious that the facts *were* in fact in dispute. See J. SLOAN, *Prosecutor v. Todorović*: Illegal capture as an Obstacle to the Exercise of International Criminal Jurisdiction, in «Leiden Journal of International Law», Vol. 16, 2003, p. 97.

⁶⁷² As noted by SLOAN, "there was nothing to say that disclosure of the full story of his arrest would not show treatment that was significantly worse than [Todorović] had alleged." See *ibid.*, p. 98.

in the *Nikolić* case. Nikolić challenged the legality of his apprehension.⁶⁷³ Both parties were in agreement that Nikolić had been forcibly abducted from the territory of the FRY by individuals not connected to SFOR or the Prosecution, had been smuggled into Bosnia and Herzegovina and consequently delivered to SFOR.⁶⁷⁴ The accused was subsequently delivered into the custody of the tribunal and transferred to The Hague.⁶⁷⁵ The Defence sought the release of the accused, the dismissal of the case or such relief as the Trial Chamber would consider appropriate.⁶⁷⁶ The Defence's concession that the individuals that apprehended Nikolić were not related to the SFOR or the OTP notwithstanding, the Defence argued that SFOR had 'actual or constructive' knowledge of the fact that Nikolić had been unlawfully apprehended, and that SFOR 'took advantage' of the situation by taking the accused in custody and by handing him over to the Prosecutor.⁶⁷⁷ Hence, the illegal conduct could be attributed to SFOR and to the tribunal.⁶⁷⁸ The Trial Chamber dismissed this argument.⁶⁷⁹

⁶⁷³ While Nikolić did not complain about the way he was apprehended and brought before the tribunal at the occasion of his initial appearance, the Defence subsequently filed a motion to that extent.

⁶⁷⁴ ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 21 (facts on which the Defence and the Prosecution agree) and p. 33 (VII. Conclusion). It is important to note that in the *Nikolić* case, an arrest warrant had been addressed to the Federation of Bosnia and Herzegovina and to the Bosnian Serb administration in Pale. Prior to that, a Rule 61 hearing had been organised, at which occasion it was also determined that the failure of the Prosecution to effectuate the arrest of Nikolić "was due wholly to the failure or refusal of the Bosnian Serb administration in Pale to cooperate." Consequently, the Security Council was notified of this failure to cooperate by the President of the tribunal.

The agreed facts on which both the Trial Chamber and the Appeals Chamber based their decision were very limited. Neither the Trial Chamber nor the Appeals Chamber convincingly engaged in a comprehensive effort to elicit the exact facts surrounding the arrest of Nikolić. Consider *e.g.* See J. SLOAN, Breaching International Law to Ensure its Enforcement: the Reliance by the ICTY on Illegal Capture, in T. McCORMACK and McDONALD (eds.), Yearbook of International Humanitarian Law, Vol. 6, 2003, T.M.C. Asser Press, The Hague, 2006, pp. 339 - 341 (criticising the Appeals Chamber's failure to further explain the *proprio motu* review of all the facts of the case it pertained to have engaged in).

⁶⁷⁵ ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 21.

⁶⁷⁶ *Ibid.*, par. 18.

⁶⁷⁷ *Ibid.*, par. 58. In response, the Prosecution argued that SFOR was only the "fortuitous recipient" of the accused (*ibid.*, par. 59).

⁶⁷⁸ ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 29. It was argued by Nikolić that SFOR *de facto* and *de jure* acted as an agent for the Prosecution and the Tribunal. Consequently, the conduct can be attributed to the Prosecution.

⁶⁷⁹ The Trial Chamber relied on the Articles on the Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/CN.4/L.602/Rev.1, 2001. Whereas it acknowledged that these Articles had not yet been adopted, the Trial Chamber noted that it followed from the Draft Articles that for conduct which was not attributable to a state at the moment of its commission, it is required that the state 'acknowledged and adopted' the conduct as its own, which did not happen in the case at hand. ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 64; Article 11 of the Draft Articles on the Responsibility of States for Internationally wrongful Acts ('Conduct acknowledged and adopted by a State as its own'). Interestingly, the ILC has drafted articles on the responsibility of international organisations (United Nations, International Law Commission: Report on the Work of its sixty-first Session (4 May to 5 June and 6 July to 7 August 2009), U.N. Doc. A/64, 2009).

Furthermore, the Trial Chamber held that from the moment the accused person “comes into contact” with SFOR, it follows from the cooperation obligations incumbent on SFOR that it should arrest the person and transfer him or her to the tribunal.⁶⁸⁰ Indeed, even when SFOR would consider the apprehension of the accused to be illegal, it does not have the liberty to release the person where such determination needs to be made by the tribunal.⁶⁸¹

As part of its inherent powers, the Court subsequently considered whether the arrest *in itself* was an impediment to the exercising of jurisdiction, since the Defence alleged that the breaches that had occurred prior to the delivery of the accused into the custody of SFOR and the tribunal entailed a violation of state sovereignty, human rights, and due process rights.⁶⁸² In so doing, given that not much guidance could be found in the case law, the Trial chamber (as did the Appeals Chamber) considered national approaches to irregularities in bringing the accused before the court. The Trial Chamber cautioned that (1) some countries follow the notion of *male captus bene detentus* more closely than others, (2) that the case law on the issue is still developing and developments are more advanced in certain jurisdictions, and (3) that different conceptual interpretations of cross-border abductions were relied upon by the parties.⁶⁸³ Furthermore, (4) all case law is based on cross-border abductions occurring on a horizontal level. This presupposes a ‘translation’ of the national case law in order to apply it to the particular context in which the tribunal operates.⁶⁸⁴

In general⁶⁸⁵ two distinct approaches may be discerned in how national courts deal with forms of illegal inter-state arrest.⁶⁸⁶ Neither of them has yet been recognised as customary

⁶⁸⁰ ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 67 (“SFOR did nothing but implement its obligations under the Statute and Rules of this Tribunal”).

⁶⁸¹ Ö. ÜLGEN, The ICTY and Irregular Rendition of Suspects, in «The Law and Practice of International Courts and Tribunals», Vol. 3, 2003, pp. 462, 465. Unfortunately, in light of its finding that the conduct of these private individuals cannot be attributed to SFOR, it did not consider the exact relationship that exists between SFOR and the Prosecution. See ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 69.

⁶⁸² *Ibid.*, par. 29. As asserted by SMEULERS, at issue was not only the question whether rights have been violated, but also what the consequences are of such violations. See A. SMEULERS, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2002-2003, Vol. XI, 2007, p. 106.

⁶⁸³ ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 75.

⁶⁸⁴ *Ibid.*, par. 76, 78, 95.

⁶⁸⁵ Here, only a general picture is drawn on national approaches towards irregular renditions. Such overview unavoidably makes certain generalisations and simplifies matters. A fully-fledged discussion of the relevant national jurisprudence is outside the scope of this study. For a very detailed analysis, the reader is referred to C.

international law.⁶⁸⁷ On the one hand, some national jurisdictions support the *male captus bene detentus* maxim, according to which a court can exercise jurisdiction over the accused person regardless of how the person has been brought within the jurisdiction of that court. The interest in prosecuting the person prevails over the violation of sovereignty and the prohibition of arbitrary deprivation of liberty.⁶⁸⁸ In U.S. jurisprudence, this maxim has traditionally been referred to as ‘the Ker-Frisbie Rule’.⁶⁸⁹ Other jurisdictions have also traditionally subscribed to this principle.⁶⁹⁰ An example of the *male captus bene detentus* maxim can be found in the heavily criticised U.S. *Alvarez-Machain* case.⁶⁹¹ The maxim dates

PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, pp. 185 – 320 and 611 – 633.

⁶⁸⁶ J. SLOAN, *Prosecutor v. Todorović: Illegal capture as an Obstacle to the Exercise of International Criminal Jurisdiction*, in «Leiden Journal of International Law», Vol. 16, 2003, p. 99; J. SLOAN, *Prosecutor v. Dragan Nikolić: Decision on Defence Motion on Illegal Capture*, in «Leiden Journal of International Law», Vol. 16, 2003, p. 54; R.J. CURRIE, *Abducted Fugitives before the International Criminal Court: Problems and Prospects*, in «Criminal Law Forum», Vol. 18, 2007, p. 352.

⁶⁸⁷ *Ibid.*, p. 359.

⁶⁸⁸ A. SRIDHAR, Note: *The International Criminal Tribunal for the Former Yugoslavia’s Response to the Problem of Transnational Abduction*, in «Stanford Journal of International Law», Vol. 42, 2006, pp. 345-346 (arguing that the principle entails that where an individual has been abducted across state borders, he cannot complain of any violation of international law, where such is the exclusive right of the state and that “transnational abduction was a violation of international law that offended the sovereign, not the individual”).

⁶⁸⁹ This name derives from two decisions by the Supreme Court affirming this maxim. First, in *Ker v. Illinois*, a U.S. citizen had forcibly been abducted from Peru to the U.S., by a private messenger. The U.S. Supreme Court held that the defendant had not been deprived from due process of law. See *Ker v. Illinois*, 119 U.S. 436 (1886). In *Frisbie v. Collins*, the accused had been forcibly abducted from Chicago to Michigan. The Supreme Court held that “the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court’s jurisdiction by reason of a forcible abduction.” Consequently, no violation of due process of law was found. See *Frisbie v. Collins*, 342 U.S. 436 (1952).

⁶⁹⁰ Examples which are often referred to include the *Ex parte Scott case (UK)* (where a British woman had been apprehended from Belgium and returned to the UK to face charges of perjury. The court held that it could not inquire into the circumstances under which a person was brought before the court). See *Ex parte Scott*, 109 Eng. Rep. 166 (1829), at 167. A similar line of argumentation has been followed in the case of *Ex parte Elliott*, where a person charged with desertion was arrested in Belgium. See *Regina v. O./C. Depot Bataillon, R.A.S.C. Colchester (Ex parte Elliott)*, 1 All E. R. 373 (K.B.) (1949), at 376-377. For France, consider the *Argoud case* (the accused was abducted in Munich and transported to France. The *Cour de Cassation* held that the violation of the sovereignty of Germany did not prevent the exercise of jurisdiction. See *Argoud*, 45 I.L.R. 90 (Cour de Cassation, 1964). This line of reasoning was followed by European as well as Commonwealth courts in the late nineteenth century and throughout the majority of the twentieth century. See A. SRIDHAR, Note: *The International Criminal Tribunal for the Former Yugoslavia’s Response to the Problem of Transnational Abduction*, in «Stanford Journal of International Law», Vol. 42, 2006, pp. 344 – 345.

⁶⁹¹ *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). This case encompassed the forcible abduction of a Mexican doctor by Mexican agents (agents retained by the US Drug Enforcement Agency (DEA)). The accused was brought to the US, to stand trial for kidnapping and murder. Importantly, U.S. agents had participated in the kidnapping and no extradition of the accused had been sought. The Supreme Court had to decide whether the existing extradition treaty between the U.S. and Mexico prohibited this abduction. The majority of the Supreme Court found that the abduction did not entail a violation of the extradition treaty as there was no explicit provision prohibiting such abduction and where the extradition treaty did not have an exclusive character. Therefore, the Ker-Frisbie rule applied and the court should not divest itself from jurisdiction. However, at the same time the Supreme Court seems to have conceded that the government’s actions amounted to a violation of international law. Note that different from the Ker and Frisbie cases, U.S. agents participated, rather than private citizens.

back to the *Eichmann* case.⁶⁹² Where both the *Eichmann* case and the *Barbie* case were concerned with crimes comparable to those falling within the subject-matter jurisdiction of the international criminal tribunals, they are of specific interest.⁶⁹³ In both cases, the court referred to the specific category of crimes concerned as a reason not to set aside jurisdiction.⁶⁹⁴

The *United States v. Toscanino* case, to some extent, limited the U.S. application of the *male captus bene detentus* maxim by recognising an exception to the principle of non-inquiry into the manner by which the accused was brought before the Court.⁶⁹⁵ The court held that “the court should divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the Government’s deliberate, unnecessary and unreasonable invasion of the accused’s constitutional rights.” Central to the Court’s decision, to divest itself of jurisdiction, was the mistreatment (torture) to which the accused was subjected.⁶⁹⁶ The Trial Chamber in *Nikolić* interpreted the rule as applying only where: (i) the abduction itself

⁶⁹² The Attorney-General of the Government of Israel v. Eichmann, 36 I.L.R. 18 (District Court of Jerusalem, 1961) and 36 I.L.R. 277 (Sup. Ct., 1962). See M. P. SCHARF, The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal, in «DePaul Law Review», Vol. 49, 2000, p. 968. Eichmann had been kidnapped from Argentina by Israeli agents and brought to Israel where he was tried, convicted and eventually executed. The District court determined that the accused did not have standing to challenge the legality of the criminal proceedings on the basis of which he was brought within the jurisdiction of the state where the illegality arises out of an international delict. After the abduction of Eichmann, the UN Security Council adopted a resolution determining that the sovereignty of Argentina had been violated and requesting Israel to make the appropriate reparations (rather than requesting the return of Eichmann to Argentina) (U.N. Doc. S/4349 S/RES/138, 23 June 1960). On the historical origins of the maxim, consider C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, pp. 19-28.

⁶⁹³ Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie, 78 I.L.R. 130 (Cour de Cassation, 1983). The *Cour de Cassation* exercised jurisdiction over the accused, notwithstanding his claim that he had come before the court by means of a disguised extradition.

⁶⁹⁴ ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 23 – 24. Such led the Appeals Chamber to conclude that the special nature of the crimes concerned may be a good reason for not setting aside jurisdiction (*ibid.*, par. 24-26). In his regard, some authors speak of the ‘Eichmann exception’. Consider e.g. H. VAN DER WILT, *Het Joegoslavië Tribunaal en het beginsel male captus, bene judicatus*, in «Delikt & Delinkwent», Vol. 18, 2004, p. 279.

⁶⁹⁵ One could argue that the abuse of process doctrine is a doctrine “that limits the unjust results of a court’s upholding of the *male captus bene detentus* principle in a specific case.” See C. RYNGAERT, *The Doctrine of Abuse of Process: A Comment on the Cambodia Tribunal’s Decisions in the Case against Duch (2007)*, in «Leiden Journal of International Law», Vol. 21, 2008, p. 728, referring to ECCC, Order of Provisional Detention, *KAING Guek Eav alias “Duch”*, Case No. 002/14-08-2006, OCIJ, 31 July 2007 and ECCC, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias “Duch”, *KAING Guek Eav alias “Duch”*, Case No. 001/18-07-2007-ECCC-OCIJ, PTC, 3 December 2007, par. 11.

⁶⁹⁶ See *United States v. Toscanino*, 500 F 2d 27, US Court of Appeals (2nd Circuit), 15 May 1974; ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 81.

amounts to “grossly cruel and unusual barbaries” or “shock[s] the conscience”, (ii) the abduction was the work of state agents or (iii) there was a protest by the injured state.⁶⁹⁷

On the other hand, other national courts have held that it should be open to the court to inquire into the way in which the accused was brought before the court (*male captus, male detentus*).⁶⁹⁸ Underlying this doctrine is the understanding that “a court has an inherent duty to protect the dignity, legitimacy and legality of its process.”⁶⁹⁹ This implies that the state should come to the court “with clean hands.”⁷⁰⁰ The case of *Ex parte Mackeson* has been considered as the first sign of the abandonment of the *male captus bene detentus* maxim.⁷⁰¹ *In casu*, the accused was found in Zimbabwe, arrested by the local authorities, and deported to the UK to be subsequently arrested upon arrival. The proceedings were stayed since his rendition had been organised in such a way as to circumvent the regular extradition proceedings.⁷⁰² Similarly, in the well-known *Ex parte Bennett* case, the British House of Lords concluded to an abuse of process where a person (a citizen of New Zealand) was forcibly abducted from South Africa to the UK, disregarding the existing extradition procedures.⁷⁰³ As noted by CURRIE, it was not so much the circumvention of the existing extradition procedures that was offensive to the court but it was rather the matter of “respect for the rule of law in the global sense.”⁷⁰⁴ It is to be noted that this second approach (‘abuse of process’) to some extent more

⁶⁹⁷ *Ibid.*, par. 81. Consider the interpretation given by U.S. jurisprudence to *Toscanino*, *supra*, fn. 663.

⁶⁹⁸ J. SLOAN, *Prosecutor v. Todorović*: Illegal capture as an Obstacle to the Exercise of International Criminal Jurisdiction, in «Leiden Journal of International Law», Vol. 16, p. 100. CURRIE argues that, rather than referring to the maxim of *male captus, male detentus* (as the Trial Chamber in *Nikolić* did), the doctrine is “perhaps best described as a specific application of the doctrine of abuse of process.” Consider R.J. CURRIE, *Abducted Fugitives before the International Criminal Court: Problems and Prospects*, in «Criminal Law Forum», Vol. 18, 2007, p. 356.

⁶⁹⁹ *Ibid.*, p. 356.

⁷⁰⁰ *State v. Ebrahim*, Supreme Court (Appellate Division), 26 February 1991, 95 I.L.R. 417, at 442. As noted by SRIDHAR, the rationale underlying many national court decisions on abuse of process is to police its executive branch by not allowing it to profit from its own illegal behaviour. See A. SRIDHAR, Note: The International Criminal Tribunal for the Former Yugoslavia’s Response to the Problem of Transnational Abduction, in «Stanford Journal of International Law», Vol. 42, 2006, pp. 357 – 358.

⁷⁰¹ *Regina v. Bow Street Magistrates (Ex Parte Mackeson)*, 77 I.L.R. 336 (High Court (Divisional Court), 1981).

⁷⁰² ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 86.

⁷⁰³ *R. v. Horseferry Road Magistrates’ Court (Ex Parte Bennett)*, 95 I.L.R. 180, at 195 (House of Lords, 24 June 1993) (“The High Court in the exercise of its supervisory jurisdiction has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if satisfied that it was in disregard of extradition procedures it may stay the prosecution and order the release of the accused”). Other cases that may be referred to include the New Zealand *Hartley* case (*R. v. Hartley*, Court of Appeal, 5 August 1977, [1978] 2 N.Z.L.R. 1999) and the Levinge case (*Levinge v. Director of Custodial Services*, 9 N.S.W.L.R. 546 (1987)).

⁷⁰⁴ R.J. CURRIE, *Abducted Fugitives before the International Criminal Court: Problems and Prospects*, in «Criminal Law Forum», Vol. 18, 2007, pp. 357 – 358.

closely aligns with the approach taken by the supervisory human rights instruments, inquiring into the manner the person concerned was brought before the court.

From the analysis of national case law, the Trial Chamber in *Nikolić* cautiously derived a number of ‘elements’ that played a role in the case law. They include (1) the involvement (direct or indirect) of the executive of the forum state in the illegal transfer, (2) whether the accused was a national of the injured state or of the forum state, (3) whether the injured state protested against the rendition of the person, (4) whether an extradition treaty existed and whether there first was an attempt to apply the extradition treaty, (5) the treatment of the accused during the period of deprivation of liberty between the moment of apprehension and the official arrest in the forum state, and (6) the nature of the crimes for which the accused was sought.⁷⁰⁵

Nikolić complained *inter alia* that (i) the violation of state sovereignty in his arrest, as well as (ii) the violation of human rights and due process should lead the tribunal to set jurisdiction aside. On the first point (i), the Trial Chamber held, in line with *Tadić*, that the defendant could invoke a violation of state sovereignty.⁷⁰⁶ However, the Trial Chamber did not find that state sovereignty had been violated. First, the concepts of sovereignty and equality of states are closely connected. In that regard, the legal context in which the international criminal tribunals operate (verticality) is different and sovereignty considerations cannot play the same role.⁷⁰⁷ Secondly, there was no involvement of the Prosecution and/or SFOR in the abduction prior to the crossing of the border between the FRY and Bosnia and Herzegovina, nor did

⁷⁰⁵ ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 95.

⁷⁰⁶ *Ibid.*, par. 97. The traditional view in international law is that the violation by one state of the rights of another state does not automatically provide the individual concerned standing to request a remedy. See R.J. CURRIE, *Abducted Fugitives before the International Criminal Court: Problems and Prospects*, in «Criminal Law Forum», Vol. 18, 2007, p. 354.

⁷⁰⁷ ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 100. On this point, consider SLOAN, submitting that while indeed different considerations apply, “there must nevertheless be some limits on the ICTY’s power to intervene in a state.” He notes, as an example, that one such limit may be that interferences with the sovereignty of a state must be specifically provided for under the Statute. See J. SLOAN, *Prosecutor v. Dragan Nikolić*: Decision on Defence Motion on Illegal Capture, in «Leiden Journal of International Law», Vol. 16, 2003, p. 549, fn. 68; S. LAMB, *The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia*, in «The British Yearbook of International Law», Vol. 70, 2000, p. 223, fn. 201 (stating that “while arrest warrants may constitute enforcement measures, these oblige custodial States to effect arrests or direct international forces to carry them out.” “They stop short of authorizing such States or forces to launch incursions into third States in order to do so”). Consider also C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 455.

SFOR or the Prosecution offer any incentives. In this regard, the Trial chamber reasoned, the situation differed from those instances in which national courts declined to exercise jurisdiction. In all these cases, there was an involvement of the executive authorities of the forum state.⁷⁰⁸ Notably, the scenario in *Nikolić* differs from that in *Dokmanović*, where the Prosecution and UNTAES had been involved in the luring operation. Thirdly, unlike several national cases, there was no circumvention of other means to bring the accused within the jurisdiction of the court.⁷⁰⁹ Similar to the arguments made in relation to the *Dokmanović* case, and as argued by SCHARF, the situation in which no arrest warrant was addressed to the FRY may be compared to the situation in which an extradition treaty is circumvented. As an *obiter dictum*, the Trial Chamber added that even where the Trial Chamber would have concluded that state sovereignty had been violated, this would imply that the accused would be returned to the FRY, which would be under the immediate obligation to arrest the accused and to surrender him to the tribunal.⁷¹⁰

⁷⁰⁸ ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 101; ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić*, Case No. IT-94-1, A. Ch., 2 October 1995, par. 100. Consider also ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 26, where the Appeals Chamber held that “the exercise of jurisdiction should not be declined in cases of abductions carried out by private individuals whose actions, unless instigated, acknowledged or condoned by a State, or an international organization or other entity, do not necessarily in themselves violate State sovereignty.” Several authors noted that in this regard, the agreed statement of facts was fatal to the Defence’s motion. See R.J. CURRIE, *Abducted Fugitives before the International Criminal Court: Problems and Prospects*, in «Criminal Law Forum», Vol. 18, 2007, p. 366; J. SLOAN, *Breaching International Law to Ensure its Enforcement: the Reliance by the ICTY on Illegal Capture*, in T. McCORMACK and McDONALD (eds.), *Yearbook of International Humanitarian Law*, Vol. 6, 2003, T.M.C. Asser Press, The Hague, 2006, p. 327.

⁷⁰⁹ ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 103.

⁷¹⁰ *Ibid.*, par. 104. Consider A. SMEULERS, Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2002-2003*, Vol. XI, 2007, p. 108 (noting that in general, “relying on the violation of State sovereignty will [...] be to little avail of individuals”). Consider C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, pp. 456 - 457 (the author distinguishes between two distinct scenarios and argues that (1) in case the violation necessitates that jurisdiction is set aside, the argumentation (of the Trial Chamber) “overlooks the fact that [...] a new transfer would make no sense if the Tribunal has earlier refused jurisdiction in this case.” “[T]here is no point in transferring a person to a Tribunal which has earlier determined that it cannot try the person.” Consequently, the author argues, there is no corresponding obligation incumbent on the injured state to transfer the person. Where (2) less serious violations occurred, the tribunal can still exercise jurisdiction and the obligation to arrest and surrender remains. Where such would result in a mere *pro forma* remedy, the author argues that other remedies stand to be preferred to release to the injured state).

On appeal, the Appeals Chamber started instead from the question of under what circumstances a violation of state sovereignty requires that jurisdiction be set aside.⁷¹¹ First, the Appeals Chamber considered that the ICTY Statute does not provide for remedies in cases where states do not comply with requests for the arrest and surrender of persons.⁷¹² Consequently, it is not clear under which circumstances SFOR or individuals acting on its behalf may enter the territory of another state, without obtaining any approval, *ex ante* or *ex post*.⁷¹³ It stated, (1) based on the analysis of national case law, that where the tribunal is dealing with ‘universally condemned offences’, jurisdiction should not be set aside by reason of violations of state sovereignty “brought about by the apprehension of fugitives from international justice.”⁷¹⁴ The Appeals Chamber held that a balancing act is required between the legitimate expectation that those accused of these crimes are brought to justice swiftly and the principle of state sovereignty.⁷¹⁵ According to the Appeals Chamber, “the damage caused to international justice by not apprehending fugitives accused of serious violations of

⁷¹¹ As noted by CURRIE, the framing of the issue (whereby the Appeals Chamber first addressed this question and to only subsequently address whether the violations were attributable to SFOR and/or OTP) already betrayed that the Appeals Chamber held the view that the sovereignty violations were not sufficiently grave to warrant setting aside jurisdiction. R.J. CURRIE, *Abducted Fugitives before the International Criminal Court: Problems and Prospects*, in «Criminal Law Forum», Vol. 18, 2007, p. 368. Or, as PAULUSSEN argues, the Judges first addressed the issue of remedies, before turning to the specific case. See C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 465.

⁷¹² ICTY, *Decision on Interlocutory Appeal Concerning Legality of Arrest, Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 20.

⁷¹³ A. CARCANO, the ICTY Appeals Chamber’s *Nikolić* Decision on Legality of Arrest: Can an International Criminal Court Assert Jurisdiction over Illegally Seized Offenders?, in «Italian Yearbook of International Law», Vol. 13, 2003, p. 82.

⁷¹⁴ ICTY, *Decision on Interlocutory Appeal Concerning Legality of Arrest, Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 26. The Appeals Chamber relied on the national cases against Eichmann and Barbie, where jurisdiction was not set aside, despite the abduction or alleged disguised extradition of the accused respectively. See *ibid.*, par. 23. As noted by LAMB, “one feature that distinguishes the forcible arrest of a Tribunal indictee from the ordinary case of intervention is the fact that a person indicted for serious breaches of international humanitarian law is a suspect whom the international community as a whole has a strong interest in bringing to justice.” See S. LAMB, *The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia*, in «The British Yearbook of International Law», Vol. 70, 2000, p. 225. Consider also CARCANO, who speaks in this regard of an ‘emergent principle of customary international law’. See A. CARCANO, the ICTY Appeals Chamber’s *Nikolić* Decision on Legality of Arrest: Can an International Criminal Court Assert Jurisdiction over Illegally Seized Offenders?, in «Italian Yearbook of International Law», Vol. 13, 2003, p. 85. A forceful critique of the jurisprudence cited in support of such principle is given by SLOAN and by PAULUSSEN. However, the latter author asserts that other case law may be referred to in support of the existence of such principle. Consider C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, pp. 470 – 473; J. SLOAN, *Breaching International Law to Ensure its Enforcement: the Reliance by the ICTY on Illegal Capture*, in T. McCORMACK and McDONALD (eds.), *Yearbook of International Humanitarian Law*, Vol. 6, 2003, T.M.C. Asser Press, The Hague, 2006, pp. 328 – 330.

⁷¹⁵ The Appeals Chamber added that “[a]ccountability for these crimes is a necessary condition for the achievement of international justice, which plays a critical role in the reconciliation and rebuilding based on the rule of law of countries and societies torn apart by international and interneccine conflicts.” See ICTY, *Decision on Interlocutory Appeal Concerning Legality of Arrest, Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 25 – 26.

international humanitarian law is comparatively higher than the injury, if any, caused to the sovereignty of a State by a limited intrusion in its territory, particularly when the intrusion occurs in default of the State's cooperation.⁷¹⁶ Nevertheless, the reasoning of the Appeals chamber risks being interpreted, as would the severity of the crimes provide an excuse for irregularities that occurred on the occasion of the apprehension.⁷¹⁷ Furthermore, (2) the Appeals Chamber derived the principle from the national jurisprudence that when there had been no complaint by the injured state or when a diplomatic resolution had been found the jurisdiction will more easily uphold jurisdiction.⁷¹⁸ According to the Appeals Chamber, this may be explained by the fact that "[t]he initial *iniuria* has in a way been cured and the risk of having to return the accused to the country of origin is no longer present."⁷¹⁹ Nevertheless, the reasoning of the Appeals Chamber seems to betray that even where any complaint would have been lodged by the injured state, jurisdiction should not be set aside. The necessity of accountability to realise international criminal justice outweighs state sovereignty considerations. Furthermore, (3) it is clear from the wording of the Appeals Chamber that the jurisdiction should not be set aside *irrespective* of the involvement of SFOR (or the Prosecution).⁷²⁰

This conclusion may not be surprising since the violation of state sovereignty does not necessarily entail a violation of the rights of the accused. Indeed, since states and not individual persons, are the beneficiaries of sovereignty they are not automatically entitled to a

⁷¹⁶ *Ibid.*, par. 26.

⁷¹⁷ C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, pp. 470 – 487 (arguing that the Appeals Chamber should have disapproved such conduct more forcefully); J. SLOAN, *Breaching International Law to Ensure its Enforcement: the Reliance by the ICTY on Illegal Capture*, in T. McCORMACK and McDONALD (eds.), *Yearbook of International Humanitarian Law*, Vol. 6, 2003, T.M.C. Asser Press, The Hague, 2006, p. 334 (noting that it is understandable that the Appeals Chamber was not overly concerned about a minor breach of state sovereignty in view of Serbia and Montenegro's lack of cooperation. Nevertheless, "to simply observe that the violation may lead to 'consequences for the international responsibility of the State or organization involved', without establishing meaningful parameters regarding when such violations will be tolerated by the ICTY, gives a blank cheque to those who would violate state sovereignty in what they perceive to be the best interests of international criminal justice." "If this were to be considered a precedent for capture of those indicted by the International Criminal Court (ICC) residing in non-cooperation member states, the ramifications could be very damaging to international peace and security").

⁷¹⁸ As noted by SLOAN, the Appeals Chamber ignores the absence of any established procedure for states to lodge a complaint for violation of sovereignty with the tribunal itself or with another body. See *ibid.*, p. 332.

⁷¹⁹ ICTY, *Decision on Interlocutory Appeal Concerning Legality of Arrest, Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 24.

⁷²⁰ *Ibid.*, par. 27, 33. Concurring, see J. SLOAN, *Prosecutor v. Dragan Nikolić: Decision on Defence Motion on Illegal Capture*, in «Leiden Journal of International Law», Vol. 16, 2003, p. 552 ("in the view of the Appeals Chamber, in the circumstances, nothing turned on whether or not the conduct of the kidnappers was attributable to SFOR").

remedy for a violation of state sovereignty.⁷²¹ In addition, the remedy of rendering the person to the state would imply that the FRY would be under the immediate obligation to arrest Nikolić and to return him to the ICTY.⁷²²

As to *Nikolić's* argument that the human rights of the accused and due process of law had been violated by the abduction (ii), the Trial Chamber stated that the concept of due process of law is broader than ensuring the fair trial of the accused and includes questions as to the comportment of the parties in the proceedings and the question how the accused had been brought before the tribunal.⁷²³ In that regard, the Prosecutor should come before the Trial Chamber 'with clean hands'.⁷²⁴ Hence, the Trial Chamber rightly adopted a conception of the right to a fair trial as being equally relevant to the pre-trial stage. The Trial Chamber concurred with the Appeals Chamber in *Barayagwiza* that the abuse of process doctrine may be applied if proceeding with the case would contravene the Court's sense of justice. The application of the abuse of process doctrine as a remedy in case of unlawful arrest or detention will be discussed in a subsequent section.⁷²⁵ For now, it suffices to note that the Trial Chamber held that the application presupposes that the rights of the accused have been "egregiously violated."⁷²⁶ In cases where the accused has been very seriously mistreated, or even subjected to inhuman, cruel or degrading treatment or torture, prior to his or her surrender to the tribunal, this may be an obstacle to the exercising of jurisdiction.⁷²⁷ Furthermore, it follows the Trial Chamber's reasoning that it is irrelevant what entity or entities is responsible for the egregious conduct.⁷²⁸

⁷²¹ Consider *e.g.* A. SMEULERS, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2002-2003, Vol. XI, 2007, p. 108 (referring to the German *Schutznorm*).

⁷²² Nevertheless, whether the FRY would live up to that obligation is a distinct matter.

⁷²³ ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 111.

⁷²⁴ *Ibid.*, par. 111.

⁷²⁵ See *infra*, Chapter 7, VII.

⁷²⁶ *Ibid.*, par. 111.

⁷²⁷ *Ibid.*, par. 114. ÜLGEN speaks in this regard of the 'legal impediment standard'. See Ö. ÜLGEN, The ICTY and Irregular Rendition of Suspects, in «The Law and Practice of International Courts and Tribunals», Vol. 3, 2003, p. 463.

⁷²⁸ ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 114 ("even without [...] involvement [of persons acting for SFOR or the Prosecution] this Chamber finds it extremely difficult to justify the exercise of jurisdiction over a person if that person was brought into the jurisdiction of the Tribunal after having been seriously mistreated"). A different opinion is held by LAMB, who argued that "none of the national authorities previously cited suggest that a court should decline to exercise jurisdiction over a defendant, in circumstances where the authorities of the forum State have acted with propriety, merely because the authorities of another State or individual may have acted irregularly. Consequently, where the ICTY or its agents were themselves

These findings by the Trial Chamber were confirmed by the Appeals Chamber.⁷²⁹ Nevertheless, the Appeals Chamber underlined the exceptional character of this remedy and held that “[a]part from such exceptional cases [...] the remedy of setting aside jurisdiction will, in the Appeals Chamber’s view, usually be disproportionate.”⁷³⁰ However, the Appeals Chamber did not clarify what remedies would be appropriate for lesser violations.⁷³¹ Furthermore the Appeals Chamber did not offer any indication how ‘egregious’ violations of human rights violations can be distinguished from non-egregious violations and rather emphasised that such assessment cannot be made *in abstracto*, but rather required a consideration of all relevant circumstances.⁷³² Similar to the Trial Chamber, where the Appeals Chamber first referred to ‘egregious violations of the rights of the accused’, it subsequently only considered that the treatment of the accused was not egregious in nature, apparently leaving out serious violations other than instances of serious mistreatment.⁷³³

Whereas the Trial Chamber acknowledged that it follows from human rights jurisprudence that the person should be released if he had been forcibly abducted, it held that the

neither involved nor complicit in any irregularities which may have occurred in the course of effecting an arrest, these irregularities would not suffice to vitiate the ICTY’s jurisdiction, at least where the jurisdiction was otherwise well-founded.” Different from the Trial Chamber, LAMB links this argument to the fact that the underlying purpose of the inherent jurisdiction of any judicial body to prevent an abuse of process is to impose a form of discipline and control over the law enforcement officials of the forum state, an object which would not be promoted by preventing a trial where the prior unlawful conduct was committed by a third state or by private individuals. S. LAMB, *The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia*, in «The British Yearbook of International Law», Vol. 70, 2000, p. 237. Nevertheless, this power also serves other purposes, in particular the protection of the integrity of the proceedings, which should not be overlooked.

⁷²⁹ ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 29 – 30.

⁷³⁰ *Ibid.*, par. 30.

⁷³¹ A. CARCANO, the ICTY Appeals Chamber’s *Nikolić* Decision on Legality of Arrest: Can an International Criminal Court Assert Jurisdiction over Illegally Seized Offenders?, in «Italian Yearbook of International Law», Vol. 13, 2003, p. 88 (arguing that “in order to avoid the impression that it condones [lesser violations], [the International Tribunal] should also have ways to remedy non-egregious human rights violations”). Consider also A. SMEULERS, Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2002-2003*, Vol. XI, 2007, p. 111.

⁷³² ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 30. Consider Ö. ÜLGEN, *The ICTY and Irregular Rendition of Suspects*, in «The Law and Practice of International Courts and Tribunals», Vol. 3, 2003, p. 463 (the author notes that “the case law so far has failed to identify what constitutes ‘serious and egregious violations’ which would undermine the Tribunal’s integrity”); J. SLOAN, *Breaching International Law to Ensure its Enforcement: the Reliance by the ICTY on Illegal Capture*, in T. McCORMACK and McDONALD (eds.), *Yearbook of International Humanitarian Law*, Vol. 6, 2003, T.M.C. Asser Press, The Hague, 2006, p. 338 (noting that the tests proposed by the Appeals Chamber are of little value for the future where the Appeals Chamber did not engage in a thorough discussion on how severe violations of state sovereignty and human rights must be before the proposed remedy would be appropriate).

⁷³³ ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 31. Compare with the first *Barayagwiza* Appeals Chamber decision. See, *infra*, Chapter 7, VII.

jurisprudence deals with the specific situation in which a state is held responsible for the violation of the right to liberty it was bound to respect. In addition, in all cases, the state was itself implicated in the forced abduction.⁷³⁴ This led the Trial Chamber to reject the allegations that the human rights of the accused person have been violated and that proceeding with the case would violate the fundamental principle of due process of law.⁷³⁵ This conclusion seems to imply that when the abduction is carried out by private individuals, there is no violation of the right to liberty where “[i]nfringements which cannot be attributed to [s]tate authorities should be considered ordinary criminal offences and not human rights violations.”⁷³⁶

While the Trial Chamber did not explicitly choose to adhere to the *male captus male detentus* doctrine, the mere fact that the Trial Chamber was willing to look into the manner in which the accused was brought before it may be regarded as proof that the Trial Chamber adheres to this view.⁷³⁷ Far from the ‘wholesale’ adoption of the *male captus male detentus* maxim, the Trial Chamber limited its application to serious violations of the rights of the accused and did not state that every serious violation should automatically lead to release.⁷³⁸ Overall, it may be argued that both the Trial Chamber and the Appeals Chamber did not give sufficient attention to remedies other than the setting aside of jurisdiction (such as a reduction of the sentence in cases of conviction or financial compensation in cases of release). Indeed, when the accused requested release ‘or such relief as the Trial Chamber considers appropriate’, it would have

⁷³⁴ ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 113. CURRIE holds that this argument “appeared to equate to a finding that there [had] been no human rights violations in the strict sense.” See R.J. CURRIE, *Abducted Fugitives before the International Criminal Court: Problems and Prospects*, in «Criminal Law Forum», Vol. 18, 2007, p. 367.

⁷³⁵ ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 115.

⁷³⁶ A. SMEULERS, Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2002-2003*, Vol. XI, 2007, p. 110 (the author adds that the authors of these crimes should be prosecuted (it should be noted that the alleged abductors of Nikolić were in fact prosecuted and convicted) and Nikolić should have the right to demand financial compensation from his abductors). Consider also C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 462 (“This can probably only be explained by the fact that the Trial Chamber must be of the opinion that private individuals cannot violate human rights”).

⁷³⁷ J. SLOAN, *Prosecutor v. Dragan Nikolić: Decision on Defence Motion on Illegal Capture*, in «Leiden Journal of International Law», Vol. 16, 2003, p. 548.

⁷³⁸ C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 464.

been proper to also consider other possible remedies.⁷³⁹ Furthermore, it should be noted that the tribunal proved willing to look into irregularities in the arrest, irrespective of the attribution of these irregularities to the tribunal.⁷⁴⁰ However, the tribunal failed to shed light in the exact circumstances of *Nikolić*' arrest.⁷⁴¹

The risks involved in the holdings of both the Trial Chamber and Appeals Chamber in the *Nikolić* case may be illustrated through the *Tolimir* case. In this case, Tolimir alleged that he had been abducted from his apartment in Serbia by an organised group of men and transported across the border of the Republika Srpska. The Prosecutor denied these allegations and argued that, even if there had been a violation of the sovereignty of Serbia, the consequence would have been that Tolimir be returned to Serbia, which would be under an obligation to re-arrest the accused.⁷⁴²

The Trial chamber followed the approach of the Appeals Chamber in the *Nikolić* decision and successively discussed (1) the circumstances under which the violation of state sovereignty requires jurisdiction to be set aside and (2) the circumstances under which the violation of human rights require jurisdiction to be set aside. On the first point, the Trial chamber unsurprisingly concluded that given the crimes the accused is charged with, even if a violation of state sovereignty would have occurred ('assuming, without deciding'), this would not suffice to set aside jurisdiction.⁷⁴³ As far as the second point is concerned, the Trial Chamber accepted the allegations of the accused concerning his initial abduction "[f]or the purpose of

⁷³⁹ *Ibid.*, p. 466 (arguing that such limited consideration turned the question of remedies in an "all or nothing" formula, which leaves no room for differentiation and which will ensure that the suspect will rarely come off best").

⁷⁴⁰ Compare S. LAMB, *The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia*, in «The British Yearbook of International Law», Vol. 70, 2000, p. 210 (the author holds that collusion of the Prosecution or the tribunal should necessarily be shown in order to establish the responsibility of the ICTY).

⁷⁴¹ Consider J. SLOAN, *Breaching International Law to Ensure its Enforcement: the Balance by the ICTY on Illegal Capture*, in T. McCORMACK and McDONALD (eds.), *Yearbook of International Humanitarian Law*, Vol. 6, 2003, T.M.C. Asser Press, The Hague, 2006, p. 342 ("It would seem right that observers of the ICTY would look to this, the ICTY's most authoritative Chamber, for a well-reasoned decision: one which was comprehensive in its scope, addressed difficult issues head on and provided a workable precedent for future cases. Moreover, the defendant himself was entitled to a decision that would explain why his motions were unsuccessful, as well as providing him with an understanding of what really occurred on the night of his capture and who was behind it. Unfortunately, the Appeals Chamber did not feel compelled to provide such a decision").

⁷⁴² ICTY, *Decision on Preliminary Motions on the Indictment Pursuant to Rule 72 of the Rules, Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, T. Ch. II, 14 December 2007, par. 13. A similar argumentation was put forward by the Trial Chamber in *Nikolić*.

⁷⁴³ *Ibid.*, par. 19; ICTY, *Decision on Submissions of the Accused Concerning the Legality of Arrest, Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, T. Ch. II, 18 December 2008, par. 14.

the present analysis only.”⁷⁴⁴ The Trial Chamber held that the only irregular aspect of the arrest was the alleged removal (abduction) of Tolimir from his apartment in Serbia. The Chamber added that this abduction “is not so egregious as to merit declining jurisdiction over this Accused in relation to the grave crimes against him.”⁷⁴⁵ Furthermore, there was no evidence on the participation of the NATO or the Prosecution in the alleged abduction.⁷⁴⁶ However, the argumentation seems to betray that even where the Prosecution or the NATO had been involved, there would not necessarily be a human rights violation of so serious a nature as to warrant that jurisdiction be declined. Whereas the Defence subsequently filed a new submission,⁷⁴⁷ in which it referred to ‘new circumstances’ (a reference in the book written by former Chief Prosecutor Carla del Ponte and a quote by the Serbian Minister of Interior on television),⁷⁴⁸ the Trial Chamber considered that where the first Trial Chamber decision assumed the Defence allegations to be true, there were no new circumstances justifying a revisitation of the decision.⁷⁴⁹ Again, the analysis of the Trial Chamber only duly considered the most severe remedy, which is the setting aside of jurisdiction. Where the Trial Chamber considered - ‘assuming, not deciding’ – the Defence allegations to be true, it considered that there was no reason to set aside jurisdiction. Subsequently, the Trial Chamber did not see any reason to further consider the circumstances of the arrest and to grant less severe remedies.⁷⁵⁰

⁷⁴⁴ ICTY, Decision on Preliminary Motions on the Indictment Pursuant to Rule 72 of the Rules, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, T. Ch. II, 14 December 2007, par. 25.

⁷⁴⁵ *Ibid.*, par. 25; ICTY, Decision on Submissions of the Accused Concerning the Legality of Arrest, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, T. Ch. II, 18 December 2008, par. 14.

⁷⁴⁶ ICTY, Decision on Preliminary Motions on the Indictment Pursuant to Rule 72 of the Rules, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, T. Ch. II, 14 December 2007, par. 26.

⁷⁴⁷ The Defence requested to establish that Tolimir was arrested in Serbia and denied the right to have a competent court decide about his transfer. Whereas the Trial Chamber determined that it did not have the power to examine the circumstances of his arrest “for the purpose of providing some form of declaration”, the Trial Chamber considered the motion insofar as the circumstances of the arrest would impact on the jurisdiction of the ICTY to adjudicate his case. As far as other remedies are concerned, the Chamber reasoned that “the accused may have remedies to pursue in national courts in relation to an alleged illegal arrest.” See ICTY, Decision on Submissions of the Accused Concerning the Legality of Arrest, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, T. Ch. II, 18 December 2008, par. 12.

⁷⁴⁸ *Ibid.*, par. 12.

⁷⁴⁹ *Ibid.*, par. 17. Where the Defence subsequently appealed the decision, the Appeals Chamber refused to consider the matter where the Defence should have requested certification to appeal. See ICTY, Decision on Zdravko Tolimir’s Appeal against the Decision on Submissions of the Accused Concerning Legality of Arrest, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-AR72.2, A. Ch., 12 March 2009.

⁷⁵⁰ Such is surprising in view of the Defence appeal against the 18 December 2008 decision where it proposed that a declaration that the circumstances of his arrest violated his rights as an accused could in itself be an appropriate remedy. See the argumentation in ICTY, Decision on Zdravko Tolimir’s Appeal against the Decision on Submissions of the Accused Concerning Legality of Arrest, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-AR72.2, A. Ch., 12 March 2009, par. 7. See C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, pp. 499 – 500, 503.

Overall, the case law of the ICTY depicts that uncertainty remains as to the situations in which proceedings will be halted and jurisdiction set aside. For example, it remains unclear in which instances the involvement of the tribunal in irregularities in the arrest leads the tribunal to relinquish jurisdiction.⁷⁵¹ In any case, given, as was clarified in *Nikolić*, that the Prosecutor should come to the tribunal with clean hands and given the necessity of relying on states and other actors in the effectuation of arrest warrants, the consideration of the level of attribution of the violation to the tribunal in the exercising of the tribunal's discretion to set aside jurisdiction seems entirely justified.⁷⁵²

VII. FORMS OF SUBSTANTIVE REDRESS

From the consideration of the relevant jurisprudence, it emerges that both the *ad hoc* tribunals and the ICC provide for different remedies in case of unlawful or arbitrary arrest or detention. Whereas international human rights law requires granting an effective remedy in cases of breaches of the rights of the accused, NAYMARK discerns two 'systemic obstacles' to granting these remedies which are peculiar to international criminal proceedings.⁷⁵³ First, since the *Barayagwiza* saga, no one will seriously challenge the important political considerations that come into play in granting remedies to persons suspected of the crimes within the subject matter jurisdiction of the international criminal tribunals.⁷⁵⁴ Secondly, it emerges from the case law, regarding at least some of the remedies included, that the seriousness of the allegations against the suspect or the charges against the accused are an

⁷⁵¹ For an argumentation that the jurisprudence should be interpreted as implying that the Prosecutor should come to the court with clean hands and that therefore, jurisdiction should be set aside where employees of the tribunal intentionally committed serious irregularities, see C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, pp. 480, 645 and 648, fn. 122. The author elsewhere acknowledges that this implies that the threshold would be lower than the corresponding threshold in the inter-state context, where it requires (i) an abduction together with serious violations of mistreatment or (ii) followed by a protest by the injured state and a request to return the person (*ibid.*, p. 650).

⁷⁵² G. SLUITER, *International Criminal Proceedings and the Protection of Human Rights*, in «New England Law Review», Vol. 37, 2002 – 2003, p. 946 (arguing that a one crucial factor in determining whether a violation should lead to the termination of the proceedings is “[t]he degree of attribution of the violation to the Tribunal, in particular the Prosecutor (significant involvement in the violation by the Prosecutor could damage the integrity of the proceedings to such an extent that the trial cannot be continued)”).

⁷⁵³ D. NAYMARK, *Violations of Rights of the Accused at International Criminal Tribunals: The Problem of Remedy*, in «Journal of International Law and International Relations», Vol. 4, 2008, p. 2.

⁷⁵⁴ *Ibid.*, p. 3; S.B. STARR, *Rethinking “Effective Remedies”: Remedial Deterrence in International Courts*, in «New York University Law Review», Vol. 83, 2008, pp. 717 - 718 (stating that releasing of the accused for violations of his or her rights “contravenes the Tribunals’ transitional justice objectives and is potentially politically disastrous”).

important factor which ought to be taken into the equation.⁷⁵⁵ In turn, borrowing from United States legal scholarship, STARR (speaking solely on the remedy of release or retrial) refers in this regard to “remedial deterrence”.⁷⁵⁶ International criminal tribunals face particularly potent remedial deterrence pressures in ordering *ex post* remedies, including factors such as the costs, the length, and the political prominence of trials which make it prohibitively costly for the tribunals to order the standard remedies for serious and prejudicial criminal procedure violations. In addition, ordering release “would undermine its goal of ending impunity for atrocities and moreover would be so politically explosive as to endanger the Tribunal’s continued viability.”⁷⁵⁷ As a result, international criminal tribunals have avoided the granting of remedies.⁷⁵⁸ The author identifies three ways in which tribunals have avoided doing so.⁷⁵⁹ They either: (1) redefine the right that is violated, narrowing it down, (2) erect procedural hurdles to avoid addressing the violation fully or (3) require a “high burden of proof of prejudice.”⁷⁶⁰ For example, arguably, both the ICC Pre-Trial Chamber and the Appeals Chamber in *Katanga* created a procedural hurdle for it not to have to consider the merits of several allegations of pre-transfer irregularities regarding the arrest and detention.⁷⁶¹ One example provided by STARR herself is the minority view in the jurisprudence of the *ad hoc* tribunals that the tribunals lack the jurisdiction to review the pre-transfer arrest and detention proceedings.⁷⁶² STARR notes that such reasoning bears “an obvious remedial-cost-avoidance

⁷⁵⁵ D. NAYMARK, Violations of Rights of the Accused at International Criminal Tribunals: The Problem of Remedy, in «Journal of International Law and International Relations», Vol. 4, 2008, p. 3 (the author argues that whereas in some instances the Judges explicitly acknowledge that they do take the seriousness of the alleged crimes into consideration, it may well be that in other instances, such factor is taken into consideration in the absence of any explicit analysis).

⁷⁵⁶ S.B. STARR, Rethinking “Effective Remedies”: Remedial Deterrence in International Courts, in «New York University Law Review», Vol. 83, 2008, pp. 695 – 697, 710. However, it should be noted that the author focuses solely on the “standard remedies for serious and prejudicial criminal procedure violations, namely release or retrial.” Consider in this regard J.I. TURNER, Policing International Prosecutors, in «International Law and Politics», Vol. 45, 2013, pp. 211 - 212 (the author argues that under a balancing approach to the granting of remedies, courts may “less likely” engage in “remedial deterrence”). On this balancing approach, consider *infra*, Chapter 7, VII, fn. 765).

⁷⁵⁷ S.B. STARR, Rethinking “Effective Remedies”: Remedial Deterrence in International Courts, in «New York University Law Review», Vol. 83, 2008, p. 696. Moreover, the author notes that at the *ad hoc* tribunals, the number of defendants is limited and that all cases are high profile. Consequently, the tribunals cannot afford to issue high-cost remedies in one case “to preserve a better doctrinal rule for the long run” (*ibid.*, p. 731).

⁷⁵⁸ *Ibid.*, p. 710.

⁷⁵⁹ The international criminal tribunals normally do not openly admit that they avoid awarding remedies. See *ibid.*, p. 743.

⁷⁶⁰ *Ibid.*, pp. 697; 711 – 730. The author refers to the danger of possible spill-over effects to other instances of procedural violations in procedures before international criminal tribunals where the remedial costs are not that elevated but also to other courts and to the domestic level which may follow the example set by the international tribunal even where they do not face similar costs.

⁷⁶¹ See the detailed discussion of both decisions, *infra*, Chapter 7, VII.2.

⁷⁶² See the discussion thereof, *infra*, Chapter 7, VIII.

advantage for the Tribunals, where the capture of suspects often depends on the cooperation of states with poor human rights records.⁷⁶³ This form of remedial deterrence may be more appealing than remedial deterrence at the merits stage, where “it avoids distorting rights interpretations.”⁷⁶⁴

VII.1. The *ad hoc* tribunals and the Special Court

In this subsection, several types of remedies will be discussed. At the outset it should be noted that several authors have criticised the jurisprudence, since it focuses too much on the most severe remedy of setting aside jurisdiction.⁷⁶⁵ It is hard to disagree with this criticism. This implies that the international criminal tribunals should consider all possible remedies at their

⁷⁶³ S.B. STARR, Rethinking “Effective Remedies”: Remedial Deterrence in International Courts, in «New York University Law Review», Vol. 83, 2008, p. 725. Another example is the refusal by the Appeals Chamber to consider breaches of the rights of the accused not raised before the Trial Chamber. STARR argues that such waiver has been applied more stringent in some cases. She gives the example of the judgment of the Appeals Chamber in *Akayesu* where the Chamber refused to consider the merits of the defendant’s claim that his right to be promptly informed of the reason of his arrest had been violated, notwithstanding the fact that he had previously filed a motion to that extent, because the defendant had not previously argued that the Prosecution was responsible for such violation. See ICTR, Judgement, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, A. Ch., 1 June 2001, par. 375 (“The Appeals Chamber finds no evidence that the specific facts and arguments cited in this limb of the ground of appeal were, as asserted by Akayesu, raised before the Trial Chamber. The submissions made at the time did not allege any error on the part of the Prosecution such as is being raised now before the Appeals Chamber. Rather, Akayesu confined himself to a general allegation that he had not been informed of the cause for his arrest, presumably as a result *inter alia* of an error by the authorities of Zambia. No clarification was provided thereon during the hearing of 26 September 1996. As a result, the Appeals Chamber finds that in this case too Akayesu has waived his right to raise this issue on appeal”).

⁷⁶⁴ S.B. STARR, Rethinking “Effective Remedies”: Remedial Deterrence in International Courts, in «New York University Law Review», Vol. 83, 2008, pp. 741 – 742. At the same time, the author recognises that procedural avoidance also comes with a certain cost where erecting procedural hurdles to invoking a substantial right unavoidably “substantially affect[s] that right’s practical value.”

⁷⁶⁵ Consider *e.g.* D. NAYMARK, Violations of Rights of the Accused at International Criminal Tribunals: The Problem of Remedy, in «Journal of International Law and International Relations», Vol. 4, 2008, p. 16 (arguing that “a more flexible, responsible approach to remedies must be taken.” “[C]ourts must attempt to provide alternative remedies where exclusions and stays cannot be awarded despite a rights violation or where such an alternative would be more appropriate in a given situation”); G. SLUITER, Human Rights Protection in the ICC Pre-Trial Phase, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 471 (“With the focus being on the ultimate remedy, no [exercise of] jurisdiction, the core of the matter – have violations occurred? – and the need for alternative remedies, tend to be overlooked.” Besides, and criticising the Appeals Chamber decision in *Lubanga* of 3 October 2006 on this point, the author holds that any violation raised that concerns the arrest or detention of an individual should be assessed in light of Article 85 ICC Statute (this article will be discussed in this section)); J.I. TURNER, Policing International Prosecutors, in «International Law and Politics», Vol. 45, 2013, p. 181, 191, 204 – 212 (the author notes with approval how the ICC moved from an ‘absolutist’ approach to remedies (focusing only on the defendant’s rights), to a ‘balancing approach’ (focusing on the different competing interests at the remedial stage) where (i) it better serves the competing goals of international criminal justice by not only focusing on the goal of providing a fair trial and where other competing goals are more pressing at the international level, considering the gravity, scope and systematic nature of the crimes; where it (ii) better accommodates the practical difficulties in prosecuting international crimes and (iii) where it exposes the interests considered by judges in determining remedies and ensures that the interests of all parties are considered).

disposal and adopt a ‘flexible’ approach in this regard.⁷⁶⁶ If the Judge considers all possible remedies, this ensures the proportionality of the remedy awarded.⁷⁶⁷

According to the ICTR Appeals Chamber, “any violation, even if it entails only a relative degree of prejudice, requires a proportionate remedy.”⁷⁶⁸ Although the statutory framework of the *ad hoc* tribunals or the SCSL does not provide for the right to an effective remedy for violations of human rights, this right derives from international human rights instruments⁷⁶⁹

⁷⁶⁶ This is probably also the opinion of STARR where she argues in favour of “a candid interest-balancing approach to remedies for human rights violations in international courts.” She argues that such approach “would give heavy weight to the victim’s interest in receiving an effective remedy for rights violations, but courts would be permitted to choose lesser remedies (or in some cases, no remedy) in face of sufficiently compelling countervailing considerations.” See S.B. STARR, Rethinking “Effective Remedies”: Remedial Deterrence in International Courts, in «New York University Law Review», Vol. 83, 2008, p. 752. Nevertheless, the author further submits that “the interest-balancing approach would alter the [international criminal tribunals’] remedial analysis only when the rights violation has caused the defendant harm that does not impair the fairness of the trial. This category encompasses the serious violations most prevalent at the ICT’s namely, most pretrial violations, including speedy trial problems as well as unlawful arrests and initial detention” (*ibid.*, p. 761). Such reasoning should be rejected and reveals a very narrow interpretation of what is to be considered a fair trial. It is clear that the fairness of the trial may equally be affected by events that occurred pre-trial.

⁷⁶⁷ Consider *e.g.* D.J. HARRIS, M. O’BOYLE and C. WARBRICK, Law of the European Convention on Human Rights, Oxford, Oxford University Press, 2009, p. 197 (the authors argue (on Article 5 (5) ECHR) that while the ECtHR’s power of review is limited where states enjoy large discretion, such remedies may not be entirely disproportionate).

⁷⁶⁸ ICTR, Decision, *Prosecutor v. Semanza*, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 125; ICTR, Decision on Appeal against Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-A, A. Ch., 13 September 2007, par. 24; ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, T. Ch. III, 31 January 2007, par. 16; ICTR, Judgment, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, T. Ch. III, 20 September 2006, par. 218; ICTR, Decision on Édouard Karemera’s Motion Relating to his Right to be Tried Without Undue Delay, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 23 June 2009, par. 4; ICTR, Decision (Prosecutor’s Request for Review or Reconsideration), *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 31 March 2000, par. 74 (“all violations demand a remedy”); ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 255, 322 (“any violation of the accused’s rights entails the provision of an effective remedy pursuant to Article 2(3)(a) of the ICCPR”).

⁷⁶⁹ ICTR, Decision on Appeal against Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-A, A. Ch., 13 September 2007, par. 25; ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, T. Ch. III, 31 January 2007, par. 40. Consider in particular Article 2 (3) (a) ICCPR (states parties should ensure “that any person whose rights or freedoms as herein [in the Covenant] recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”); Article 8 UDHR (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law”); Article 25 (1) ACHR (affording the right “to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties”); Article 13 ECHR (“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”); Article 14 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible”). Consider in that regard the Declaration of Judge Rafael Nieto-Navia in the *Barayagwiza* case (noting that “[h]uman rights treaties provide that when a state violates fundamental human rights, it is obliged to ensure that appropriate

and arguably forms part of customary international law.⁷⁷⁰ It should be noted that Rule 5 ICTY, ICTR and SCSL RPE provides for a right to relief for the parties in the proceedings in cases of non-compliance with the Rules and regulations *if* the Trial Chamber determines that the non-compliance is proved and where it has caused material prejudice to the party. However, this provision is limited in scope and applies only to breaches of the Rules and regulations where a material prejudice to the party is proven.⁷⁷¹ The Trial Chamber in *Rwamakuba* reasoned that its power to grant an effective remedy for human rights violations “arises out of the combined effect of the Tribunal’s inherent powers and its obligation to respect generally accepted international human rights.”⁷⁷² On the latter point, the Trial Chamber rightly held that as a subsidiary organ of the UNSC, it “is bound to respect and ensure respect for generally accepted human rights norms.”⁷⁷³ On the first point, the Trial Chamber reasoned that it “has an inherent power to provide an accused or former accused with an effective remedy for violations of his or her human rights while being tried before [the] tribunal.”⁷⁷⁴ The Trial Chamber reasoned that this power “is essential for the carrying out of judicial functions [including the fair and proper administration of justice] and for complying with its obligation to respect generally accepted international human rights

domestic remedies are in place to put an end to such violations and in certain circumstances to provide for fair compensation to the injured party”). Consider also ICTR, *Prosecutor v. Barayagwiza*, Decision (Prosecutor’s Request for Review or Reconsideration), Case No. ICTR-97-19-AR72, A. Ch., 31 March 2000, Declaration of Judge Rafael Nieto-Navia, par. 28.

⁷⁷⁰ ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, T. Ch. III, 31 January 2007, par. 40. Consider also ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 209 (the Appeals Chamber relied upon the ICCPR as reflective of customary international law and on provisions of regional human rights treaties as “persuasive authority and evidence of international custom”).

⁷⁷¹ In *Rwamakuba*, the Trial Chamber determined that Rule 5 ICTR RPE did not apply, where the Trial Chamber had previously determined that the violations that occurred did not cause “a serious and irreparable prejudice” which implied that no material prejudice was proved. See ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, T. Ch. III, 31 January 2007, par. 33 – 39.

⁷⁷² *Ibid.*, par. 45.

⁷⁷³ *Ibid.*, par. 48. The Chamber added that such is in keeping with the stated purpose of the United Nations to achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all (*cf.* Article 1 (3) of the UN Charter).

⁷⁷⁴ *Ibid.*, par. 49. The Trial Chamber defined ‘inherent powers’ as those powers “a court should be recognized as having been implicitly conferred [...], which prove necessary to the exercise of [the Court’s] mandate” (*ibid.*, par. 46). The Trial Chamber based its definition, among others, on the Nuclear Tests Case (ICJ, Nuclear Test Case (Australia v. France), I.C.J. Reports 1974, Judgment of 20 December 1974, pp. 259 – 260). In doing so, the Trial Chamber deviated from the definition given to ‘inherent powers’ by the Appeals Chamber in *Blaškić* as “those functions of the International Tribunal which are judicial in nature and not expressly provided for in the Statute.” Compare: ICTY, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v. Blaškić*, Case No. IT-95-AR108 bis, A. Ch., 29 October 1997, par. 25, fn. 27.

norms.”⁷⁷⁵ In turn, the Appeals Chamber in *Rwamakuba* held that the power to offer an effective remedy derives from the general obligation which is incumbent on the Trial Chamber to ensure that the trial is fair and that the rights of the accused are fully respected.⁷⁷⁶ “The existence of fair trial guarantees in the Statute necessarily presumes their proper enforcement.”⁷⁷⁷ The Appeals Chamber, thus, holds that this is an implied power.⁷⁷⁸ Importantly, the nature and form of the effective remedy should be proportionate to the gravity of the harm that has been suffered.⁷⁷⁹

Previous jurisprudence had stated that the accused was entitled to a remedy for violations related to his or her arrest and detention, without enquiring about the authority for the tribunal to order such remedies. For example, in the case of *Semanza*, discussed previously, in which the accused had suffered a violation of his right to be promptly informed of the nature of the charges against him, the Appeals Chamber stated that the accused would be entitled to financial compensation, were he not to be found guilty by the Trial Chamber, or to a reduction of his sentence, if he were to be found guilty.⁷⁸⁰ Similarly, the Appeals Chamber in *Kajelijeli* considered the proper remedy to be awarded, without enquiring on its authority to do so. It concluded that notwithstanding various violations of the procedural rights of the accused during the initial arrest and detention in the requested state and prior to his initial appearance, dismissing the case for lack of jurisdiction would be disproportionate.⁷⁸¹ The Appeals Chamber reiterated that the correct balance must be maintained between “the fundamental rights of the accused and the essential interests of the international community in the

⁷⁷⁵ ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, T. Ch. III, 31 January 2007, par. 49.

⁷⁷⁶ ICTR, Decision on Appeal against Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-A, A. Ch., 13 September 2007, par. 26. Consider Article 20 (1) ICTY Statute and Article 19 (1) ICTR Statute. The Appeals Chamber additionally argued that the letters sent by the Presidents of the *ad hoc* tribunals to the Security Council seeking an amendment of the Statute to provide for compensation do not suggest that a financial compensation cannot be ordered but rather expressed a preference for a statutory provision. See *infra*, fn. 784.

⁷⁷⁷ ICTR, Decision on Appeal against Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-A, A. Ch., 13 September 2007, par. 26.

⁷⁷⁸ Implied powers are the powers “which, although not expressly conferred upon an organ by its constitutive document, arise by necessary implication as being essential to the performance of the organ’s duties and can be derived from the express powers of an organization or its function.” See G. SLUITER, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, Antwerp, Intersentia, 2002, p. 28.

⁷⁷⁹ ICTR, Decision on Appeal against Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-A, A. Ch., 13 September 2007, par. 27; ICTR, Decision, *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 125 (“any violation, even if it entails only a relative degree of prejudice, requires a proportionate remedy”).

⁷⁸⁰ ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 206.

⁷⁸¹ *Ibid.*, par. 206, 255.

prosecution of persons charged with serious violations of international humanitarian law.”⁷⁸² Consequently, the Appeals Chamber ordered that the accused’s sentence be reduced.⁷⁸³

§ A right to (financial) compensation?

Does the right to an effective remedy for violations of the rights of the suspect or accused equally entail a right to financial compensation? This right is not provided for under the Statute, the RPE of the *ad hoc* tribunals or the SCSL.⁷⁸⁴ Furthermore, no budgetary allocation has been made to pay such financial compensation from.⁷⁸⁵ Nevertheless, the ICTR Appeals Chamber held in *Rwamakuba* that “while there is no right to compensation for an acquittal *per se*, there is a right in international law to an effective remedy for violations of the rights of the accused, as reflected in Article 2 (3) (a) of the ICCPR.”⁷⁸⁶ In that regard, the Appeals Chamber noted that international human rights treaties expressly provide for a right to compensation for persons who have been unlawfully (or arbitrarily) arrested or detained.⁷⁸⁷ Consequently, the

⁷⁸² *Ibid.*, par. 206, citing ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 30.

⁷⁸³ ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 255 and 324.

⁷⁸⁴ Notably, the Presidents of the ICTY and the ICTR requested the Security Council to amend their respective Statutes to provide for the authority to award compensation. Consider ICTR, Letter dated 28 September 2000 from the Secretary General Addressed to the President of the Security Council, U.N. Doc. S/2000/925, 6 October 2000 (annexing a letter from President Pillay of the ICTR); ICTY, Letter dated 26 September 2000 from the Secretary General Addressed to the President of the Security Council, U.N. Doc. S/2000/904, 26 September 2000 (annexing a letter from President Jorda of the ICTY) as well as ICTY, Letter dated 18 March 2002 from the Secretary - General Addressed to the President of the Security Council, U.N. Doc. S/2002/304, 18 March 2002 (annexing a letter from President Jorda of the ICTY). However, such efforts failed. These letters dealt with the issue of financial compensation in case of wrongful prosecution or conviction as well as in the case of unlawful or arbitrary arrest and detention. Only the latter situation is dealt with here. See the discussion of these letters in: S. BERESFORD, Redressing the Wrongs of the International Criminal Justice System: Compensation for Persons Erroneously Detained, Prosecuted or Convicted by the Ad Hoc Tribunals, in «The American Journal of International Law», Vol. 96, 2002, pp. 640 – 641.

⁷⁸⁵ BERESFORD argued that “[s]uch authority is a significant power that raises legitimate budgetary considerations, as well as doubts whether the courts, as organs of the United Nations, may unilaterally create financial liability for the Organization as a whole. While their Statutes may be interpreted liberally in many respects, particularly as to provide the ad hoc Tribunals with the power to carry out their mandates, they contain no language implying that the Security Council intended to allow them to make such awards. Moreover, should they unilaterally decide to award compensation, the courts may be seen by some members of the Security Council as overstepping their authority and violating their Statutes.” See *ibid.*, p. 641.

⁷⁸⁶ ICTR, Decision on Appeal against Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-A, A. Ch., 13 September 2007, par. 25. On the right for compensation of acquitted persons before international criminal courts, consider J.D. MICHELS, Compensating Acquitted Defendants before International Criminal Courts, in «Journal of International Criminal Justice», Vol. 8, 2010, pp. 407 – 424.

⁷⁸⁷ Article 9 (5) ICCPR and Article 5 (5) ECHR. See *ibid.*, par. 25. The Appeals Chamber also referred to the Basic Principles and Guidelines on the right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Resolution 60/147, 16 December 2005. Also other human rights instruments expressly provide for the possibility to provide for compensation for human rights violations. Consider, e.g. Article 63 (1) ACHR (“If the Court finds that there

ICCPR specifically envisions compensation to be an appropriate remedy in certain circumstances, such as unlawful arrest or detention.⁷⁸⁸ The Trial Chamber in *Rwamakuba* noted that if the tribunal were not to have this power, “it would lead to the untenable conclusion that it could not give effect to the right to an effective remedy in circumstances where financial compensation formed the only effective [remedy] for a human rights violation.”⁷⁸⁹ Indeed, if no reparation would be provided to the individuals whose human rights have been violated, the obligation to provide an effective remedy is not discharged.⁷⁹⁰ Instead, the Trial Chamber “must have the inherent power to make an award of financial compensation.”⁷⁹¹ “Were the provision of financial compensation never available, then an individual’s right to an effective remedy would be unjustifiably restricted in cases where such compensation was necessary to adequately and efficaciously address the previous human rights violation.”⁷⁹² *In casu*, the Trial Chamber decided to grant *Rwamakuba* 2000 U.S. dollars “for the moral injury sustained as a result of this violation.”⁷⁹³ This holding confirms

has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that *fair compensation* be paid to the injured party” (emphasis added)). Also the jurisprudence of the regional human rights confirms that compensation has been awarded. See in detail D. SHELTON, *Remedies in International Human Rights Law* (2nd ed.), Oxford, Oxford University Press, 2005 pp. 294 - 301 (citing case law from the ACommHPR, the ECtHR and the IACtHR). Besides, the ECtHR and the IACtHR have both granted *financial* compensation for unlawful detention (*ibid.*, p. 305).

One further comment should be made regarding the different scope of Article 9 (5) ICCPR and 5 (5) ECHR. It was argued by NOWAK that whereas the right to compensation under the former provision attaches to *every* unlawful arrest and detention (whether it is unlawful because it violates Article 9 (1) – (4) ICCPR or because it violates domestic law), compensation under Article 5 (5) ECHR requires a violation of Article 5 ECHR. In that regard, consider *e.g.* the previously quoted Murray Judgment of the ECtHR. See ECtHR, *Murray v. the United Kingdom*, Application No. 14310/88, Series A, No. 300-A, Judgment of 28 October 1994, par. 82 (“As the Court has found no violation of Article 5 paras. 1 or 2 (art. 5-1, art. 5-2), no issue arises under Article 5 para. 5 (art. 5-5). There has accordingly been no violation of this latter provision in the present case”). Consider also M. NOWAK, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edition), Kehl am Rhein, Engel, 2005, p. 238. However, it should be noted that the lawfulness under Article 5 ECHR presupposes lawfulness *under domestic law*. Consequently, the difference which seems to derive from the different wording of the said provisions may, at least in some instances, be more apparent than real. For a confirming view, consider S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, p. 497.

⁷⁸⁸ ICTR, Decision on Appeal against Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-A, A. Ch., 13 September 2007, par. 25.

⁷⁸⁹ ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, T. Ch. III, 31 January 2007, par. 58.

⁷⁹⁰ Indeed, the HRC stated in its General Comment No. 31 that “[i]n addition to the explicit reparation required by articles 9, paragraph 5 and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation (General Comment No. 34: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, par. 16).

⁷⁹¹ ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, T. Ch. III, 31 January 2007, par. 62.

⁷⁹² *Ibid.*, par. 62.

⁷⁹³ ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, T. Ch. III, 31 January 2007, disposition (sub IV). Following the decision by the Appeals Chamber, the ICTR Registrar first refused to execute the remedy, stating that no budget was allocated for making such compensation. Nevertheless,

the earlier jurisprudence of the ICTR Appeals Chamber where it had stated that if the defendants were found to be not guilty, they would be entitled to financial compensation.⁷⁹⁴ Similarly, the Trial Chamber in *Karadžić* confirmed that financial compensation can be awarded when the accused would be acquitted.⁷⁹⁵ This statement presupposes that compensation will not be considered to be a proper remedy were the accused to be found guilty. Hence, such remedy can only be considered at the end of the trial.⁷⁹⁶

§ Sentence reduction

The unlawful arrest or detention of suspects or accused persons can also be remedied through the reduction of the sentence, in cases where the person is found guilty. While such practice exists at both *ad hoc* tribunals, no express authority is provided for this form of compensation under the Statute or the RPE of the *ad hoc* tribunals or the Special Court.⁷⁹⁷ As to the procedure to be followed, no separate procedure is provided for and this remedy is in practice offered at the end of the proceedings. It was held by the Trial Chamber in *Karadžić* that a request for the reduction of the sentence before the end of the trial proceedings would be premature, since it should be done on the assumption that the accused will be found guilty.⁷⁹⁸

the payment was eventually made (consider <http://www.hirondellenews.com/ict-rwanda/363-trials-ended/rwamakuba-andre/21559-en-en-270208-ict-rwamakuba-ict-compensates-genocide-acquitted-person-for-legal-discrepancy1061010610>, last visited 14 February 2014).

⁷⁹⁴ Consider *e.g.* ICTR, *Prosecutor v. Barayagwiza*, Decision (Prosecutor's Request for Review or Reconsideration), Case No. ICTR-97-19-AR72, A. Ch., 31 March 2000, par. 75; ICTR, Decision, *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, A. Ch., 31 May 2000, p. 24 (disposition, sub VII). In the *Barayagwiza* case, the sentence of life imprisonment was reduced to 35 years. Consider ICTR, Judgment, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, T. Ch. I, 3 December 2003, par. 1107 ("The Chamber considers that a term of years, being by its nature a reduced sentence from that of life imprisonment, is the only way in which it can implement the Appeals Chamber decision. Taking into account the violation of his rights, the Chamber sentences Barayagwiza in respect of all the counts on which he has been convicted to 35 years' imprisonment"). Where Semanza was convicted to 25 years imprisonment, his sentence was reduced with six months, see ICTR, Judgment and Sentence, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, T. Ch., 15 May 2003, par. 580, 590.

⁷⁹⁵ ICTY, Decision on Accused's Motion for Remedy for Violation of Rights in Connection with Arrest, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, T. Ch., 31 August 2009, par. 5.

⁷⁹⁶ *Ibid.*, par. 5 (the Trial Chamber held that it "would be premature [...] to award compensation to the Accused at this point in time, as it would have to make this decision on the assumption that he will be acquitted").

⁷⁹⁷ In addition to the *Semanza* and the *Barayagwiza* cases, referred to above (fn. 794), a reduction of the sentence was also awarded in the *Kajelijeli* case, where the sentence of life and fifteen years imprisonment was converted into a single sentence of 45 years of imprisonment. See ICTR, Judgment, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 320 – 324. At the ICTY, the Trial Chamber confirmed the possibility to reduce the sentence imposed as a remedy in ICTY, Decision on Accused's Motion for Remedy for Violation of Rights in Connection with Arrest, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, T. Ch., 31 August 2009, par. 5.

⁷⁹⁸ *Ibid.*, par. 5. *In casu*, the Defence had requested a finding that the rights of the accused had been violated and for an "appropriate remedy at the conclusion of these proceedings", which could either be a financial compensation if the accused would be acquitted or a reduction of the sentence in case of conviction (*ibid.*, par.

Moreover, this would imply that this sentence reduction is decided upon before the accused is given the opportunity to present arguments that are relevant to the sentence.⁷⁹⁹

§ *Declaratory relief*

A simple declaration that the rights of the suspect or accused have been violated in the course of the arrest or during the subsequent detention may also be a proper remedy.⁸⁰⁰ In fact, it has been argued that this constitutes “the most commonly awarded remedy in international law.”⁸⁰¹

§ *Setting aside jurisdiction*

When irregularities in the course of the effectuation of the arrest have been addressed, it was already indicated that the ICTY has embraced the abuse of process doctrine. Both *ad hoc* tribunals adopted the view that violations of the rights of the suspect or of the accused in relation to the arrest and detention may lead to the non-exercising of jurisdiction in exceptional cases. This power normally follows from the inherent powers of the tribunal.⁸⁰² The concept was first adopted by the ICTR Appeals Chamber in *Barayagwiza* and later by the ICTY in the *Nikolić* case.

Under international criminal procedural law, the abuse of process doctrine implies that proceedings which were initiated lawfully be terminated following the use of improper or illegal procedures in pursuing an otherwise lawful process.⁸⁰³ The doctrine is *discretionary* in

1). The defendant asserted that irregularities occurred during his arrest in Serbia, where he was allegedly kept incommunicado for four days, without being promptly brought before a judicial officer, without being informed of the reasons of his arrest and in violation of the domestic and the ICTY’s legal framework as well as international human rights law (*ibid.*, par. 2).

⁷⁹⁹ *Ibid.*, par. 5.

⁸⁰⁰ ICTR, Decision on Appeal against Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-A, A. Ch., 13 September 2007, par. 27 (“the effective remedy accorded by a Chamber will almost always take the form of equitable or declaratory relief”).

⁸⁰¹ J.I. TURNER, Policing International Prosecutors, in «International Law and Politics», Vol. 45, 2013, p. 228.

⁸⁰² This is the case as far as the *ad hoc* tribunals are concerned. The Special Court codified such practice “to enhance and further protect the rights of the accused” in Rule 72 (B) (v) SCSL RPE. See SCSL, Written Reasons for the Trial Chamber’s Oral Decision on the Defence Motion on Abuse of Process due to the Infringement of Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts, *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-PT, T. Ch., 31 March 2004, par. 18.

⁸⁰³ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 74.

nature and allows the court to decline to exercise jurisdiction where exercising that jurisdiction in light of serious or egregious violations of the accused's rights would prove detrimental to the court's integrity. Thus, while the Chamber may exercise its discretion to decline to exercise jurisdiction, "it should only do so 'where to exercise that jurisdiction would prove detrimental to the Court's integrity'."⁸⁰⁴ The discretionary character of this tool notwithstanding, the discretion is arguably very limited in cases in which serious violations of the rights of the accused have occurred.⁸⁰⁵ Characteristic of the interpretation given to the abuse of process doctrine at the international echelon, as underscored by the Appeals Chamber in *Barayagwiza*, is the irrelevancy of the entity or entities which were responsible for the violation of the rights of the suspect or the accused.⁸⁰⁶ In this regard, the application of the abuse of process doctrine differs from the application of its counterpart in the inter-state context.⁸⁰⁷ While it seems logical to accept that the abuse of process doctrine applies equally

⁸⁰⁴ *Ibid.*, par. 74; ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 206; ICTR, Decision on Édouard Karemera's Motion Relating to his Right to be Tried Without Undue Delay, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 23 June 2009, par. 6; ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 29; ICTY, Decision on Preliminary Motions, *Prosecutor v. Milošević*, Case No. IT-99-37-PT, T. Ch., 8 November 2001, par. 38.

⁸⁰⁵ Concurring, see C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 636, fn. 86 (noting that "one can imagine that if the judges were to determine that to exercise jurisdiction under certain conditions would prove detrimental to the court's integrity, that there is one option left, namely to refuse jurisdiction"). Consider ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 30 ("certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined"); ICTY, Decision on Preliminary Motions, *Prosecutor v. Milošević*, Case No. IT-99-37-PT, T. Ch., 8 November 2001, par. 48 ("the international community will exercise its discretion to refuse to try the accused if there has been an egregious breach of the rights of the accused").

⁸⁰⁶ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 73. The Appeals Chamber referred to the case of *R. v. Horseferry Road Magistrates' Court ex parte Bennett*, [1994] 1 AC 42, 95 I.L.R. 380 (House of Lords, 1993), where it was argued that "[a] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case" (emphasis added). Also the Trial Chamber in the *Nikolić* case confirmed that it is irrelevant which entity or entities are responsible for the violations. See ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 114 (the Trial Chamber added that this would certainly be the case where the Prosecution itself or states or international forces executing the arrest at the behest of the tribunal are involved in the serious mistreatment). Also the Appeals Chamber confirmed in *Karadžić* that the abuse of process doctrine applies irrespective of the entity which carried out the misconduct and does not allow for a dual standard, based on whether the entity responsible was a third party or not. See ICTY, Decision on Karadžić's Appeal of Trial Chamber's Decision on alleged Holbrooke Agreement, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.4, A. Ch., 12 October 2009, par. 47. Consider also ECCC, Decision on Request for Release, *KAING Guek Eav "Duch"*, Case No. 001/18-07-2007/ECCC/TC, T. Ch., 15 June 2009, par. 33.

⁸⁰⁷ PAULUSSEN notes that in the relevant national jurisprudence, it is relevant whether the authorities were involved in the violations. See C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 529, pp. 636 – 637. Nevertheless (as the author subsequently considers), it is to be reminded that these national cases cannot neatly be translated to the

in case states and/or international forces, which effectuate an arrest at the behest of the tribunal, are responsible for the serious violations that occurred, it may be more difficult to accept that jurisdiction should be set aside because of serious violations that have been committed by an entity unrelated to the tribunal.⁸⁰⁸ This seemed to have been the underlying thought where the Trial Chamber in *Karadžić* reasoned that “it could only be in exceptional circumstances that actions of a third party that is completely unconnected to the Tribunal or the proceedings could ever lead to those proceedings being stayed.”⁸⁰⁹ It will be explained that this holding should not be understood as implying that the tribunal may not exercise its discretion to stay the proceedings and not exercise jurisdiction where a third party unrelated to the Court is responsible for the violation(s).⁸¹⁰

The application of the abuse of process doctrine results in the halting of proceedings. In that regard, the *ad hoc* tribunals distinguish between a permanent stay of proceedings and a stay of

international realm, where states and international forces assist the tribunal and are in effect the ‘enforcement arm’ of the tribunal. It may even be argued that such stance is preferable in the international arena where the international criminal tribunals necessarily have to rely on national states or international forces to effectuate arrests (*ibid.*, pp. 637 – 638: “the broad version is *especially* interesting for the tribunals because they do not have their own police force” (emphasis in original)). For a similar view, consider A. SRIDHAR, Note: The International Criminal Tribunal for the Former Yugoslavia’s Response to the Problem of Transnational Abduction, in «Stanford Journal of International Law», Vol. 42, 2006, p. 355.

⁸⁰⁸ International forces and states act as a sort ‘enforcement arm’ of the *ad hoc* tribunals where they execute an arrest warrant. In that regard, Judge Robinson noted that SFOR exercises a function analogous to that of a police force in a domestic context. Where SFOR exercises “a quasi police function”, “it virtually operates as an enforcement arm of the Tribunal.” See ICTY, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, *Prosecutor v. Simić*, Case No. IT-95-9, T. Ch., 18 October 2000, Separate Opinion of Judge Robinson, par. 6. Judge Robinson further noted that there exists a “strong functional, although not organic, relationship between SFOR and the Tribunal, through one of its organs, the Office of the Prosecutor.” Notably, in the *Todorović* case, SFOR argued that it was to be considered a third state, and not to be likened to the enforcement arm of the forum state. See ICTY, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, *Prosecutor v. Simić*, Case No. IT-95-9, T. Ch., 18 October 2000, par. 19 (“SFOR points out that, in the current case, it is the Office of the Prosecutor, not SFOR, that stands analogous to the agents of a prosecuting State”). Similarly, the OTP argued that national case law does not suggest that the tribunal should decline jurisdiction over the defendant where the authorities of another state have acted irregularly. The Prosecutor added that whereas the ICTY lacks an enforcement arm and has to rely on state cooperation in the arrest and surrender of persons, “[t]he conduct of States and multi-State entities such as NATO and SFOR, cannot be imputed to the Prosecutor, when the Prosecutor was not involved in that conduct.” “They are not agencies of the Tribunal and should not be treated as if they were.” See ICTY, Prosecutor’s Response to the “Notice of Motion for Evidentiary Hearing on Arrest, Detention and Removal of Defendant Stevan Todorović and for Extension of Time to Dismiss Indictment” Filed by Stevan Todorović on 10 February 1999, *Prosecutor v. Simić et al.*, Case No. IT-95-9-PT, T. Ch. III, 11 February 1999, par. 37 – 40. However, one can but agree with SLOAN that “[t]hey have after all, been charged with effecting arrests on behalf of the Tribunal.” See J. SLOAN, *Prosecutor v. Todorović: Illegal capture as an Obstacle to the Exercise of International Criminal Jurisdiction*, in «Leiden Journal of International Law», Vol. 16, 2003, pp. 85 – 113; S. LAMB, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in «The British Yearbook of International Law», Vol. 70, 2000, p. 104.

⁸⁰⁹ ICTY, Decision on the Accused’s Holbrooke Agreement Motion, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, T. Ch., 8 July 2009, par. 85.

⁸¹⁰ See *infra*, Chapter 7, VII.1., fn. 833 - 843 and accompanying text.

proceedings of a non-permanent nature. The latter form is temporary in nature and should prevent further breaches of the rights of the accused. A stay of proceedings of a non-permanent nature has been imposed on many occasions, at the *ad hoc* tribunals, including the obstructive behaviour of states, issues related to the legal representation of the accused or awaiting the resolution of issues regarding the allocation of resources for defence preparations.⁸¹¹ Because violations relating to arrest and detention concern breaches that have occurred previously, these violations cannot be remedied by the imposition of a non-permanent stay of proceedings.⁸¹² The proceedings should be halted permanently.⁸¹³ Where the suspect or the accused seeks the permanent stay of proceedings, a motion should be brought under Rule 73 ICTY and ICTR RPE. Such motion is not a preliminary motion challenging jurisdiction pursuant to Rule 72 (A) (i) and (D) ICTY and ICTR RPE.⁸¹⁴

As to the applicable threshold, the Appeals Chamber in *Barayagwiza* determined that the abuse of process doctrine can be relied upon in two distinct scenarios, to know (1) where delay has made a fair trial for the accused impossible, and (2) where in the circumstances of a particular case, proceeding with the trial would contravene the court's sense of justice, due to impropriety or misconduct.⁸¹⁵ The second prong refers to situations "where to exercise that

⁸¹¹ As summarized by the Appeals Chamber in *Lubanga*. See ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled "Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008", *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-1486 (OA 13), A. Ch., 21 October 2008, par. 82. See further ICTY, Judgment, *Prosecutor v. Tadić*, Case No. IT-94-1, A. Ch., 15 July 1999, par. 55; ICTY, Decision on Second Motion by Brđanin and Talić, *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, T. Ch., 16 May 2001, par. 5 (the Pre-Trial Judge argued that if a "Trial Chamber is satisfied that the absence of such resources will result in a miscarriage of justice, it has the inherent power and the obligation to stay the proceedings until the necessary resources are provided, in order to prevent the abuse of process involved in such a trial"); ICTY, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, *Prosecutor v. Blagojević*, Case No. IT-02-60-AR73.4, A. Ch., 7 November 2003, par. 7 ("the only option open to a Trial Chamber, where the registrar has refused the assignment of new counsel, and an accused appeals to it, is to stay the trial until the President has reviewed the decision of the Registrar"); ICTR, Decision on Ngeze's Motion for a Stay of Proceedings, *Prosecutor v. Nahimana et al.*, Pre-Appeal Judge, 4 August 2004, p. 2 (staying the proceedings until a new lead counsel has been assigned to represent him).

⁸¹² K. DE MEESTER, K. PITCHER, R. RASTAN and G. SLUITER, Investigation, Coercive Measures, Arrest and Surrender, in H. FRIMAN, S. LINTON, G. SLUITER, S. VASILIEV and S. ZAPALLÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, p. 356.

⁸¹³ Such would not prevent subsequent proceedings in another jurisdiction.

⁸¹⁴ Notably, the Special Court explicitly provides for the bringing of preliminary motions based on the abuse of process doctrine. See Rule 72 (B) (v) SCSL RPE as amended during the 2nd plenary session in March 2003. See SCSL, Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process due to the Infringement of Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts, *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-PT, T. Ch., 31 March 2004, par. 18.

⁸¹⁵ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 77. In a similar vein, consider ICTY, Decision on Karadžić's Appeal of Trial Chamber's Decision on alleged

jurisdiction in light of serious and egregious *violations of the accused's rights* would prove detrimental to the court's integrity."⁸¹⁶ As discussed previously, in the *Nikolić* case, the Trial Chamber further clarified this test and held that it presupposes that the rights of the accused have been "egregiously violated."⁸¹⁷ If the accused has been very seriously mistreated, or even subjected to inhuman, cruel or degrading treatment or torture, prior to his or her surrender to the tribunal this may be an obstacle to the exercising of jurisdiction, irrespective of the entity or entities responsible for this conduct.⁸¹⁸ In turn, the Appeals Chamber underlined the exceptional character of such remedy and held that "[a]part from such exceptional cases [...] the remedy of setting aside jurisdiction will, in the Appeals Chamber's view, usually be disproportionate."⁸¹⁹ It was noted previously that while the *Nikolić* case focused primarily on serious mistreatment, the first *Barayagwiza* Appeals Chamber decision, as well as other jurisprudence, prove that the test can also be applied to instances of serious procedural violations (arguably also including abductions in which the Prosecution is involved)⁸²⁰, the absence of serious mistreatment notwithstanding.⁸²¹

Holbrooke Agreement, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.4, A. Ch., 12 October 2009, par. 45. The Appeals Chamber later referred to these two distinct scenarios as the two prongs of the test. See *ibid.*, par. 51.

⁸¹⁶ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 74, as further clarified in ICTY, Decision on Karadžić's Appeal of Trial Chamber's Decision on alleged Holbrooke Agreement, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.4, A. Ch., 12 October 2009, par. 45 and 51.

⁸¹⁷ See *supra*, Chapter 7, VI. ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 111. Consider also ICTY, "Reasons for Decision on the Defence Motion for Stay of Proceedings for Abuse of Process," *Prosecutor v. Florence Hartman*, Case No. IT-02-54-R77.5, Specially Appointed Chamber, 3 February 2009, par. 4.

⁸¹⁸ ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 114.

⁸¹⁹ ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 30.

⁸²⁰ Whereas in the *Dokmanović* case the Trial Chamber focused on the distinction between luring and abduction, it did not clearly determine whether jurisdiction may be refused in case of an abduction in which the Prosecutor is involved. Also other cases, such as *Nikolić*, failed to resolve these uncertainties. Consider PAULUSSEN, who noted that the application of the abuse of process doctrine in cases of abductions, absent serious mistreatment, is not entirely clear and argues that the tribunal should have the power to refuse jurisdiction in case of an abduction in which the Prosecution was involved. See C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, pp. 460 – 461, 529, 639 – 642 (and accompanying footnotes). The author notes that in such scenario, it is not the minimal harm caused to the accused or the harm inflicted on the sovereignty of a State which justifies setting aside jurisdiction but rather the "integrity and credibility of the Tribunal as an institution based on (international) law which would be harmed if the trial continued." Such conduct would undermine the mission of the tribunal and set an example that would be followed by national states. Consider also J. SLOAN, *Breaching International Law to Ensure its Enforcement: the Reliance by the ICTY on Illegal Capture*, in T. McCORMACK and McDONALD (eds.), *Yearbook of International Humanitarian Law*, Vol. 6, 2003, T.M.C. Asser Press, The Hague, 2006, pp. 342 – 343 (commenting on the *Nikolić* case, the author argues that if a thorough examination of the facts would have shown foreknowledge of the Prosecution of SFOR's plans of carrying out an illegal capture operation, the tribunal should have provided a remedy reflecting the tribunal's disapproval of such act, a remedy that may well have taken the form of ordering the release).

In *Barayagwiza*, the Appeals Chamber had to decide on the proper remedy to be awarded for the violations of the rights of Barayagwiza, including the 11 month gap he spent in illegal detention before being transferred, the 96 day lapse between his transfer and the initial appearance, and the fact that he was never heard on the *writ of habeas corpus* he filed. The Appeals Chamber held that the prosecutorial conduct was “egregious” and concluded “that the only remedy available for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him.”⁸²² Consequently, proceeding with the case “would cause irreparable damage to the integrity of the judicial process” and release “is the only effective remedy for the cumulative breaches of the accused’s rights.”⁸²³ The Appeals Chamber expressed the hope that this remedy may deter future violations. Moreover, it avoids that the Appeals Chamber places its imprimatur on these violations.⁸²⁴ The tribunal thus seemed willing to accept responsibility for these violations even if the accused were not in the constructive custody of the tribunal.⁸²⁵

Moreover, the Appeals chamber argued that the stay of proceedings should be ordered with prejudice to the Prosecutor.⁸²⁶ The Appeals Chamber based this decision on a controversial reading of Rule 40*bis* (H) (holding that ‘shall’ implies (effective interpretation) that release is imperative and should not allow the Prosecutor to file a new indictment and re-arrest the suspect).⁸²⁷ Otherwise, the release would remedy the illegal detention. Consequently, if the Prosecutor would decide to re-arrest the accused, he would not be entitled to credit for that

⁸²¹ Other decisions confirm that the doctrine may equally apply in other situations. Consider *e.g.* ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 206 (referring to ‘serious mistreatment’ as an example of a situation where the tribunal may exercise its discretion to decline to exercise jurisdiction, given that in light of serious and egregious violations of the accused’s rights, such would prove detrimental to the court’s integrity); ICTY, Decision on Karadžić’s Appeal of Trial Chamber’s Decision on alleged Holbrooke Agreement, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.4, A. Ch., 12 October 2009, par. 47 (in referring to the first Barayagwiza Appeals Chamber decision, the Appeals Chamber noted with approval that the Trial Chamber considered “whether the Appellant suffered a serious mistreatment or if there was any other egregious violation of his rights”); ICTR, Decision on Defence Motion for Stay of Proceedings, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-PT, T Ch. III, 3 June 2005, p. 38; ICTR, Decision on Édouard Karemera’s Motion Relating to his Right to be Tried Without Undue Delay, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 23 June 2009, par. 6.

⁸²² ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 106. The Appeals Chamber argued that this remedy was in line with Rule 40 *bis* (H) ICTR RPE, which requires that the suspect is released if not charged within 90 days after arrest and with Rule 40 (D), which requires release if the suspect is not charged within 20 days upon transfer to the tribunal.

⁸²³ *Ibid.*, par. 108.

⁸²⁴ *Ibid.*, par. 108, 112.

⁸²⁵ *Ibid.*, par. 100. See *infra*, Chapter 7, VIII.

⁸²⁶ *Ibid.*, par. 108.

⁸²⁷ See the discussion of Article 40*bis* (H) ICTY RPE, *supra*, Chapter 7, III.1.3.

period of detention (pursuant to Rule 101 (D) ICTR RPE (present Rule 101 (C))).⁸²⁸ On 31 March 2000, the Appeals Chamber reviewed its decision, in light of new facts discovered, and concluded that the remedy of a stay of proceedings with prejudice to the Prosecutor was disproportionate.⁸²⁹

In addition to the cases which were discussed previously in the section on irregularities in the execution of the arrest, the ICTY had additional chances to further illuminate the scope of the remedy of setting jurisdiction aside. In the *Karadžić* case, the defendant's motion on the Holbrooke agreement included a subsidiary claim to stay the proceedings because of abuse of process where the Trial Chamber would (1) confirm the existence of this agreement and (2) conclude to the non-binding character thereof *vis-à-vis* the tribunal.⁸³⁰ Both the Trial Chamber and the Appeals Chamber subsequently had a chance to discuss the application of the abuse of process doctrine. The Trial Chamber (not entirely accurately) repeated the understanding of the doctrine by the ICTR Appeals Chamber in *Barayagwiza* and by the Trial Chamber and Appeals Chamber respectively in *Nikolić*.⁸³¹ More worrisome is the determination by the Trial Chamber that not every situation of "serious mistreatment" should lead to a stay of proceedings where such situation involves a third party not connected to the tribunal.⁸³² According to the Trial Chamber, such mistreatment "is unlikely to be a barrier to a fair trial which can be secured in various other ways, for example, by excluding evidence obtained by torture at the hands of the third party."⁸³³ While stating that the Trial Chamber in *Nikolić* *did* acknowledge (as an *obiter dictum*) that in such cases jurisdiction should not be exercised irrespective of the entity responsible for it, the Trial Chamber in *Karadžić* noted that this decision was based on (1) a hypothetical situation of torture or cruel or degrading treatment of

⁸²⁸ *Ibid.*, par. 110. The Appeals Chamber added that "[t]he net result of this would be to place the Appellant in a worse position than he would have been in had he not raised this appeal. This would effectively result in the Appellant being punished for exercising his right to bring this appeal."

⁸²⁹ ICTR, Decision (Prosecutor's Request for Review or Reconsideration), Case No. ICTR-97-19-AR72, A. Ch., 31 March 2000, par. 71 (according to the Appeals Chamber, "[t]he new facts diminish the role played by the failings of the Prosecutor as well as the intensity of the violation of the rights of the appellant. The cumulative effect of these elements thus being reduced, the reparation now appears disproportionate in relation to the events").

⁸³⁰ ICTY, Decision on the Accused's Holbrooke Agreement Motion, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, T. Ch., 8 July 2009, par. 11.

⁸³¹ *Ibid.*, par 82. For example, in its discussion of the *Nikolić* Appeals Chamber decision, the Trial Chamber only considered the possibility of setting aside jurisdiction as a consequence of human rights violations, where the Appeals Chamber's analysis also included the possibility of setting aside jurisdiction as a consequence of violation of state sovereignty.

⁸³² ICTY, Decision on the Accused's Holbrooke Agreement Motion, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, T. Ch., 8 July 2009, par. 85.

⁸³³ *Ibid.*, par. 85.

the accused just prior to his or her transfer to the tribunal (which was not the case *in casu*) and (2) events of delays in the pre-trial detention of the accused caused by the Prosecutor, which compounded delays by the custodial state prior to surrender (*Barayagwiza*).⁸³⁴ Furthermore, the Trial Chamber reasoned that it was explicitly held in *Barayagwiza* that the state authorities were acting on behalf of the ICTR Prosecutor. The Trial Chamber concluded that “it could only be in exceptional circumstances that actions of a third party that is completely unconnected to the Tribunal or the proceedings could ever lead to those proceedings being stayed.”⁸³⁵ This limited interpretation of the abuse of process doctrine is obviously at odds with the definition provided by the Appeals Chamber. According to the definition given in *Barayagwiza*, which was discussed previously, this doctrine not only implies that jurisdiction may be declined where a fair trial is not longer possible but also “where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court’s sense of justice, due to pre-trial impropriety or misconduct.”⁸³⁶ Although the abuse of process only allows that jurisdiction be set aside in exceptional cases, this depends on the specific circumstances of each case. Therefore, any distinction between third parties and other parties should be prevented.⁸³⁷ However, it has been pointed out by some authors, based on national case law that the abuse of process doctrine would not normally apply in the absence of the participation or involvement of the authorities of the forum state. Therefore, the nature of the actor is an important element in the consideration of the abuse of process doctrine and whether the actions are serious enough to warrant that the exercise of jurisdiction be declined.⁸³⁸

Karadžić argued on appeal that the Trial Chamber erred in applying a ‘dual abuse of process standard’, depending on whether the misconduct has been committed by the tribunal or by

⁸³⁴ *Ibid.*, par. 85.

⁸³⁵ *Ibid.*, par. 85.

⁸³⁶ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 77.

⁸³⁷ However, consider PAULUSSEN: “one can concur with the Chamber that some third parties can be seen as being more connected with the Tribunal than others.” “For example, irregularities caused by a State which is acting on the Prosecutor’s behalf may be deemed more serious than the same irregularities committed by third parties which have a less strong connection with the Tribunal, such as private individuals acting on their own.” See C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 508.

⁸³⁸ *Ibid.*, p. 509 – 510; J. SLOAN, *Breaching International Law to Ensure its Enforcement: the Reliance by the ICTY on Illegal Capture*, in T. McCORMACK and McDONALD (eds.), *Yearbook of International Humanitarian Law*, Vol. 6, 2003, The Hague, T.M.C. Asser Press, 2006, p. 342.

third parties not related to the tribunal.⁸³⁹ The Appeals Chamber considered that the Appeals Chamber in *Nikolić* and *Barayagwiza* did not introduce a dual standard depending on the entity that committed the conduct.⁸⁴⁰ The Appeals Chamber stated, nonetheless, that *in casu*, “the Trial Chamber adopted the common standard established by the Appeals Chamber in the *Barayagwiza* Decision and in the *Nikolić* Appeal Decision, and not a higher one by considering whether the Appellant suffered a serious mistreatment or whether there was any other egregious violation of his rights.” “The jurisprudence of the Appeals Chamber does not allow the abuse of process doctrine to deploy a standard lower than this, irrespective of the author of the alleged misconduct.”⁸⁴¹

Overall, the remedy of terminating the proceedings is “an extraordinary remedy applicable in exceptional circumstances.”⁸⁴² According to the Appeals Chamber, “[i]t is generally recognised that courts have supervisory powers that may be utilised in the interests of justice, regardless of a specific violation.”⁸⁴³ These powers are closely related to the abuse of process doctrine, and the exercising thereof, and serve three distinct purposes: (1) to provide a remedy for the violation of the accused’s rights, (2) to deter future misconduct, and (3) to enhance the integrity of the judicial process.⁸⁴⁴

Importantly, the Judges factor in the severity of the crimes the person has been charged with, in their assessment. Indeed, the application of the abuse of process necessitates that the Judges “undertake a balancing exercise in order to assess all the factors of relevance in the case at hand in order to conclude whether, in the light of these factors, the Chamber can exercise

⁸³⁹ ICTY, Decision on Karadžić’s Appeal of Trial Chamber’s Decision on alleged Holbrooke Agreement, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.4, A. Ch., 12 October 2009, par. 43.

⁸⁴⁰ *Ibid.*, par. 47. Therefore, the argumentation put forward by RYNGAERT that the more liberal abuse of process standard put forward by the Appeals Chamber in *Barayagwiza* only applies to “specific situations”, “where the tribunal itself carries responsibility” or cases of concerted action (and is limited to instances of torture or serious mistreatment absent such involvement) should be rejected where it, likewise, introduces a dual standard. Consider C. RYNGAERT, The Doctrine of Abuse of Process: A Comment on the Cambodia Tribunal’s Decisions in the Case against Duch (2007), in «Leiden Journal of International Law», Vol. 21, 2008, p. 735.

⁸⁴¹ ICTY, Decision on Karadžić’s Appeal of Trial Chamber’s Decision on alleged Holbrooke Agreement, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.4, A. Ch., 12 October 2009, par. 47.

⁸⁴² ICTR, Decision on Édouard Karemera’s Motion Relating to his Right to be Tried Without Undue Delay, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 23 June 2009, par. 6.

⁸⁴³ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 76. Note that the tribunal exclusively refers to U.S. Supreme Court cases.

⁸⁴⁴ *Ibid.*, par. 76, referring to *U.S. v. Hasting*, 461 U.S. 499 (1983), p. 505.

jurisdiction over the Accused.”⁸⁴⁵ It was stated by the Appeals chamber in *Nikolić* that this exercise requires that “a correct balance between “the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law” be maintained.”⁸⁴⁶ Factoring in the ‘gravity of the crime’ seems acceptable since the application of the abuse of process doctrine is discretionary in nature.⁸⁴⁷ However, in relying on this factor, some tension with the presumption of innocence is unavoidable.

It is to be recalled that the Trial Chamber in *Nikolić* concluded that SFOR, and by extension the Prosecution, did not adopt the illegal conduct where the accused had been abducted by unknown individuals.⁸⁴⁸ From there, it has been argued that in considering the seriousness of the violation, the international criminal tribunals should equally have regard for the level of attribution of these violations to the tribunals.⁸⁴⁹ This would be justified by the fact that the tribunals have to rely necessarily upon cooperation by states and international organisations, since they lack their own enforcement arm. This is not at odds with the holding, discussed previously, that the doctrine applies, irrespective of the entity or entities responsible. It only indicates that this degree of attribution is a factor which is taken into consideration by the tribunals in their assessment of whether or not the seriousness of the violations justifies exercising its discretion not to exercise jurisdiction.⁸⁵⁰

⁸⁴⁵ ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 112.

⁸⁴⁶ ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 30; ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 206; ICTY, Decision on Karadžić’s Appeal of Trial Chamber’s Decision on alleged Holbrooke Agreement, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.4, A. Ch., 12 October 2009, par. 46, 49; ICTY, Decision on the Accused’s Holbrooke Agreement Motion, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, T. Ch., 8 July 2009, par. 82; ICTR, Decision on Édouard Karemera’s Motion Relating to his Right to be Tried Without Undue Delay, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 23 June 2009, par. 11. Compare ECCC, Order of Provisional Detention, *KAING Guek Eav “Duch”*, Case No. 002/14-08-2006, OCIJ, 31 July 2007, par. 21.

⁸⁴⁷ C. RYNGAERT, The Doctrine of Abuse of Process: A Comment on the Cambodia Tribunal’s Decisions in the Case against Duch (2007), in «Leiden Journal of International Law», Vol. 21, 2008, pp. 731 – 732 (“Because the tribunal’s decision is a discretionary one, it may rely on any criteria it deems fit in order to assess whether application of the abuse of process doctrine to the case would be warranted. There is no reason why gravity of the crime could not be one of them”).

⁸⁴⁸ ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 67. See *supra*, Chapter 7, VI.

⁸⁴⁹ G. SLUITER, International Criminal Proceedings and the Protection of Human Rights, in «New England Law Review», Vol. 37, 2002 – 2003, p. 946; C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, pp. 529, 651.

⁸⁵⁰ These two factors, to know the seriousness of the offences charged and the level of attribution to the court organs are, according to PAULUSSEN, the two factors which explain the absence of any *male captus male detentus* case in the practice of the international criminal tribunals. See C. PAULUSSEN, Male Captus Bene

VII.2. The International Criminal Court

§ (Financial) compensation pursuant to Article 85

Taking over verbatim the wording of Article 9 (5) ICCPR, Article 85 (1) ICC Statute recognises that “[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”⁸⁵¹ An almost identical formulation is to be found in the ECHR.⁸⁵² In line with Article 9 (5), the mere fact of having been deprived of liberty and later acquitted does not entitle the person to compensation. The general formulation of the right to compensation implies that this right likewise applies to the arrest proceedings in the custodial state in which the suspect is arrested and detained at the behest of the ICC.⁸⁵³ The Court held in the *Muthaura and Kenyatta* case that this requires that the domestic arrest (1) breaches a provision of the Court’s statutory framework and (2) is attributable to the Court.⁸⁵⁴ In turn, the latter implies that an arrest or detention occurred “in respect of an investigation” within the meaning of Article 55 (1) (d), which as a minimum requires a *concerted action* between the Court and the national authorities.⁸⁵⁵ The procedure applicable to obtaining compensation is

Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, pp. 650 – 652. Compare with the reasoning of STARR, who suggests that release and dismissal of the charges with prejudice will never be a valuable option, with the possible exception of extraordinary cases, because “the charges are simply too serious.” See S.B. STARR, Rethinking “Effective Remedies”: Remedial Deterrence in International Courts, in «New York University Law Review», Vol. 83, 2008, p. 747. In addition, the author refers to the example of *Barayagwiza* case to argue that a release would be a slap in the face of the victims and a blow to the transnational justice objectives. The argument of the author is dubious, where she refers to the example of a “convicted major war criminal or *génocidaire*” which would be freed without possibility of a retrial. Such reasoning does not answer the question whether release with prejudice is also an untenable solution where the person is not yet convicted. Besides, it fails to mention that such release does not prevent the prosecution by another forum.

⁸⁵¹ In the 1994 draft of the International Law Commission, a right to compensation for unlawful arrest or detention was placed in the provision on pre-trial detention or release. When the WGPM finalized the provision, a footnote was added, reminding of the need to follow the exact wording of the ICCPR in all language versions. This footnote was accepted by the Committee of the Whole as an ‘understanding’. See W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, pp. 965 – 966. Zappalà argues that the right for compensation for unlawful arrest and detention or unjust conviction under Article 85 ICC Statute should be expanded to all violations of fundamental rights and be expanded to the *ad hoc* tribunals. See S. ZAPPALÀ, *Human rights in International Criminal Proceedings*, Oxford, Oxford University Press, 2003, pp. 255 – 258.

⁸⁵² Article 5 (5) ECHR provides that “[e]veryone who has been the victim of arrest or detention in contravention of the provisions of [article 5 ECHR] shall have an enforceable right to compensation.”

⁸⁵³ See C. STAKER, Article 85, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1501 – 1502.

⁸⁵⁴ ICC, Decision on the Application for a Ruling on the Legality of the Arrest of Mr. Dennis Ole Intumbi, *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-534, T. Ch. V, 19 December 2012, par. 6.

⁸⁵⁵ *Ibid.*, par. 7.

outlined in Chapter 10 of the ICC RPE.⁸⁵⁶ It follows from Rule 173 (1) ICC RPE that the victim of the unlawful arrest or detention seeking compensation should submit a request to the ICC President who will designate three Judges to deal with the request.⁸⁵⁷ He or she should do so within six months after being informed about the unlawfulness of the arrest or detention.⁸⁵⁸ The Prosecutor has the opportunity to respond to a request for compensation.⁸⁵⁹

An important obstacle to the granting of a remedy, in keeping with what was argued earlier regarding the *ad hoc* tribunals is the absence of any funds or budgetary allocation to pay these compensations from. In the absence of any clarity in that respect in the Statute or the RPE, the compensation should arguably be paid from the ICC's general budget.

The wording of Article 85 is broad enough to include not only forms of financial compensation but also other forms of compensation, including the reduction of sentences and forms of declaratory relief. However, while at the *ad hoc* tribunals the possibility of reducing the sentence is considered at the moment the sentence is handed down, the separate compensation proceedings under Rule 173 ICC RPE imply that this reduction is to be determined separately. Since this request is to be made within six months following notification of the decision on the unlawfulness of the arrest or detention, a decision may precede the final judgment. The approach of the *ad hoc* tribunals should be preferred insofar that it allows the Trial Chamber to take the sentence into consideration in its assessment of the sentence reduction. Indeed, a reduction of the sentence only gets meaning in light of the length of the sentence eventually imposed. For example, a sentence reduction of six months may become meaningless when a life sentence is later imposed.

⁸⁵⁶ Rules 173 – 175 ICC RPE.

⁸⁵⁷ These Judges may not have participated in an earlier judgment of the Court regarding the person submitting the request. The underlying idea is “to ensure that the Chamber dealing with the request for compensation would be completely impartial.” See G. BITTI, Compensation to an Arrested or Convicted Person, in R.S. LEE (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, Transnational Publishers, 2001, p. 627. ZAPPALÀ notes that it may have been preferable to leave this competence with the Chamber that decided on the unlawfulness of the arrest or detention. “It does not seem appropriate to burden the system of the Court with several micro-proceedings unrelated to the main object of its jurisdiction.” S. ZAPPALÀ, *Human rights in International Criminal Proceedings*, Oxford, Oxford University Press, 2003, p. 75; S. ZAPPALÀ, Compensation to an Arrested or Convicted Person, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, pp. 1584 - 1585.

⁸⁵⁸ Rule 173 (2) ICC RPE.

⁸⁵⁹ Rule 174 (1) ICC RPE.

Also relevant is Article 85 (3) ICC Statute, which Article provides for a right to compensation in cases of “a grave and manifest miscarriage of justice” limited to exceptional circumstances. A request should be made within six months following the decision notifying the miscarriage of justice.⁸⁶⁰ The Judges should take the consequences of the miscarriage of justice on the personal, family, social, and professional situation of the person into consideration in determining the amount to be awarded.⁸⁶¹ Importantly, far from being an enforceable right on the part of the victim of the miscarriage of justice, this remedy is discretionary in nature. This remedy surpasses obligations under international human rights law.⁸⁶²

When *Rwamakuba* upon his acquittal requested a remedy for the alleged grave and manifest injustice suffered (and referred to Article 85 (3) ICC Statute which allows the Judges to exercise their discretion to award compensation to an acquitted person in cases of a grave and manifest miscarriage of justice), ICTR Trial Chamber III noted that no such power was provided for under the statutory framework or the practice of the *ad hoc* tribunals and that Article 85 (3) ICC Statute cannot be regarded as customary international law.⁸⁶³ Surprisingly, some years later, Trial Chamber III, constituted differently, concluded that Article 85 (3) ICC Statute “reflects the current state of customary law with respect to compensation for acquitted persons”, but underlined its permissive, rather than compulsory character.⁸⁶⁴

⁸⁶⁰ Rule 173 (2) (c) ICC RPE.

⁸⁶¹ Rule 175 ICC RPE.

⁸⁶² H. BRADY and M. JENNINGS, Appeal and Revision, in S. LEE (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, The Hague, Kluwer Law International, 1999, p. 304; C. STAKER, Article 85, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, München, Verlag C.H. Beck, 2008, p. 1501 (noting that such remedy is not unheard of in some national criminal justice systems); S. ZAPPALÀ, Compensation to an Arrested or Convicted Person, in A. CASSESE, P. GAETA and J. R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1577.

⁸⁶³ ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, T. Ch. III, 31 January 2007, par. 23 – 31. Nevertheless, the Trial Chamber underlined, *obiter*, that “it is notable that under the Tribunal’s Rules, an accused person who is sentenced is given credit for the period during which he was detained in custody pending his or her surrender to the Tribunal or pending trial or appeal. By analogy, the Chamber is of the view that the possibility to grant some sort of remedy or compensation would be fair in circumstances where, although the arrest or detention of an acquitted person was not unlawful, he or she was subject to a lengthy detention during the pre-trial and trial stages. Such an award of compensation would be exercised in light of the circumstances of the case, and could not be applied, for instance, where an accused had intentionally caused his or her arrest or where it would be unreasonable to award compensation. In the Chamber’s view, such a provision would offer an acceptable balance between the fundamental right to freedom of any individual and the realities of the investigation and prosecution of international crimes” (*ibid.*, par. 30).

⁸⁶⁴ See ICTR, Decision on Protais Zigiranyirazo’s Motion for Damages, *Prosecutor v. Zigiranyirazo*, T. Ch. III, 18 June 2012, par. 19.

§ *Setting aside jurisdiction*

The practice of the ICC reveals that in exceptional cases, the Court may relinquish jurisdiction. The consequence thereof will be that proceedings will be halted. In line with the *ad hoc* tribunals, the case law of the ICC distinguishes between a conditional and a permanent stay of proceedings. According to the ICC Appeals Chamber, “a conditional stay of the proceedings may be the appropriate remedy where a fair trial cannot be held at the time that the stay is imposed, but where the unfairness to the accused person is of such a nature that a fair trial might become possible at a later stage because of a change in the situation that led to the stay.”⁸⁶⁵ By its nature, a conditional stay of proceedings is “potentially only temporary.”⁸⁶⁶ The Appeals Chamber emphasised that a conditional stay is not irreversible and for a stay to be lifted it is required that “a trial that is fair in all respects becomes possible as a result of changed circumstances.”⁸⁶⁷ The Trial Chamber should review its decision to impose a stay from time to time and when a trial has become “permanently and incurably impossible”, a permanent stay should be imposed.⁸⁶⁸ Since the violations addressed in the present chapter relate to the unlawful arrest and detention of the suspect or accused, it is clear

⁸⁶⁵ ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled “Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-1486 (OA 13), A. Ch., 21 October 2008, par. 4, 80. Consider also ICC, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-1401, T. Ch. I, 13 June 2008, par. 94 (clarifying that the stay of proceedings imposed can be lifted); ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur*, Case No. ICC-02/05-03/09-410, T. Ch. IV, 26 October 2012, par. 84.

⁸⁶⁶ ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled “Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008”, *Situation in the DRC, Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06-1486 (OA 13), A. Ch., 21 October 2008, par. 75.

⁸⁶⁷ *Ibid.*, par. 80 – 81. The Appeals Chamber reminded, in referring to the Preamble to the ICC Statute, that “there would be no reason not to put on trial a person who is accused of genocide, crimes against humanity or war crimes - deeds which must not go unpunished and for which there should be no impunity. At the same time, the Appeals Chamber reiterated that such lift should not occasion unfairness to the accused for other reasons, in particular in case a trial would become unfair because the right of the accused to be tried without undue delay (Article 67 (1) (c) ICC Statute) has been violated. It follows from this right that a conditional stay cannot be imposed indefinitely. See also ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur*, Case No. ICC-02/05-03/09-410, T. Ch. IV, 26 October 2012, par. 85.

⁸⁶⁸ ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled “Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008”, *Situation in the DRC, Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06-1486 (OA 13), A. Ch., 21 October 2008, par. 81.

that these violations do not involve circumstances that can be changed. Consequently, only the remedy of a *permanent* stay of proceedings is relevant here.

In general, the Appeals Chamber has confirmed the ‘drastic’ and ‘exceptional’ nature of the remedy of staying the proceedings. This measure may or does (depending on whether the stay of proceedings is permanent or conditional in nature) “frustrat[e] the objective of the trial of delivering justice in a particular case as well as [affect] the broader purposes expressed in the Preamble to the Rome Statute.”⁸⁶⁹

When a decision to stay the proceedings has been rendered, the Trial Chamber should immediately determine the consequences thereof for the detention of the accused. There is no need to wait for the decision on a possible appeal of the decision.⁸⁷⁰ When an arrest warrant has lawfully been issued, the validity of it remains unaltered by a stay of proceedings.⁸⁷¹ The decision to stay the proceedings has no influence on the existence of ‘reasonable grounds’. More problematic, then, is the second prong under Article 58 ICC Statute, to know that the detention is necessary for one of the grounds indicated in Article 58 (1) (b) ICC Statute. When proceedings have been stayed *sine die*, the detention cannot be necessary in order to ensure the appearance at trial, to safeguard the investigation or prosecution or for the ‘purely preventative’ reason of deterring the further commission of crimes.⁸⁷² Therefore, Trial Chamber I decided in the *Lubanga* case that Lubanga Dyilo should be released. The whole

⁸⁶⁹ See e.g. ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending further Consultations with the VWU”, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-2582, 8 October 2010, par. 55; ICC, Redacted Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending further Consultations with the VWU, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-2517, T. Ch. I, 8 July 2010, par. 55; ICC, Redacted Decision on the “Defence Application Seeking a Permanent Stay of Proceedings”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-2011, T. Ch. I, 7 March 2011, par. 165, 168; ICC, Decision on the “Defence request for a permanent stay of proceedings”, *Prosecutor v. Callixte Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-264, PTC I, 1 July 2011; ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan*, Case No. ICC-02/05-03/09-410, T. Ch. IV, 26 October 2012, par. 80.

⁸⁷⁰ ICC, Judgment on the Appeal against the Decision of Trial Chamber I Entitled “Decision on the Release of Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01-06-1487 (OA 12), A. Ch., 21 October 2008, par. 18; ICC, Transcript, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-T-314, T. Ch. I, 15 July 2010, p. 18.

⁸⁷¹ ICC, Decision on the Release of Thomas Lubanga Dyilo, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-1418, T. Ch. I, 2 July 2008, par. 28 (the Appeals Chamber argued that the stay imposed on the proceedings does not undermine the validity of the warrant since it is no more than the direct result of the present impossibility of trying the accused fairly).

⁸⁷² *Ibid.*, par. 30.

justification for his detention had been removed because of the estimation that a fair trial was no longer possible.⁸⁷³ This holding was overturned by the Appeals Chamber. The Appeals Chamber found that the Trial Chamber had erred by not distinguishing between a *permanent* or *irreversible* stay on the one hand and a *conditional* stay of proceedings on the other.⁸⁷⁴ The latter does not necessarily imply a permanent bar on the exercising of jurisdiction in respect of the person concerned. The Appeals Chamber reasoned that the Trial Chamber should have considered “whether further developments since the imposition of the conditional stay make it likely that the stay might be lifted in the not-too-distant future.”⁸⁷⁵ The Chamber erred by not considering all options, including conditional release. At the same time, the Chamber must vigilantly check the reasonableness of any continued detention.⁸⁷⁶ Where the Appeals Chamber subsequently identified different important developments which aimed at correcting the situation which led to the imposition of the stay of proceedings, it concluded that the Trial Chamber had incorrectly concluded that unconditional release was inevitable and remanded the matter to the Trial Chamber.⁸⁷⁷

Similarly, in its oral decision of 15 July 2010, Trial Chamber I decided in *Lubanga* that where the proceedings had been halted because the trial was no longer fair, the accused could not be held in preventative custody on a speculative basis, to know that the proceedings may continue at some stage in the future.⁸⁷⁸ Importantly, where this second stay of proceedings was unconditional in nature and taking into consideration the ‘wholesale uncertainty’

⁸⁷³ *Ibid.*, par. 34.

⁸⁷⁴ ICC, Judgment on the Appeal against the Decision of Trial Chamber I Entitled “Decision on the Release of Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01-06-1487 (OA 12), A. Ch., 21 October 2008, par. 36-37.

⁸⁷⁵ *Ibid.*, par. 37.

⁸⁷⁶ *Ibid.*, par. 37.

⁸⁷⁷ *Ibid.*, par. 43. Pikis dissented and argued that where the stay of proceedings brought the proceedings to an end, the person should be released, as ensuring that the person stands trial is the only cause that may legitimise pre-trial detention according to human rights law. Even where the stay could be lifted at an indefinite future time, the person should be released as the Statute does not confer a power to detain a person for any other reason than standing his or her trial. Authority to lift the stay would leave the accused answerable to charges for an indefinite time, in breach of the right to be tried without undue delay as laid down in Article 67 (1) (c) ICC Statute. Besides, a right to expeditious trial is laid down in Article 64 (2) ICC Statute. See ICC, Judgment on the Appeal against the Decision of Trial Chamber I Entitled “Decision on the Release of Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01-06-1487 (OA 12), A. Ch., 21 October 2008, Dissenting Opinion of Judge Georgios M. Pikis, par. 10 – 20.

⁸⁷⁸ ICC, Transcript, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-T-314, T. Ch. I, 15 July 2010, p. 21.

regarding the possible continuation of proceedings as well as the length of Lubanga's detention, the Trial Chamber ordered the unconditional release of the accused.⁸⁷⁹

§ *Setting aside jurisdiction for violations of the rights of the suspect or accused in the effectuation of the arrest*

In *Lubanga*, as referred to previously, the Defence filed a jurisdictional challenge (pursuant to Article 19 (2) (b) ICC statute), based on the abuse of process doctrine.⁸⁸⁰ The Defence alleged that Lubanga had been arbitrary arrested and unlawfully detained in the DRC.⁸⁸¹ The Defence argued that “Article 21 (3) [...] vests the Court with the obligation to consider whether its exercise of personal jurisdiction over Thomas Lubanga Dyilo is consistent with such general principles of human rights, or whether, given the serious violations of his human rights, it would be an abuse of process to exercise personal jurisdiction over him in such circumstances.”⁸⁸²

The Pre-Trial Chamber made a distinction in considering whether irregularities in the arrest and detention may lead to the setting aside of jurisdiction. First, (1) in relation to violations of the rights of Lubanga relating to his arrest and detention which occurred at the time when he was not yet held at the behest of the Court⁸⁸³ (prior to the sending of the cooperation request),

⁸⁷⁹ *Ibid.*, p. 22. The order could not be enforced during the five day time limit for appeal. The appeal was filed and the Appeals Chamber granted the request that the appeal be given suspensive effect. On appeal, the decision to impose an unconditional stay was reversed and consequently, also the oral decision on the unconditional release was reversed, as the unconditional stay of proceedings was the essential element in the decision to release Lubanga. See ICC, Judgment on the Appeal of Prosecutor Against the Oral Decision of Trial Chamber I of 15 July 2010 to Release Thomas Lubanga Dyilo, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2583 (OA17), A. Ch., 8 October 2010.

⁸⁸⁰ ICC, Application for Release, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04 – 01/06, PTC I, 23 May 2006, 9 – 12.

⁸⁸¹ Among others, he had allegedly not been informed of the reasons for his arrest when he was deprived of liberty, no warrant of arrest had been served on him, he had been detained for 30 months without being charged, his family had not been informed of his arrest for 33 months and he was not brought before the competent judicial authority within a reasonable time. Besides, he argued that the military judicial authorities deprived him of his liberty, which was unlawful because they did not have jurisdiction over him (*ibid.*, par. 9 – 12).

⁸⁸² *Ibid.*, par. 9.

⁸⁸³ While the main text does not refer to the ‘held at the behest of the tribunal’ criterion, such emerges from the reference in the accompanying footnote to the *Semanza* case, where the tribunal declined to take responsibility for the illegal arrest and detention of the accused where it was not carried out at the behest of the tribunal. The paragraph referred to in the *Semanza* case may not entirely justify such general conclusion. In this paragraph, the Appeals Chamber only clarified, with regard to the right to be informed promptly about the nature of the charges, that it would look into two periods where the accused was held at the behest of the tribunal. More relevant then is the reference to the earlier discussed Rwamakuba decision of 12 December 2000, where the Chamber refused to take responsibility for violations that occurred at the time the accused was not yet held at the behest of the ICTR Prosecutor. Therefore, challenges regarding that period of time should be brought before the

the Pre-Trial Chamber held that these will only be examined in the case of a *concerted action* between the Court and the national authorities.⁸⁸⁴ However, the Pre-Trial Chamber adopted the holding by the Appeals Chamber in *Nikolić* and viewed the abuse of process doctrine to be “an additional guarantee of the rights of the accused” in the absence of a concerted action between organs of the Court and the authorities of the custodial state.⁸⁸⁵ Moreover, (2) the Pre-Trial presumably takes responsibility for violations that occur at the time the person is being arrested and held at the behest of the tribunal.

The Pre-Trial Chamber narrowed the application of the abuse of process doctrine in several unfortunate ways. Among others, it emerges from the Pre-Trial Chamber’s reasoning that its present (‘to date’)⁸⁸⁶ application is limited to “instances of torture or serious mistreatment by the national authorities in the custodial state.” Moreover, this behaviour should “in some way be related to the process of arrest and transfer of the person to the relevant international criminal tribunal.”⁸⁸⁷ The Pre-Trial Chamber relied on the *Nikolić*, the *Dokmanović* and the *Kajelijeli* case. Not all references do entirely justify the findings by the Pre-Trial Chamber. Where the ICTR Appeals Chamber in *Kajelijeli* stressed the exceptional character of setting aside jurisdiction, its reference to the serious mistreatment or the subjecting to inhuman, cruel or degrading treatment or torture is clearly meant to be an example. The abuse of process doctrine is not limited to these instances.⁸⁸⁸ Similarly, the decision of the Trial Chamber in

Namibian authorities. See ICTR, Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused, *Prosecutor v. Rwamakuba et al.*, Case No. ICTR-98-44-T, T. Ch. II, 12 December 2000, par. 30.

⁸⁸⁴ ICC, Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-512, PTC I, 3 October 2006, p. 9. PAULUSSEN argues that the criterion of ‘concerted action’ is too narrow where instances where the Court adopts the conduct of third parties as its own should be included. See C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 864. It is argued that the Court should take responsibility for all violations. In the determination of the remedy, the nature of the relationship between the tribunal and the violation can be taken into consideration.

⁸⁸⁵ ICC, Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-512, PTC I, 3 October 2006, p. 10.

⁸⁸⁶ It has been argued that the definition of the abuse of process doctrine given by the Pre-Trial Chamber does not exclude its future application to other instances than serious mistreatment. However, the further analysis (which is limited to instances of serious mistreatment), contradicts such view. Consider C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 869.

⁸⁸⁷ ICC, Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-512, PTC I, 3 October 2006, p. 10.

⁸⁸⁸ ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 206 (“*For example*, in circumstances where an accused is very seriously mistreated, maybe even subjected to inhuman,

Dokmanović does not seem to support this narrow view.⁸⁸⁹ Only in *Nikolić*, the Appeals Chamber seemed to have limited the application of the abuse of process doctrine to egregious violations constituting serious mistreatment.⁸⁹⁰ Nevertheless, it was argued previously that other cases, *Barayagwiza* in particular, suggest that the material scope of the abuse of process doctrine in international criminal law ought not to be restricted to instances of serious mistreatment solely.⁸⁹¹ The Pre-Trial Chamber determined that no instances of serious mistreatment had arisen at the period of time during which he was not held by the national authorities at the behest of the Court and that there was no evidence indicating that this detention was the result of a concerted action.⁸⁹² The jurisdictional challenge was, therefore, refused. The Pre-Trial Chamber did not look into other remedies.⁸⁹³

On appeal, the Appeals Chamber equally considered the applicability of the abuse of process doctrine to proceedings before the ICC. It first considered what the defendant sought, which was that the Court would abstain from *exercising* jurisdiction. Hence, rather than a challenge to the jurisdiction of the Court, the application should be labelled a *sui generis* application, in the sense of “a procedural step not envisaged by the [procedural framework] of the Court invoking a power possessed by the Court to remedy breaches of the process in the interest of justice.”⁸⁹⁴

cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment” (emphasis added).

⁸⁸⁹ As previously discussed, the Trial Chamber in *Dokmanović* did not consider under what circumstances the tribunal may exercise jurisdiction over a defendant that had *illegally* been obtained from abroad. See *supra*, Chapter 7, VI.

⁸⁹⁰ As previously discussed, see *supra*, Chapter 7, VI.

⁸⁹¹ See *supra*, Chapter 7, VII.1.

⁸⁹² ICC, Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-512, PTC I, 3 October 2006, pp. 10 – 11.

⁸⁹³ *Ibid.*, p. 11.

⁸⁹⁴ ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 24; ICC, Public Redacted version of the “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings” of 20 November 2009 (ICC-01/04-01/07-1666-Cong-Exp), *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07, T. Ch. II, 3 December 2009, par. 44; ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I on Jurisdiction and Stay of Proceedings, *Prosecutor v. Gbagbo, Situation in Côte d’Ivoire*, Case No. ICC-02/11-01/11-321 (OA 2), A. Ch., 12 December 2012, par. 99 – 106 (“The *Lubanga OA 4 Judgment* thus clarifies that requests for a stay of proceedings based on alleged violations of the suspect’s fundamental rights are *not* jurisdictional in nature. [...] Since then, it is settled that a decision on such a request is not jurisdictional in nature, and cannot therefore be appealed under article 82 (1) (a) of the Statute”).

Unlike the decision by the Pre-Trial Chamber, the Appeals Chamber decision inquired into the legal foundation for applying this doctrine. Following a perfunctory analysis, the Appeals Chamber determined that the ICC Statute does not leave room for the application of the doctrine because the grounds upon which the Court may relinquish jurisdiction are exhaustively detailed under the Statute (Article 17 ICC Statute). In a next step, the Appeals Chamber reasoned that it is not possible to have recourse to other sources of law (in particular Article 21 (1) (b) and (c) ICC Statute).⁸⁹⁵ Moreover, the Appeals Chamber did not consider the doctrine to be an inherent power of every court of law where the doctrine “is not generally recognised as an indispensable power of a court of law, an inseparable attribute of the judicial power.”⁸⁹⁶ However, the Appeals Chamber considered the relevance of the doctrine in light of Article 21 (3) ICC Statute since this doctrine “had *ab initio* a human rights dimension in that the causes for which the power of the Court to stay or discontinue proceedings were largely associated with breaches of the rights of [...] the accused in the criminal process, such as delay, illegal or deceitful conduct on the part of the prosecution and violations of the rights of the accused in the process of bringing him/her to justice.”⁸⁹⁷ In so doing, the ICC effectively reduced the abuse of process doctrine to its human rights component. Nevertheless, the category of “breaches of the rights of the accused” is rather broad, and seems not necessarily to be limited to instances of serious mistreatment.⁸⁹⁸ The Appeals Chamber referred to Article 85 (1) ICC Statute providing a right to compensation to the victims of illegal arrest and the rights of accused and other persons under Article 55 and 67 ICC Statute. Article 21 (3) implies that “every aspect of the Statute”, including the exercise of jurisdiction by the court

⁸⁹⁵ ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 34. PAULUSSEN argues that (1) where the Court would have engaged in a more detailed analysis, it would have found that the statutory documents do leave a gap and are not exhaustive on the matter. Besides, (2) the ‘reasoning behind the abuse of process doctrine’, to know the refusal of jurisdiction in very serious *male captus* instances may qualify as a principle or a rule of international law or a general principle of law. The author criticises the narrow focus of the Appeals Chamber on the ‘abuse of process’ label. Consider C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, pp. 884 – 886. See also *ibid.*, p. 994 (“it seems far too easy to conclude that the ICC Statute is exhaustive on the matter simply because the abuse of process doctrine is not explicitly mentioned or implicitly covered”).

⁸⁹⁶ ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 35.

⁸⁹⁷ *Ibid.*, par. 36.

⁸⁹⁸ C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 977 (arguing that it could include all sorts of *male captus* situations, including abductions and instances of luring).

should be interpreted in light of internationally recognised human rights including the right to a fair trial. From there, it follows that:

“[w]here fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be contradiction in terms to put the person on trial.”⁸⁹⁹

This test was repeated in subsequent decisions.⁹⁰⁰ Consequently, while dismissing the abuse of process doctrine in the ICC’s context, the Appeals Chamber confirmed that the accused person can bring a motion challenging his or her pre-transfer arrest and detention as being unlawful with a view to seeking the stay of proceedings.⁹⁰¹ The reference to “his or her accusers” seems to exclude acts by third parties (*e.g.* private individuals). Consequently, arguably, it cannot be argued that the test applies irrespective of the entity responsible for the violation.⁹⁰² The meaningful interpretation of this reference entails that the test does not apply to third parties.

⁸⁹⁹ ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 37.

⁹⁰⁰ Consider ICC, Judgment on the Appeal of Prosecutor against the Oral Decision of Trial Chamber I of 15 July 2010 to Release Thomas Lubanga Dyilo, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2583 (OA17), A. Ch., 8 October 2010, par. 55; ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan*, Case No. ICC-02/05-03/09-410, T. Ch. IV, 26 October 2012, par. 84; ICC, Decision on the ‘Corrigendum of the Challenge to the Jurisdiction of the International Criminal Court on the Basis of Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute Filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)’, *Prosecutor v. Gbagbo, Situation in Côte d’Ivoire*, Case No. ICC-02/11-01/11-212, PTC I, 15 August 2012, par. 89.

⁹⁰¹ ICC, Judgment on the Appeal of Mr. Katanga against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-2259 (OA 10), A. Ch., 12 July 2010, par. 48. Note that occasionally, later case law still refers to the abuse of process doctrine. Consider *e.g.* ICC, Decision on the ‘Corrigendum of the Challenge to the Jurisdiction of the International Criminal Court on the Basis of Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute Filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)’, *Prosecutor v. Gbagbo, Situation in Côte d’Ivoire*, Case No. ICC-02/11-01/11-212, PTC I, 15 August 2012, par. 90.

⁹⁰² PAULUSSEN argues that it was the interpretation of the ECCC Co-Investigating Judges that the Appeals Chamber’s decision should be understood as entailing that jurisdiction should be refused *irrespective of the entity or entities responsible for serious mistreatment*. See the argumentation: C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, pp. 898 - 900; 969 – 970. However, rather, where the Co-Investigating Judges argued that “the International Criminal Court adopted the same solution [as the ICTY in *Nikolić*]”, the Co-Investigating Judges were referring to the fact that, both in the *Nikolić* and the *Lubanga* case, the setting aside of jurisdiction was limited to acts or torture or serious mistreatment. At no point the Co-Investigating Judges expressly stated that the Appeals Chamber’s decision in *Lubanga* must be interpreted as implying that jurisdiction should be refused in cases of torture or serious mistreatment, *irrespective of the entity responsible*. They simply did not address this issue. See ECCC, Order of Provisional Detention, *KAING Guek Eav “Duch”*, Case No. 002/14-08-2006, OCIJ, 31 July 2007, par. 18 - 19, 21.

This implies that the Court upholds a narrower view than the *ad hoc* tribunals as to which violations in the arrest and detention of the suspect may lead the Court not to exercise jurisdiction.⁹⁰³

Next, the Appeals Chamber reformulated its test in a more puzzling manner. It argued that

“[w]here the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed.”⁹⁰⁴

Whereas the previous formulation required that proceedings must be stayed, the second formulation, in line with the abuse of process doctrine, introduces a discretionary element (‘can’). Moreover, similar to the previous formulation, it does not reserve the setting aside of jurisdiction to instances of torture or serious mistreatment. Furthermore, the formulation narrows the fair trial yardstick to the in-court setting by referring to the impossibility to make a defence, which arguably excludes certain pre-trial violations that do not make it impossible to make his/her defence within the context of his rights.⁹⁰⁵ Nevertheless, reading the paragraph as a whole clarifies that the Appeals Chamber referred to a broader notion of violations where it consequently referred to “[u]nfairness in the treatment of the suspect or the accused [that] rupture[s] the process to an extent making it impossible to piece together the constituent elements of a fair trial.”⁹⁰⁶ That the Appeals Chamber envisaged a broader notion is also

⁹⁰³ Such interpretation would put the ICC on par with the interpretation given in inter-state cases to the abuse of process doctrine (which requires the involvement of the forum state in the violations). See C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 983.

⁹⁰⁴ ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 39.

⁹⁰⁵ A stance which is rightly criticised by C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, pp. 890 – 891; 966 – 967; 996.

⁹⁰⁶ ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-772 (OA 4), A. Ch., 14 December 2006, par. 39. Consider also *e.g.* ICC, Judgment on the Appeal of Prosecutor against the Oral Decision of Trial Chamber I of 15 July 2010 to Release Thomas Lubanga Dyilo, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2583 (OA 17), A. Ch., 8 October 2010, par. 55; ICC, Redacted Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending further Consultations with the VWU, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-2517, T. Ch. I, 8 July 2010, par. 30 (the test applied by the Trial Chamber is incorrect (that the proceedings should be halted where they constitute an abuse of process), in that the abuse of process doctrine was explicitly rejected by the Appeals Chamber. See *supra*, Chapter 7, VII.2.,

confirmed by the Appeals Chamber subsequent assessment of the Pre-Trial Chamber's decision and consideration that the Pre-Trial Chamber should have considered "whether a fair trial remained possible in the particular circumstances of the case."⁹⁰⁷ No showing of *mala fides* is required as a precondition to relinquish jurisdiction.⁹⁰⁸ The Appeals Chamber concluded that the Pre-Trial Chamber adopted a broader standard to the relinquishment of jurisdiction than the one that was warranted in law where it did not require the condition that the fair trial was no longer possible under the specific circumstances.⁹⁰⁹ In the words of the Appeals Chamber "[t]he findings of the Pre-Trial Chamber to the effect that the appellant was not subjected to any ill-treatment in the process of his arrest and conveyance before the Court sidelines the importance of the precise ambit of the test applied as a guide to the resolution of this appeal."⁹¹⁰

Moreover, the Appeals Chamber further narrowed the application of a permanent stay of proceedings to breaches that are part of "the process of bringing the appellant to justice for crimes that form the subject-matter of the proceedings before the Court."⁹¹¹

Some authors have criticised the approach taken by the Appeals Chamber, which implies that the Court does not embrace the abuse of process doctrine but nonetheless derives a power to stay proceedings from Article 21 (3) ICC Statute where a fair trial is not longer possible. In short, their arguments boil down to the problem that abductions and other forms of irregular renditions would not suffice to set jurisdiction aside. This is unconvincing. After all,

fn. 894 - 898 and accompanying text); ICC, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-1401, T. Ch. I, 13 June 2008, par. 93.

⁹⁰⁷ ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-772 (OA 4), A. Ch., 14 December 2006, par. 40.

⁹⁰⁸ ICC, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-1401, T. Ch. I, 13 June 2008, par. 90.

⁹⁰⁹ Notably, the Defence appealed the decision of the Pre-Trial Chamber, *inter alia*, on the ground that the Pre-Trial adopted "an unduly restrictive approach to the relinquishment of jurisdiction for violations of the fundamental rights of the accused" (*ibid.*, par. 40).

⁹¹⁰ *Ibid.*, par. 40. Consider C. RYNGAERT, The Doctrine of Abuse of Process: A Comment on the Cambodia Tribunal's Decisions in the Case against Duch (2007), in «Leiden Journal of International Law», Vol. 21, 2008, p. 735 (the author noted, in relation to the standard for setting aside jurisdiction, that the Appeals Chamber "left the door conspicuously open for a wider interpretation ambit of the standard").

⁹¹¹ *Ibid.*, par. 44.

abductions entail that the right to be free from arbitrary deprivation of liberty has been violated and a fair trial is not longer possible. To be fair, some situations (such as the luring situation of *Dokmanović*) violate the sovereignty rights of states but do not necessarily amount to a human rights violation.⁹¹²

Also in the *Katanga and Ngudjolo Chui* case, the Defence of *Katanga* introduced a “motion for a declaration on unlawful detention and stay of proceedings.”⁹¹³ The Defence submitted that *Katanga* had been arbitrarily arrested and detained in the DRC (the custodial state) prior to his transfer to the Court and alleged that several illegalities occurred in the implementation of the request for *Katanga*’s arrest and surrender.⁹¹⁴ In view of the violations, *Katanga* requested that his arrest and detention in the DRC be declared unlawful and that the proceedings against him be stayed.⁹¹⁵ Alternatively, the Defence requested that a financial compensation for the breaches and/or, in the event of *Katanga*’s conviction, a reduction of the penalty would be imposed.⁹¹⁶ However, the Trial Chamber concluded that the motion had been filed too late.⁹¹⁷ “[A] challenge to the lawfulness of the arrest and detention of an accused, in particular where such a challenge is accompanied by an application to stay or terminate the proceedings, must be submitted in the initial phase of the proceedings.”⁹¹⁸ The Trial Chamber emphasised that it would be in the interest of all participants, including the suspect, that issues relating to the unlawfulness of their detention be addressed as early as

⁹¹² Consider *e.g.* R.J. CURRIE, *Abducted Fugitives before the International Criminal Court: Problems and Prospects*, in «Criminal Law Forum», Vol. 18, 2007, p. 393.

⁹¹³ ICC, Public Redacted Version of the Defence Motion for a Declaration on Unlawful Detention and Stay of Proceedings (ICC-01/07-01/04-1258-Conf-Exp), *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07, T. Ch. II, 2 July 2009.

⁹¹⁴ *Ibid.*, par. 34.

⁹¹⁵ *Ibid.*, par. 2, 121 – 122, 132 – 135 and 136 – 138 respectively.

⁹¹⁶ *Ibid.*, par. 2.

⁹¹⁷ ICC, Public Redacted version of the “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings” of 20 November 2009 (ICC-01/04-01/07-1666-Cong-Exp), *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07, T. Ch. II, 3 December 2009, par. 65 – 66.

⁹¹⁸ *Ibid.*, par. 39. As an example, the Trial Chamber referred to Article 19 ICC Statute which stipulates that challenges to admissibility or jurisdiction must be made at the earliest opportunity. Nevertheless, it was previously explained that the Appeals Chamber held in *Lubanga* that a challenge to stay the proceedings is an application *sui generis*. The Trial Chamber also referred to Rule 122 (2), (3) and (4) ICC RPE, according to which compliance with the provisions of expeditiousness (prescribed by Rule 58 ICC RPE) must be provided and according to which “objections or observations concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing must be raised at the start of the hearing, failing which it will no longer be possible to do so subsequently” (*ibid.*, par. 41). The Trial Chamber equally referred to Article 64 (2) ICC Statute, according to which the Trial Chamber must ensure that the trial is fair and expeditious and conducted with full respect of the rights of the accused. Lastly, the Trial Chamber referred to the right of the co-accused, *Ngudjolo Chui*, to be tried without undue delay (Article 67 (1) (c) ICC Statute).

possible.⁹¹⁹ This approach was confirmed by the Appeals Chamber.⁹²⁰ While recognising the right of every defendant to challenge his or her pre-transfer unlawful arrest and detention, the Appeals Chamber concurred with the Trial Chamber that in principle, these challenges should be brought at the pre-trial stage. It added that this principle is not unfair towards the accused, because it allows for flexibility.⁹²¹ While the statutory framework does not expressly stipulate the time limits that apply for the filing of motions that allege the unlawful arrest and detention prior to the transfer to the to the Court, Article 64 (2) ICC statute provides the Trial Chamber with discretion to decide on the timeliness of such motions.⁹²² The Trial Chamber did not err in exercising its discretion under Article 64 (2) ICC Statute where it held that the motion was filed too late because the Defence submitted the issue seven months after the Chamber's request to submit relevant issues on which it wanted the latter to rule, and despite their many opportunities to do so.⁹²³

⁹¹⁹ *Ibid.*, par. 40.

⁹²⁰ The Appeals Chamber argued that the reasoning of the Trial Chamber was based on (1) the role of the Pre-Trial Chamber in having "primary responsibility of ensuring the protection of the rights of suspect during the investigations stage of the proceedings" and (2) on the purpose of the confirmation proceedings ensuring "efficiency and judicial economy within the procedural framework of the Court" by filtering the cases. Expediency is a "recurrent theme" in the statutory framework of the Court and a duty that applies to all parties and participants. More than just a component of the right to a fair trial, it is "an independent and important value in the Statute to ensure the proper administration of justice." See ICC, Judgment on the Appeal of Mr. Katanga against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-2259 (OA 10), A. Ch., 12 July 2010, par. 40-41, 43 and 48.

⁹²¹ See *ibid.*, par. 48 ("only in instances where the accused could not reasonably be expected to raise the matter at that stage will he or she be permitted to raise it at the trial stage"). The Appeals Chamber referred to the holding in *Nyramasuhuko*, where an ICTR Trial Chamber refused to offer a remedy where a challenge that the accused's right to be promptly informed of her rights and to promptly appear before a judge was only raised long time (almost six years) after the arrest.

⁹²² *Ibid.*, par. 1. Note the criticism of Judges Kourula and Trendafilova, who argue in their dissenting opinion that the majority erred in not entertaining the motion on its merits. Among others, the Judges hold that the majority wrongly focused on the request to stay the proceedings, whereas the Defence also made requests concerning compensation and mitigation of sentence. See ICC, Judgment on the Appeal of Mr. Katanga against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", Dissenting Opinion of Judge Erkki Kourula and Judge Ekaterina Trendafilova, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-2259 (OA 10), A. Ch., 28 July 2010, par. 8 - 10.

⁹²³ While *in casu*, the Defence raised the issue at several instances since his initial appearance, it never submitted a motion to the Pre-Trial Chamber, either claiming that the detention was unlawful or in the form of a challenge to jurisdiction. Nevertheless, the Trial Chamber considered that a previous holding by the Pre-Trial Chamber may have led the Defence to believe that it could file its motion under Article 19 of the ICC Statute, also after the start of the confirmation hearing. However, after the commencement of the trial phase, the Defence did not longer pursue the alleged unlawfulness of the Katanga's detention. Relying on the Chamber's general duty to ensure the expeditiousness of the trial under Article 64 (2) ICC Statute, the Trial Chamber held that it is incumbent on the parties to file motions in a timely fashion, in particular where these motions may have repercussions on the conduct of the proceedings and to inform the Chamber if the filing of such motion depends on receiving documents or information. Hence, the Trial Chamber concluded that the reasons put forward by the Defence could not justify the inaction, where the Defence submitted the issue up to seven months after the

It could be argued that the Appeals Chamber and Trial Chamber's decisions may well be justified in light of the long delay before the Defence submitted the motion. However, one can agree with PAULUSSEN (commenting on the Trial Chamber's decision) that the end result is unfortunate where the merits were not considered and the absence of any violations of the rights of the accused, with regard to his pre-transfer arrest and detention, cannot be guaranteed.⁹²⁴ It contrasts with the way the Pre-Trial Chamber previously conceived of its role, at the pre-trial stage of proceedings as the "ultimate guarantor of the rights of the Defence."⁹²⁵ Moreover, it was argued that the failure to address the merits of the case may also be a way through which the tribunal seeks to avoid having to address the issue of remedies, through a process of erecting procedural hurdles.⁹²⁶

Also in *Gbagbo*, the Defence asserted that Gbagbo was subjected to arbitrary arrest by the Ivorian authorities and subjected to conditions of detention amounting to inhuman treatment and torture, prior to his transfer to the Court.⁹²⁷ However, in the absence of any involvement of the Court in the detention of Gbagbo in Côte d'Ivoire following his arrest, *either before or after the notification of the request for arrest and surrender*, the Pre-Trial Chamber concluded that no violation of the fundamental rights of Gbagbo could be attributed to the Court.⁹²⁸ Therefore it refused to stay the proceedings. Hence, Pre-Trial Chamber I interpreted the test for setting aside jurisdiction as to always require *attribution* to a Court organ.⁹²⁹ It seems to follow that the phrase 'his/her accusers' not only excludes third parties unrelated to the Court but likewise excludes the national authorities who execute the request for arrest and surrender,

Chamber's request to submit relevant issues on which it wanted the latter to rule. ICC, Judgment on the Appeal of Mr. Katanga against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-2259 (OA 10), A. Ch., 12 July 2010, par. 48 - 51, 62 - 66.

⁹²⁴ C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 959 (arguing that "[the ICC Judges] should want to know what happened to the suspects they are now trying prior to their arrival in The Hague").

⁹²⁵ ICC, Decision on the Powers of the Pre-Trial Chamber to Review *proprio motu* the Pre-Trial Detention of Germain Katanga, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-330, PTC I, 18 March 2008, p. 8; ICC, Decision on the "Prosecution's Request for a Review of Potentially Privileged Material", *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-67, PTC I, 4 March 2011, p. 6. See *infra*, Chapter 8, II.3.3.

⁹²⁶ See *supra*, Chapter 7, VII.

⁹²⁷ ICC, Decision on the 'Corrigendum of the Challenge to the Jurisdiction of the International Criminal Court on the Basis of Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute Filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)', *Prosecutor v. Gbagbo, Situation in Côte d'Ivoire*, Case No. ICC-02/11-01/11-212, PTC I, 15 August 2012, par. 68.

⁹²⁸ *Ibid.*, par. 108 - 112.

⁹²⁹ *Ibid.*, par. 92, 107-112.

in the absence of further involvement of a Court organ.⁹³⁰ This interpretation denies the fact that in relation to the arrest proceedings and the detention in the custodial state, the national authorities function as the ‘enforcement arm’ of the Court. It ignores the fact that the Ivorian authorities were holding Gbagbo at the behest of the Court. Regrettably, although the Defence appealed the argumentation by the Pre-Trial Chamber in relation to its request to stay the proceedings, this appeal was dismissed, where this issue could only be appealed with leave from the Appeals Chamber.⁹³¹

VII.3. The internationalised criminal tribunals

As far as the internationalised criminal tribunals are concerned, it should be noted that the TRCP provided, in line with the ICC, for compensation where (1) a conviction was reversed on the basis of new evidence showing a miscarriage of justice (*cf.* Article 85 (2) ICC Statute) or (2) in case of an unlawful arrest or detention.⁹³² The provision should be preferred to the ICC provisions where it explicitly provided that compensation should be paid “from a source of public funds [...] allocated to the administration of justice and to be determined by the competent court.”⁹³³ Rather than providing for a separate procedure, the TRCP provided that compensation may be made as part of the final disposition or by means of a separate civil action.

Following their amendment, the STL RPE include a right for the accused person to request compensation in case of a final judgment of release or a final decision that the accused has been illegally arrested or detained ‘under the authority of the tribunal’, *if* such results from ‘a serious miscarriage of justice’.⁹³⁴ The rule thus merges Article 85 (1) and (3) ICC Statute in one provision. The formulation of the provision is regrettable where it (i) falls short of an

⁹³⁰ *Ibid.*, par. 110 (“The same holds true for the period between the notification of the request for arrest and surrender of Mr Gbagbo and his transfer to the Court. During this period, he was still detained by the Ivorian authorities and the conditions of his detention were within their competence. In particular, while organs of the Court were involved in the process of surrender of Mr Gbagbo to the Court, there is no evidence indicating any violation of Mr Gbagbo’s fundamental rights that can in any way be attributed to the Court”).

⁹³¹ ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I on Jurisdiction and Stay of Proceedings, *Prosecutor v. Gbagbo, Situation in Côte d’Ivoire*, Case No. ICC-02/11-01/11-321 (OA 2), A. Ch., 12 December 2012, par. 101 – 105.

⁹³² Section 52 TRCP.

⁹³³ Section 52.2 TRCP.

⁹³⁴ Rule 170 (D) STL RPE, as amended on 10 November 2010. See STL, Summary of the Accepted Rule Amendments and some Key Rejected Rule Amendment Proposals Pursuant to Rule 5 (I) of the Special Tribunal for Lebanon’s Rules of Procedure and Evidence (Third Plenary of Judges), November 2010, p. 75.

enforceable right but rather leaves the Chamber the discretion whether or not to grant such compensation and where (ii) it makes the awarding of compensation for unlawful deprivation of liberty dependent on an additional requirement, to know that a ‘serious miscarriage of justice’ has occurred. As such, the compensation regime falls short of guaranteeing the enforceable right of any victim of unlawful arrest or detention to compensation, as provided for under international human rights law.⁹³⁵ Furthermore, (iii) the provision refers to illegal arrest or detention ‘under the authority of the tribunal’, which provision further narrows the scope of the provision.

A request should be filed with the STL President within six months following the final judgement or decision.⁹³⁶ The request will be assigned to a panel of three Judges who will decide thereupon after having heard from the Prosecutor. They will consider the consequences the miscarriage of justice has had on the personal, family, social and professional situation of the person filing the request.⁹³⁷

While a comparable provision seems absent from the procedural framework of the Extraordinary Chambers, the ECCC embraced the abuse of process doctrine in relation to violations relating to the arrest and detention of a person.⁹³⁸ When the Co-Investigating Judges ordered the provisional detention of Duch, the Co-Investigating Judges, the Pre-Trial Chamber as well as the Trial Chamber had a chance to address this issue.⁹³⁹ The Co-Investigating Judges had to consider whether “the more than 8 year detention of the Charged Person in separate proceedings before another jurisdiction taint the present proceedings?” “Or rather, is such detention so excessive and prejudicial to the rights of the defence as to affect the very ability to bring this case within the jurisdiction of the Extraordinary Chambers [...] to no longer allow the detention of the Charged Person within the jurisdiction of the

⁹³⁵ See *supra*, Chapter 7, VII.2.

⁹³⁶ Rule 170 (D) STL RPE.

⁹³⁷ Rule 170 (E) STL RPE.

⁹³⁸ On the absence of an “abuse of procedure mechanism”, consider ECCC, Decision on Ieng Thirith’s Appeal against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of an Abuse of Process (D264/1), *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 42), PTC, 10 August 2010, par. 14, 20.

⁹³⁹ ECCC, Order of Provisional Detention, *KAING Guek Eav “Duch”*, Case No. 002/14-08-2006, OCIJ, 31 July 2007; ECCC, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias “Duch”, *KAING Guek Eav alias “Duch”*, Case No. 001/18-07-2007-ECCC-OIJ, PTC, 3 December 2007; ECCC, Decision on Request for Release, *KAING Guek Eav “Duch”*, Case No. 001/18-07-2007/ECCC/TC, T. Ch., 15 June 2009. Where these decisions also addressed the issue of the length of detention, this issue will be considered in detail, *infra*, Chapter 8, II.4.1.

Extraordinary Chambers, or even to require the Co-Investigating Judges to stay the proceedings?”⁹⁴⁰ Duch had been detained for over eight years by the Military Court in Phnom Penh without any form of trial before the Co-Investigating Judges decided to detain him provisionally.⁹⁴¹

The Co-Investigating Judges noted that whereas almost all precedents on *male captus bene detentus* are based on the initial arrest and more rarely on the conditions of their prior detention, the reasoning remains the same.⁹⁴² In relying on a partial reading of national and international case law, they argued that there “exists a strong tradition supporting the strict separation of, on the one hand, a legal procedure before one jurisdiction and, on the other hand, the prior illegal arrest and detention ordered by a different authority.”⁹⁴³ Nevertheless, the Judges argued that such tradition is limited by the discretionary abuse of process doctrine.

The Co-Investigating Judges reviewed national case law as well as the abuse of process doctrine as elaborated in the *Barayagwiza*, the *Nikolić* and the *Lubanga* case, acknowledging that under certain circumstances the actions of the organs of the tribunal or of third parties may undermine the integrity of the judicial process.⁹⁴⁴ However, the Co-Investigating Judges consequently held that they do not have the jurisdiction to consider the legality of the prior detention insofar that the Extraordinary Chambers were only established after the moment Duch had been taken into custody.⁹⁴⁵ Therefore, there could not have been a concerted action

⁹⁴⁰ ECCC, Order of Provisional Detention, *KAING Guek Eav “Duch”*, Case No. 002/14-08-2006, OCIJ, 31 July 2007, par. 3.

⁹⁴¹ *Ibid.*, par. 1.

⁹⁴² *Ibid.*, par. 5.

⁹⁴³ *Ibid.*, par. 5 – 11. In particular, several of the ICTR decisions referred to by the Co-Investigating Judges may be seen as supportive of the idea that the tribunal will take responsibility for some violations that occur prior to transfer, as far as they occur in the context of the case. See also C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, pp. 588 – 589 (“it is in any case difficult to connect these ICTR cases with the idea that there is a strict separation between, on the one hand, *male captus* problems caused by other entities and stemming from a pre-transfer jurisdiction and, on the other hand, the jurisdiction of the Tribunal”).

⁹⁴⁴ These cases were previously discussed, see *supra*, Chapter 7, VII.1, VI and VII.2 respectively.

⁹⁴⁵ *Ibid.*, par. 20. Some authors criticise the reasoning of the Co-Investigating Judges on this point. They refer to the fact that the charges under which Duch was held in detention by the Military Court were based on the ECCC Law and were crimes over which the ECCC has jurisdiction and argue that he was detained “in anticipation of the ECCC’s authority and jurisdiction.” See M. MOHAN, *Schisms in Humanitarianism*, - *The Khmer Rouge Tribunal’s First Hearing*, in «Asian Journal of Comparative Law», Vol. 4, 2009, pp. 14 - 15; C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 593 (“One can wonder whether the link between the ECCC and the Military Court is indeed as weak as the Co-Investigating Judges present it here. [...] [I]t can be argued that, even if one cannot speak of concerted action here, there was certainly a link between Duch’s provisional detention, at least from 2002, and the ECCC, even if the matter was not yet operational.” “It could be argued that this link entails the violations being seen as

with the Military Court. Secondly, the Co-Investigating Judges concluded that the abuse of process doctrine does not apply in the absence of ‘grave violations’ of the rights of the accused.⁹⁴⁶ The Co-Investigating Judges limited the application of the abuse of process to acts of torture or serious mistreatment.⁹⁴⁷

The Co-Investigating Judges emphasised that the courts that have applied this doctrine “have always considered the proportional relationship between the alleged violations and the proposed remedy.”⁹⁴⁸ Since the allegations against Duch at that time included crimes against humanity, the Co-Investigating Judges considered that a balancing exercise was justified and reasoned that the prolonged detention under the jurisdiction of the Military Court, in comparison to the alleged crimes, cannot be considered “a sufficiently grave violation of the rights of the accused.” While one might agree that the violation of rights may not have been sufficiently grave to justify the setting aside jurisdiction, this does not entail that the Extraordinary Chambers “do not have jurisdiction to determine the legality of DUCH’s prior detention”, and may not review these violations and offer an appropriate remedy (such as a reduction of the sentence), where this violation is, arguably, linked to the case put before the Extraordinary Chambers.⁹⁴⁹

The Pre-Trial Chamber argued, on appeal, that in order to take this violation of Article 9 ICCPR (length of pre-trial detention) into consideration, the organ responsible for the violation should be connected to an organ of the ECCC or should have been acting on behalf of the ECCC, or was acting in concert with organs of the ECCC.⁹⁵⁰ The Pre-Trial Chamber subsequently determined that no direct relationship exists between the ECCC and the Military

falling within the context of the ECCC case more generally and that as a result of that, the violations must be remedied by the ECCC”).

⁹⁴⁶ ECCC, Order of Provisional Detention, *KAING Guek Eav “Duch”*, Case No. 002/14-08-2006, OCIJ, 31 July 2007, par. 21.

⁹⁴⁷ *Ibid.*, par. 19. The Co-Investigating Judges based this narrow interpretation on the Trial chamber’s decision in *Nikolić* and, incorrectly, on the Appeals Chamber’s decision in *Lubanga* (consider the discussion, *supra*, Chapter 7, VII.2).

⁹⁴⁸ *Ibid.*, par. 21; ECCC, Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis of Abuse of Process Filed by Ieng Thirith, *NUON Chea et al.*, Case No. 002/19-09-2007, OCIJ, 31 December 2009, par. 32.

⁹⁴⁹ C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, pp. 594 – 595. The Co-Investigating Judges do not seem to exclude the possibility of a future remedy where they state that “an eventual remedy for the prejudice caused by the prior detention (in the form of a reduction of sentence or by any other means decided by the Chamber) is not at issue during the investigative phase” (*ibid.*, par. 21).

⁹⁵⁰ ECCC, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias “Duch”, *KAING Guek Eav alias “Duch”*, Case No. 001/18-07-2007-ECCC-OCIJ, PTC, 3 December 2007, par. 15.

Court, as the ECCC is an independent entity within the Cambodian Court structure.⁹⁵¹ Moreover, no evidence was adduced that the Military Court acted on behalf of the ECCC or of any concerted action between the two organs.⁹⁵² Lastly, the ECCC only came into existence after the swearing-in of the Judges on 3 July 2006 and it did not adopt its Internal Rules prior to 12 June 2007.⁹⁵³ Consequently, the Pre-Trial Chamber found that the Co-Investigating Judges and Co-Prosecutors acted in accordance with Article 9 ICCPR.⁹⁵⁴ Like the Co-Investigating Judges, the Pre-Trial Chamber left the door open for the eventual taking into consideration of this violation at a later stage of the proceedings.⁹⁵⁵

The Trial Chamber also considered the issue following a request by Duch for provisional release. The Trial Chamber agreed with the Pre-Trial Chamber that the ECCC is an independent entity in the Cambodian Court structure.⁹⁵⁶ However, contrary to the Pre-Trial Chamber, the Trial Chamber held that “international jurisprudence indicates that an international criminal tribunal has both the authority and the obligation to consider the legality of the detention.”⁹⁵⁷ “[A] violation of an accused person’s rights under the law must be acknowledged by an international criminal tribunal before which he seeks relief, even where

⁹⁵¹ *Ibid.*, par. 19. The factors taken into consideration by the Pre-Trial Chamber included the fact that the ECCC Agreement, the ECCC Law, the Internal Rules and Cambodian Law do not provide the Court with jurisdiction to decide on matters related to decisions or actions of the Investigating Judges of the Military Court or of other courts in the Cambodian Court system as well as the different jurisdiction *ratione materiae*; the different composition of the ECCC (the presence of international judges in the latter, which would not normally qualify for appointment within the Cambodian court structure) and the self-contained character of the ECCC from the start of the investigation to the determination of the appeals, including the absence of outside review of its decisions. Overall, such reasoning does not convince where it is clear that the Extraordinary Chambers in the courts of Cambodia form part of the Cambodian criminal justice system (see *e.g.* Article 2 new ECCC Law “Extraordinary Chambers shall be established in the existing court structure, namely the trial court and the supreme court”). As rightly noted by one author, the Chamber’s analysis “is deceptive in its simple elegance.” [...] “Even while emphasising that there is no connection between the organs of the ECCC and other Cambodian courts, the Chamber was unable to state unreservedly that the ECCC is separate from the Cambodian judicial structure; at best, it can claim to be a completely independent entity within that structure.” See N. JAIN, *Conceptualising Internationalisation in Hybrid Criminal Courts*, in «Singapore Year Book of International Law», Vol. 12, 2008, p. 86.

⁹⁵² ECCC, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias “Duch”, *KAING Guek Eav alias “Duch”*, Case No. 001/18-07-2007-ECCC-OCIJ, PTC, 3 December 2007, par. 21.

⁹⁵³ *Ibid.*, par. 22.

⁹⁵⁴ *Ibid.*, par. 24.

⁹⁵⁵ *Ibid.*, par. 25.

⁹⁵⁶ ECCC, Decision on Request for Release, *KAING Guek Eav “Duch”*, Case No. 001/18-07-2007/ECCC/TC, T. Ch., 15 June 2009, par. 10 - 17. Factors taken into consideration by the Trial Chamber to determine its independent character include the fact that the ECCC is entitled to adopt its own internal rules in accordance with international standards, taking into consideration the specific mechanisms necessary to adjudicate mass crimes; its mixed composition; the additional privileges and immunities of ECCC Judges; the invalidity of amnesties or pardons for crimes within the competence of the ECCC and the absence of a ‘procedural basis for commencing investigations before a domestic Cambodian court and concluding them before the ECCC where there does not exist a line of authority between the ECCC and other Cambodian courts’.

⁹⁵⁷ *Ibid.*, par. 16 (referring to the *Barayagwiza case*, which was discussed, *supra*, Chapter 7, VII.1.).

that violation cannot be attributed to that tribunal.”⁹⁵⁸ The Trial Chamber concluded that *Duch*’s detention prior to his transfer to the ECCC was illegal under domestic laws and violated the rights of the accused under international law to a trial within a reasonable time and to detention in accordance with the law.⁹⁵⁹

In its assessment of the appropriate remedy, the Trial Chamber reiterated (referring to *Nikolić*) that a balance must be struck between the fundamental rights of the accused and the “essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.”⁹⁶⁰ The Trial Chamber subsequently held that where external authorities were responsible for the violation of the rights of the accused, that they will only be attributed to the international criminal tribunal when a concerted action has taken place between that tribunal and the authorities in respect of these violations.⁹⁶¹ At the same time, the Trial Chamber recognised the abuse of process doctrine to be an ‘additional guarantee’ requiring the tribunal to decline jurisdiction where illegal conduct “is such as to make it repugnant to the rule of law to put the accused on trial.” This doctrine also applies to violations which are not attributable to the tribunal in cases or instances of torture or serious mistreatment by external authorities.⁹⁶² As argued previously, this view may be too narrow where the abuse of process in international criminal proceedings may be applied in instances of grave violations, a category which is arguably broader than serious mistreatment or torture.⁹⁶³ Moreover, it introduces a ‘dual notion’ of abuse of process, depending on the entity responsible. As discussed above, such dual notion should be rejected.⁹⁶⁴ *In casu*, the Trial Chamber did not find that serious mistreatment took place. Nevertheless, the Chamber held that even where the violations could not be attributed to an international tribunal or did not amount to an abuse of process, the accused is still entitled to seek a remedy for the violation of his rights by national authorities.⁹⁶⁵ In case of conviction the accused would be entitled to a

⁹⁵⁸ *Ibid.*, par. 16.

⁹⁵⁹ The Law on Duration of Pre-Trial Detention 1999 applied, which imposed a maximum length of three years of provisional detention. Besides, no serious investigative actions were undertaken during the period of pre-trial detention, no reasoned decisions were taken on the detention; the extension of the detention seemed to have been ordered by the Prosecutor and not by the investigating judge and several laws on which the Military Court relied seemed to have been applied retroactively. See *ibid.*, par. 20 – 21.

⁹⁶⁰ *Ibid.*, par. 31. Hence, a ‘balancing approach’ was adopted. See J.I. TURNER, Policing International Prosecutors, in «International Law and Politics», Vol. 45, 2013, pp. 217 – 218.

⁹⁶¹ *Ibid.*, par. 32.

⁹⁶² *Ibid.*, par. 33.

⁹⁶³ See *supra*, Chapter 7, VII.1.

⁹⁶⁴ See *supra*, Chapter 7, VII.1.

⁹⁶⁵ *Ibid.*, par. 35.

remedy to be decided upon at the sentencing stage or, in case of an acquittal, “to pursue remedies available within the Cambodian national law in relation to time spent in detention and any violation of his rights whilst in custody of the Cambodian Military Court.”⁹⁶⁶ This reasoning by the Trial Chamber confirms the prevailing view in the jurisprudence of the international criminal tribunals that monetary compensation is not awarded in cases where the reduction of sentence is possible. When the Trial Chamber rendered its judgment in the Duch case, it decided to reduce the sentence of 35 years imprisonment to 5 years.⁹⁶⁷ However, the Supreme Court later held that the “Trial Chamber misinterpreted the relevant international jurisprudence to mean that violations of KAING Guek Eav’s rights should be redressed by the ECCC *even* in the absence of violations attributable to the ECCC and in the absence of abuse of process.”⁹⁶⁸ The Trial Chamber erred in granting a remedy where the detention of Duch could not be attributed to the ECCC and because the abuse of process doctrine did not apply.⁹⁶⁹ Furthermore, the Supreme Court Chamber confirmed that the doctrine applies to cases of illegal conduct, which make it repugnant to the rule of law to put the accused on trial, irrespective of the entity responsible for the conduct. It encompasses “torture or other serious mistreatment” and “egregious violations of [the accused person’s] rights which would prove detrimental to the ECCC’s integrity”.⁹⁷⁰ Hence, the Supreme Court did not uphold the ‘dual standard’ which was advanced by the Trial Chamber. In Case No. 002, the Pre-Trial Chamber likewise confirmed the interpretation given to the abuse of process doctrine by the Appeals Chamber in *Barayagwiza* and *Karadžić*. It considered “whether the Appellant suffered a serious mistreatment or if there was any other egregious violation of his rights.”⁹⁷¹

⁹⁶⁶ *Ibid.*, par. 36 -37.

⁹⁶⁷ ECCC, Judgement, *KAING Guek Eav (Duch)*, Case No. 001/18-07-2007/ECCC/TC, 26 July 2010, par. 627.

⁹⁶⁸ ECCC, Appeal Judgement, *KAING Guek Eav (Duch)*, Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 390 (emphasis in original).

⁹⁶⁹ *Ibid.*, par. 393 - 399.

⁹⁷⁰ *Ibid.*, par. 392 – 394. Where the Pre-Trial Chamber later also had the chance to consider the abuse of process doctrine in Case No. 002, it confirmed that its application is to be limited to instances of serious and egregious violations of the accused’s rights which would prove detrimental to the Court’s integrity.

⁹⁷¹ ECCC, Decision on Ieng Thirith’s Appeal against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of an Abuse of Process (D264/1), *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 42), PTC, 10 August 2010, par. 23 – 27.

VIII. ALLOCATING RESPONSIBILITY FOR UNLAWFUL ARREST AND DETENTION

VIII.1. The *ad hoc* tribunals and the SCSL

§ *Shared responsibilities*

It was shown that, regrettably, the procedural frameworks of the *ad hoc* tribunals do not include a provision equivalent to Article 59 of the ICC Statute, offering clear protection to persons who have been arrested and detained in the custodial state. However, as will be explained, the *ad hoc* tribunals accepted responsibility, sometimes to varying extents, for certain aspects of the arrest and pre-transfer detention of suspects and accused persons. This should not come as a surprise where, from the picture outlined above, it emerges that in the effectuation of arrests, the Prosecutor and the requested state have overlapping responsibilities during the period that a person is detained in the requested state, at the Prosecutors' request. Remarkably, the ICTR Appeals Chamber found these shared responsibilities to derive from an underlying *rationale* that the international division of labour in prosecuting crimes should not be to the detriment of the apprehended person.⁹⁷² In this regard, the Appeals Chamber referred to the prosecutorial *duty of due diligence*. It requires the Prosecutor to ensure, once it initiates a case that “the case proceeds to trial in a way that respects the rights of the accused.”⁹⁷³ This obligation derives from the Prosecutor's authority to set the whole legal process in motion by starting an investigation and by submitting an indictment for confirmation.⁹⁷⁴ An ethical duty of due diligence is equally reflected in the ICTY and ICTR Standards of Professional Conduct

⁹⁷² ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 220. Note the absence of any reference to the legal basis for such principle.

⁹⁷³ *Ibid.*, par. 220; ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 91-92. The Appeals Chamber in *Barayagwiza* made a comparison with extradition procedures. In referring to internal US extradition law jurisprudence, the Appeals Chamber argued that the prosecuting authorities have a due diligence obligation with regard to accused persons awaiting extradition. The Appeals Chamber held that notwithstanding the apparent differences between ‘extradition’ and ‘surrender’, “extradition procedures offer analogies that are useful to this analysis.” In this regard, the Appeals Chamber referred to the holding in *Smith v. Hoey*, where the U.S. Supreme Court found that the government had the obligation to make a diligent, good-faith effort to bring the defendant before the Court (see *Smith v. Hoey*, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969), p. 383). Similarly, in *United States v. McConahy*, the court stated that the government's obligation to provide a speedy resolution of pending charges is not relieved unless the accused fails to demand that an effort be made to return him and the prosecuting authorities have made a diligent, good faith effort to have him returned and were unsuccessful or can prove that such an effort would prove futile (U. S. v. McCohany, 505 F.2d 770 (Court of Appeals, 7th Circuit), 1974).

⁹⁷⁴ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 91. The Appeals Chamber emphasised that the ultimate responsibility to bring a defendant to trial rests with the Prosecutor.

[for] Prosecution Counsel (Regulation No. 2). According to these standards, counsel for the prosecution should always adopt the ‘highest standards of professional conduct’ in the course of investigations and must ‘exercise the highest standards of integrity and care, including the obligation always to act expeditiously when required and in good faith’.

The prosecutorial duty of due diligence led the Appeals Chamber to conclude in *Barayagwiza* that “the only plausible conclusion is that the Prosecutor failed in her duty to take the steps necessary to have the Appellant transferred in a timely fashion.”⁹⁷⁵ This finding was altered in the Review Decision of 31 March 2000. On the basis of new facts, the Appeals Chamber concluded that Cameroon was not prepared to extradite Barayagwiza prior to the date of his transfer. Consequently, the finding of prosecutorial negligence, in that the Prosecutor failed to act was mistaken.⁹⁷⁶ A failure to effect the prosecutorial duty of due diligence was also found by the Appeals Chamber in *Kajelijeli*.⁹⁷⁷

Similarly, the Trial Chamber acknowledged in *Rwamakuba* that the tribunal is responsible for *some* aspects of the detention of an individual at its behest.⁹⁷⁸ These findings stand in stark contrast to previous case law of the ICTR, where it was consistently held that the tribunal has no jurisdiction over the conditions of arrest, detention or other measures carried out by sovereign states at the tribunal’s request⁹⁷⁹ or that “an accused, before his transfer to the

⁹⁷⁵ *Ibid.*, par. 98. The Appeals Chamber held that “the Appellant made several inquiries of Tribunal officials regarding his status.” “It is also clear from the record that the Prosecutor made no efforts to have the Appellant transferred to the Tribunal’s detention unit until after he filed the *writ of habeas corpus*. Similarly, the Prosecutor has made no showing that such efforts would have been futile. There is nothing in the record that indicates that Cameroon was not willing to transfer the Appellant. Rather, it appears that the Appellant was simply forgotten about” (*ibid.*, par. 96).

⁹⁷⁶ ICTR, Decision (Prosecutor’s Request for Review or Reconsideration), *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 31 March 2000, par. 56 - 58.

⁹⁷⁷ ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 252.

⁹⁷⁸ See ICTR, Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused, *Prosecutor v. Rwamakuba et al.*, Case No. ICTR-98-44-T, T. Ch. II, 12 December 2000, par. 23.

⁹⁷⁹ Consider *e.g.* ICTR, Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items, *Prosecutor v. Ngirumpatse*, Case No. ICTR-97-44-I, T. Ch. II, 10 December 1999, par. 56; ICTR, Decision on the Defence Motion for Exclusion of Evidence and Restitution of Evidence Seized, *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, T. Ch. II, 12 October 2000, par. 26; ICTR, Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items, *Prosecutor v. Ngirumpatse*, Case No. ICTR-97-44-I, T. Ch. II, 10 December 1999, par. 56; ICTR, Decision on the Defence Motion for the Restitution of Documents and other Personal or Family Belongings Seized (Rule 40 (C) of the Rules of Procedure and Evidence), and the Exclusion of such Evidence which May be Used by the Prosecutor in Preparing an Indictment against the Applicant, *Prosecutor v. Karemera*, Case No. ICTR-98-44-I, T. Ch. II, 10 December 1999, par. 4.2; ICTR, Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized, *Prosecutor v. Nzirorera*, Case No. ICTR-98-38, T. Ch. II, 7 September 2000, par. 27; ICTR, Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal

custody of the Tribunal, has no remedy under the Statute and Rules for the detention and acts by sovereign States over which the Tribunal does not exercise control.”⁹⁸⁰

In *Kajelijeli*, in turn, the Appeals Chamber clarified the corresponding responsibilities of the requested state regarding the manner and method of arrest (in relation to suspects). It held that the obligations of the requested state are twofold. First, the requested state has to comply with the request for assistance from the tribunal. Secondly, the requested state is under the obligation to respect the rights of the suspect as protected in customary international law, under the treaties to which that state has acceded and under their national law.⁹⁸¹ The consequence thereof is burden-sharing in the protection of the safeguards of the fundamental rights of the suspect in international cooperation on criminal matters.⁹⁸² What this shared burden entails for both parties in terms of the duty to inform the person of the reasons for his or her arrest has been discussed previously.⁹⁸³

§ *Violations attributable to the tribunal*

It is clear that where a shared burden exists in the apprehension and the first phase of the detention, difficulties arise regarding the responsibility of the tribunal for pre-transfer violations of the rights of the suspect or the accused as well as to the entitlement of the suspect or accused to remedies before the tribunal for procedural violations.

In *Kajelijeli*, the Appeals Chamber, after establishing that the rights of the accused had been violated during the first period of detention, held that “irrespective of any responsibility of Benin for violations of the Appellant’s rights during the first period of arrest and detention, on which this Tribunal does not have competence to pronounce, the Appeals Chamber finds that fault is *attributable* to the Prosecution for violations to the Appellant’s rights during this first period of arrest and detention.”⁹⁸⁴ This attribution was, according to the Appeals Chamber, warranted because of the failure of the Prosecution “to effect its prosecutorial duties with due

Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44-I, T. Ch. II, 8 May 2000, par. 34-35.

⁹⁸⁰ ICTR, Decision on the “Motion to Set aside the Arrest and Detention of Laurent Semanza as Unlawful, *Prosecutor v. Semanza*, Case No. ICTR-97-20-I, T. Ch. III, 6 October 1999, par. 30.

⁹⁸¹ ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 220.

⁹⁸² *Ibid.*, par. 221.

⁹⁸³ See *supra*, Chapter 7, V.2.1.

⁹⁸⁴ ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 251 - 253.

diligence out of respect for the Appellant's rights following its Rule 40 request to Benin."⁹⁸⁵ Rather than taking responsibility for all of the pre-trial violations, such reasoning thus requires the *attribution* of pre-transfer violations and some responsibility of the tribunal in the violation before a remedy may be granted. The Appeals Chamber decided that such attribution was necessary, it's finding that it was the Prosecutor's request that triggered the apprehension, arrest, and detention, notwithstanding.⁹⁸⁶

According to one commentator, the Appeals Chamber did not say that the suspect would *solely* be entitled to a remedy where certain pre-transfer violations can be attributed to the Prosecutor.⁹⁸⁷ Hence, it may well be the view of the Appeals Chamber that the tribunal should take responsibility for all pre-transfer violations that occurred in the context of the case. This is indeed correct but because the Appeals Chamber did not address that issue, nothing meaningful can be said about these violations. It is clear that the Appeals Chamber *in casu* made the granting of a remedy dependent on its finding "that fault is attributable to the Prosecution."⁹⁸⁸

Likewise, in *Karadžić*, the Trial Chamber suggested that the attribution of the infringement of the rights to one of the organs of the tribunal or a showing that at least some responsibility lays with the tribunal is required.⁹⁸⁹

⁹⁸⁵ *Ibid.*, par. 252.

⁹⁸⁶ *Ibid.*, par. 232.

⁹⁸⁷ C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 570.

⁹⁸⁸ ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 232. Compare ECCC, Appeal Judgement, *KAING Guek Eav (Duch)*, Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 396 ("the *Barayagwiza* case [...] concerned an instance in which abuse of process *was indeed established*. It is therefore impossible to affirm whether the Appeals Chamber in *Barayagwiza* would have granted a remedy in the absence of violations attributable to the Tribunal and in the absence of abuse of process" (emphasis in original)).

⁹⁸⁹ ICTY, Decision on Accused's Motion for Remedy for Violation of Rights in Connection with Arrest, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, T. Ch., 31 August 2009, par. 6 ("there is substance in the Prosecution's submission that, before being able to obtain the remedy he seeks, the Accused has to be able to attribute the infringement of his rights to one of the organs of the Tribunal or show that at least some responsibility for that infringement lies with the Tribunal. The Tribunal does not have an enforcement agency, such as its own police force, which could effectuate arrest of persons against whom an indictment has been issued and confirmed by the Tribunal's organs. Accordingly, it must rely on the international community for the arrest and transfer of such persons"). Compare ECCC, Appeal Judgement, *KAING Guek Eav (Duch)*, Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 392.

Support for the opposite view that the offering of a remedy should not be made dependent on the attribution of the breach to the tribunal, may be found in the argumentation by Judge Lal Chand Vohrah where he held that:

“if an accused is arrested or detained by a state at the request or under the authority of the Tribunal even though the accused is not yet within the actual custody of the Tribunal, the Tribunal has a responsibility to provide whatever relief is available to it to attempt to reduce any violations as much as possible.”⁹⁹⁰

In this regard, in *Barayagwiza*, the ICTR Appeals Chamber adopted the concept of ‘constructive custody’ (‘detainer process’)⁹⁹¹, borrowing it from internal U.S. extradition law. More precisely, the Appeals Chamber held that Barayagwiza was in the constructive custody of the tribunal after a Rule 40bis order was filed on 4 March 1997 (at which point Barayagwiza was only held by Cameroon at the behest of the tribunal).⁹⁹² Therefore, the provisions of that rule applied prior to the accused person’s transfer to the tribunal. The Appeals Chamber determined that “Cameroon was holding Barayagwiza in constructive custody for the Tribunal by virtue of the Tribunal’s lawful process or authority.”⁹⁹³ The Appeals Chamber added that “[t]his finding does not mean, however, that the Tribunal was responsible for each and every aspect of the Appellant’s detention, but only for the decision to place and maintain the Appellant in detention.”⁹⁹⁴ While such acceptance of responsibility for procedural violations occurring *before* the actual transfer of the suspect or the accused person is to be welcomed, it remains difficult to marry this holding with the aforementioned string of

⁹⁹⁰ ICTR, Decision, *Prosecutor v. Semanza*, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, Declaration by Judge Lal Chand Vohrah, par. 6; ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 223 (the Appeals Chamber noted that the statement made by Judge Vohrah was made in relation to the status of an accused, but emphasised that it applies to suspects as well).

⁹⁹¹ Such is a device whereby the requesting state can obtain the custody of the detainee upon his release from the detaining state, upon the filing of a special warrant (‘detainer’ or ‘hold order’). In such situation, the detaining state acts as an agent for the demanding state and the accused is in the constructive custody of the requesting state. See ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 56.

⁹⁹² See the discussion *supra*, Chapter 7, V.2.1., fn. 1.

⁹⁹³ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 61. Judge Shahabuddeen was critical of this approach and underlined that the requested state cannot be considered an agent of the tribunal where the state is discharging its own obligations and not those of the Tribunal. Where the Rule 40bis order triggers these obligations it does not create a relationship of agent and principal (*ibid.*, Separate Opinion of Judge Shahabuddeen, sub 5).

⁹⁹⁴ *Ibid.*, par. 61.

jurisprudence denying any responsibility for procedural violations that occurred prior to transfer.⁹⁹⁵

The concept of ‘constructive custody’ was also relied upon by the Trial Chamber in *Rwamakuba*. However, the Trial Chamber found that the Namibian authorities had not arrested Rwamakuba at the behest of the tribunal, following a Rule 40 request.⁹⁹⁶ The Prosecutor, according to the Trial Chamber, only became aware of the detention later, on 21 December 1995, when he was notified by the Namibian authorities, whereas the accused had been held in custody by the Namibian authorities since 2 August 1995.⁹⁹⁷ Consequently, violations that occurred during that first period of detention could not be attributed to the tribunal and “any challenges in this respect are to be brought before the Namibian jurisdictions.”⁹⁹⁸ Where the tribunal considered that also after this date, (until the moment the Prosecutor informed the Namibian authorities that they had not sufficient evidence against Rwamakuba), there had not been a Rule 40 request by the ICTR Prosecutor, the Trial Chamber likewise concluded that Rwamakuba was not being held at the request of the tribunal.⁹⁹⁹ Therefore, any challenges should likewise be brought before the Namibian jurisdictions.¹⁰⁰⁰

In *Rwamakuba*, the Trial Chamber was only willing to take responsibility for the pre-transfer breaches that occurred while the suspect was held in the tribunal’s constructive custody. Therefore, it was only willing to take responsibility for “some aspects” of the detention by the requested state, but at the same time upheld the view that the tribunal has no jurisdiction over the conditions of any arrest, detention or other measures carried out by a sovereign state at the request of the tribunal.¹⁰⁰¹

⁹⁹⁵ See also C. DEFRANCIA, *Due Process in International Criminal Courts*, in «Virginia Law Review», Vol. 87, 2001, pp. 1404 -1405 (the author argues that “[i]n resolving the question of where supervisory responsibility attaches, international criminal law walks a fine line between punishing the requesting institution for the erroneous acts of its agents and allowing cover for violations of due process that may take place as a result of its requests”); G. SLUITER, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, Antwerp, Intersentia, 2002, p. 220.

⁹⁹⁶ ICTR, *Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused, Prosecutor v. Rwamakuba et al.*, Case No. ICTR-98-44-T, T. Ch. II, 12 December 2000, par. 27.

⁹⁹⁷ *Ibid.*, par. 28 – 29.

⁹⁹⁸ *Ibid.*, par. 30.

⁹⁹⁹ *Ibid.*, par. 33.

¹⁰⁰⁰ *Ibid.*, par. 33.

¹⁰⁰¹ ICTR, *Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused, Prosecutor v. Rwamakuba et al.*, Case No. ICTR-98-44-T, T. Ch. II, 12 December 2000, par. 22 – 23.

§ *Violations not attributable to the tribunal*

In *Barayagwiza* the Appeals Chamber, with regard to ‘abuse of process’, proved willing to look *beyond* the ‘constructive custody’ of the suspect, as well as the attribution of acts to the tribunal and considered *all* violations that occurred in the context of the case at hand, further complicating matters. The Appeals Chamber held that:

“under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations for the Appellant’s rights.”¹⁰⁰²

Other jurisprudence of the *ad hoc* tribunals and the Special Court confirmed that under the abuse of process doctrine, whatever entity was responsible for the violation is not relevant. Hence, as far as the abuse of process doctrine or setting aside jurisdiction is concerned, these tribunals prove willing to take responsibility for pre-transfer violations, even where these violations cannot be linked to the tribunal.¹⁰⁰³

¹⁰⁰² ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 73, 85 and 101 (with regard to the right to be informed about the charges, the Appeals Chamber concluded that only 35 days were clearly attributable to the Tribunal (those moments where the suspect was clearly being held at the behest of the Tribunal). The Chamber argued that “the facts remain that the Appellant spent an inordinate amount of time on provisional detention without knowledge of the general nature of the charges against him. *At this juncture, it is irrelevant that only a small portion of that total period of provisional detention is attributable to the Tribunal, since it is the Tribunal – and not any other entity – that is currently adjudicating the Appellant’s claims.* Regardless of which other parties may be responsible, the inescapable conclusion is that the Appellant’s right to be promptly informed of the charges against him was violated” (emphasis added). See the discussion *supra*, Chapter 7, V.2.1.

¹⁰⁰³ See ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 206; ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002, par. 114 (“even without [...] involvement [of persons acting for SFOR or the Prosecution] this Chamber finds it extremely difficult to justify the exercise of jurisdiction over a person if that person was brought into the jurisdiction of the Tribunal after having been seriously mistreated”); less explicit in ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003, par. 30; ICTY, Decision on Preliminary Motions, *Prosecutor v. Milošević*, Case No. IT-99-37-PT, T. Ch., 8 November 2001, par. 51; ICTY, Decision on the Accused’s Holbrooke Agreement Motion, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, T. Ch., 8 July 2009, par. 85; ICTY, Decision on Karadžić’s Appeal of Trial Chamber’s Decision on alleged Holbrooke Agreement, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.4, A. Ch., 12 October 2009, par. 47; SCSL, Written Reasons for the Trial Chamber’s Oral Decision on the Defence Motion on Abuse of Process due to the Infringement of Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts, *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-PT, T. Ch., 31 March 2004, par. 26 (holding that it follows from the 3 November 1999 Appeals Chamber decision in *Barayagwiza* that “the finding of specific fault by one section of the court is not required”); ECCC, Order of Provisional Detention, *KAING Guek Eav “Duch”*, Case No. 002/14-08-2006, OCLIJ, 31 July 2007, par. 27. Consider also ECCC, Decision on Request for Release, *KAING Guek Eav “Duch”*, Case No. 001/18-07-2007/ECCC/TC, T. Ch., 15 June 2009, par. 33; ECCC, Appeal Judgement, *KAING Guek Eav (Duch)*, Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 392.

It has been argued that the ICTR Appeals Chamber's jurisprudence further supports the idea that the tribunal should take responsibility for *any* violation that occurs in the context of a case, irrespective of its attribution to the Prosecutor and not with regard to the abuse of process doctrine exclusively.¹⁰⁰⁴ In support of this view, reference is made to the Baraygwiza Reconsideration Decision and the holding of the Appeals Chamber "that the Appellant's rights were violated, and that all violations demand a remedy."¹⁰⁰⁵ A similar holding can be found in other decisions by the Appeals Chamber, including in the *Semanza*¹⁰⁰⁶ case and the *Kajelijeli* case.¹⁰⁰⁷ However, such general principle, that all violations should be remedied, falls short of taking responsibility to remedy all such violations. While the author agrees that the tribunal should, ideally, accept responsibility for any violation that occurs in the context of a case, at present there is no case law supporting this argument *outside the context of the abuse of process doctrine*.¹⁰⁰⁸ There is only one exception. As a matter of fact the ECCC Trial Chamber clearly established that:

"[e]ven if a violation of the Accused's rights cannot be attributed to the ECCC, international jurisprudence indicates that an international criminal tribunal has both the authority and the obligation to consider the legality of his prior detention. The ICTR Appeals Chamber decision in Barayagwiza held that a violation of an accused person's rights under the law must be acknowledged by an international criminal tribunal before which he seeks relief, even if that violation cannot be attributed to that tribunal."¹⁰⁰⁹

"The case law of the ICTR Appeals Chamber nevertheless indicates that even where these violations cannot be attributed to an international tribunal or do not amount to an abuse of

¹⁰⁰⁴ C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, pp. 515, 526, 527, 533, 546, fn. 919, 556, 558, 667 – 668. While the criterion of violations that occurred 'in the context of the case' is vague, the author clarifies that such limitation is necessary to avoid that the tribunal "has to take responsibility for every violation ever suffered by the suspect." The author proposes that the criterion may be interpreted as including violations that occurred after the Prosecution started its case against a particular person and for the period during which the Prosecution, even were the person was not in its constructive custody, was involved in the case (*ibid.*, p. 533).

¹⁰⁰⁵ ICTR, Decision (Prosecutor's Request for Review or Reconsideration), *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 31 March 2000, par. 74.

¹⁰⁰⁶ ICTR, Decision, *Prosecutor v. Semanza*, A. Ch., Case No. ICTR-97-20-A, A. Ch., 31 May 2000, par. 125.

¹⁰⁰⁷ ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 255, 322.

¹⁰⁰⁸ Confirming, consider ECCC, Appeal Judgement, *KAING Guek Eav (Duch)*, Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 397 ("the totality of cases in which the ICTR Appeals Chamber awarded a remedy reveal that the violations taken into account by that Tribunal were committed after the Prosecutor had requested the arrest or transfer of the accused pursuant to Rules 40 and 40bis of the ICTR RPE, thus demonstrating at least some level of involvement by the ICTR").

¹⁰⁰⁹ ECCC, Decision on Request for Release, *KAING Guek Eav "Duch"*, Case No. 001/18-07-2007/ECCC/TC, T. Ch., 15 June 2009, par. 16.

process, an accused may be entitled to seek a remedy for violations of his rights by national authorities.”¹⁰¹⁰

However, the sources referred to by the ECCC Trial Chamber only concern the doctrine of abuse of process and do not allow drawing such general conclusions. The ECCC Supreme Court Chamber later held that the “Trial Chamber misinterpreted the relevant international jurisprudence where it held that violations of KAING Guek Eav’s rights should be redressed by the ECCC *even* in the absence of violations attributable to the ECCC and in the absence of abuse of process.”¹⁰¹¹ Where (i) the detention of Duch could not be attributed to the ECCC and where the (ii) abuse of process doctrine did not apply, the Trial Chamber erred in granting a remedy.¹⁰¹²

It can be concluded that, with the notable exception of the abuse of process doctrine, the *ad hoc* tribunals and the SCSL (and the ECCC) are not willing to take responsibility for all violations of the rights of the suspect or the accused which relate to his or her arrest and pre-transfer detention. This picture of the present-day jurisprudence is unsatisfactory. It has convincingly been argued that “[i]f the tribunal is willing, under the abuse of process, to take the *ultimate* responsibility for actions of third parties, it should also be perfectly able to take responsibility for less serious violations. It would be strange for the tribunal to take responsibility for a suspect who suffered egregious violations, but to refuse to do so if the suspect suffered less serious violations because these violations could not be attributed to the tribunal.”¹⁰¹³ The basis for such responsibility, as argued by SLUITER, follows from the “overall responsibility” that international criminal tribunals have over the proceedings and their duty to ensure that the accused person receives a fair trial.¹⁰¹⁴ The tribunals should watch over the integrity of their proceedings, a duty that is not limited to the seat of the tribunal.¹⁰¹⁵

¹⁰¹⁰ *Ibid.*, par. 35.

¹⁰¹¹ ECCC, Appeal Judgement, *KAING Guek Eav (Duch)*, Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 390 (emphasis in original).

¹⁰¹² *Ibid.*, par. 393 - 399.

¹⁰¹³ C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 665.

¹⁰¹⁴ G. SLUITER, Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 1997-1999*, Vol. III, Antwerp, Intersentia, 2001, p. 156; G. SLUITER, *International Criminal Proceedings and the Protection of Human Rights*, in «New England Law Review», Vol. 37, 2002 – 2003, p. 945.

¹⁰¹⁵ A. ZAHAR and G. SLUITER, *International Criminal Law: a Critical Introduction*, Oxford, Oxford University Press, 2008, p. 286 (the authors note that putting a responsibility upon the tribunal to remedy all violations may seem unfair, where the tribunals “interact with a wide variety of actors, not all of whom may

The transfer of suspects and accused persons to international criminal courts and tribunals should never allow these institutions to turn a blind eye to serious violations of fundamental rights prior to this transfer.¹⁰¹⁶ The involvement or lack thereof of the tribunal in pre-transfer violations should then be a factor which is taken into consideration in the determination of the proper remedy.¹⁰¹⁷

Some Judges interviewed confirmed that the tribunal should remedy all human rights violations in the course of the investigation, even in cases where they cannot be attributed to a tribunal organ.¹⁰¹⁸ Other Judges are more hesitant and consider that, with the exception of “[v]ery fundamental violations”, attribution of the violation to the Court should be a prerequisite for the provision of a remedy.¹⁰¹⁹ Legal officers of the ICTR also held different opinions as to whether the ICTR should take responsibility for all violations. Some legal officers held the view that attribution should be a prerequisite,¹⁰²⁰ while others were more hesitant.¹⁰²¹ In this regard, proponents emphasise the exemplary function of international

apply the highest standards of justice, and the tribunals are not in a position to change this.” However, they add that “the reverse is even more unfair”).

¹⁰¹⁶ G. METTRAUX, *The Internationalization of Domestic Jurisdictions by International Tribunals: The Special Tribunal for Lebanon Renders its First Decisions*, in «Journal of International Criminal Justice», Vol. 7, 2009, pp. 917 – 918.

¹⁰¹⁷ C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 665.

¹⁰¹⁸ Interview with Judge Weinberg de Roca of the ICTR, ICTR-01, Arusha, 19 May 2008, p. 4 (*Q. Do you think that the Tribunal is under an obligation to remedy human rights violations occurring in the course of the investigation even when these are not attributable to a Court organ? A. Yes. I do not think we can ignore it. When the parts of a product are bad, the final product cannot be good*); Interview with an ICTR Judge, ICTR-05, Arusha, 2 June 2008, p. 7 (*Q. If a human rights violation were to occur during an investigation, and the violation is not directly attributable to this Court or an organ of the Tribunal, do you feel that the Tribunal is obliged to provide a remedy to the accused? A. I think there should be a moral obligation to do so*); Interview with a Judge of the SCSL, SCSL-09, The Hague, 16 December 2009, pp. 10-11 (with regard to the possible remedy of reducing the sentence).

¹⁰¹⁹ Interview with a Judge of the ICTR, ICTR-02, Arusha, 16 May 2008, p. 5 (“when the human rights violations are solely attributable to an organization or people not associated with the Tribunal, I believe the Tribunal may not intervene in such issues. *Q. But then the court might actually benefit from certain human rights violations that occurred, for example, at the time of arrest of a person. Do not you think that the court should remedy the violation in all cases? A. If the violation is very critical or damaging to the victim or to the accused, the bench should make some corrections, even if it was not related to a Court organ. Very fundamental violations, for example to the right of counsel or the right of privacy should be considered by the bench, if they are not related to the court*”).

¹⁰²⁰ Consider e.g. Interview with a Legal Officer of the SCSL, SCSL-13, The Hague, 16 December 2009, p. 13 (“Where it is more or less a direct result of an order of those Tribunals, there should be a remedy, in my personal opinion”); Interview with a Legal Officer of the ICTR, ICTR-36, Arusha, 4 June 2008, p. 5.

¹⁰²¹ Interview with a Legal Officer of the SCSL, SCSL-12, The Hague, 4 February 2010, p. 12 (“I am not sure it is the obligation of the court to remedy it. I am not sure what the court could do in terms of remedy. At the ICTY or ICTR, no remedies are envisaged for that type of situations. [...] I agree that they probably should. However, I do not think that this has arisen before the SCSL, although I could be wrong. With the Sesay *voir dire*, these were actions taken by organs of the court”).

criminal tribunals.¹⁰²² One legal officer emphasised that offering a remedy for all human rights violations in the context of a criminal investigation does not necessarily entail that proceedings should be stayed.¹⁰²³ This corresponds with the view expressed that the tribunal should consider all of the remedies and choose the most appropriate remedy, rather than focussing on abuse of process solely.

VIII.2. The International Criminal Court

As far as the ICC is concerned, the Court has so far refused to take responsibility for all pre-transfer violations of the rights of the suspect or accused person. As noted previously, Pre-trial Chamber I held that no obligation is incumbent upon the competent national authorities (pursuant to Article 59 (2) ICC Statute) to review the pre-transfer arrest and detention prior to the cooperation request by the Court which are not linked to the proceedings before the Court.¹⁰²⁴ Both the Pre-Trial Chamber and the Appeals Chamber held that violations occurring prior to the sending of the cooperation request will only be considered once a ‘concerted action’ between the Court the external entities has been established.¹⁰²⁵ Hence, the Court refuses responsibility for the arrest and detention which was not *at the behest* of the tribunal.

¹⁰²² Interview with a Legal Officer of the ICTR, ICTR-28, Arusha, 30 May 2008, p. 8 (“Je pense que toute violation des droits de l’homme doit être réparée. J’en suis personnellement convaincu, je le dis et je le répète, que ce soit attribuable à un organe du Tribunal ou pas, il s’agit d’un tribunal international qui doit donner l’exemple à tout le reste. Donc, je pense qu’on doit toujours réparer. C’est-à-dire, si on retourne, par exemple, au cas de *Barayagwiza*, ce n’est pas forcément parce que ses droits ont été violés qu’il faut arrêter la procédure sur des crimes sérieux pour lesquels on a des éléments de preuve contre lui. Je ne suis pas sûr que la fin des poursuites soit la meilleure réparation possible. Mais je pense, que ce soit la responsabilité du Procureur du Cameroun ou de n’importe qui, que le Tribunal se doit d’en tenir compte et de montrer à cet individu accusé qu’on vit dans un monde où les droits de l’homme sont mieux respectés que ce qu’on connaît dans certains systèmes nationaux”); Interview with a Legal Officer of the ICTR, ICTR-34, Arusha, 3 June 2008, p. 7.

¹⁰²³ Interview with a Legal Officer of the ICTR, ICTR-28, Arusha, 30 May 2008, p. 8.

¹⁰²⁴ ICC, Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-512, PTC I, 3 October 2006, p. 6 (holding that the detention prior to 14 March 2006 was solely related to national proceedings in the DRC).

¹⁰²⁵ *Ibid.*, p. 9; ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 42; ICC, Public Redacted version of the “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings” of 20 November 2009 (ICC-01/04-01/07-1666-Cong-Exp), *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07, T. Ch. II, 3 December 2009, par. 44.

However, in the absence of any ‘concerted action’ between the Court and the authorities of the custodial state, the Court may decide not to exercise jurisdiction. As far as the relinquishment of jurisdiction is concerned, the ICC Appeals Chamber held that this is only warranted where a fair trial is no longer possible “because of breaches of the fundamental rights of the suspect or accused *by his/her accusers*.”¹⁰²⁶ This formulation excludes acts committed by third parties who are unrelated to the Court or not carried out at the behest of the Court. Pre-Trial Chamber I in *Gbagbo* interpreted this test as always requiring *attribution* to a Court organ.¹⁰²⁷ The Court may only refuse to exercise jurisdiction in cases where there is an involvement of the Prosecution in the violation of the fundamental rights of the accused, either in the period *before* or in the period *following* the notification of the request for arrest and surrender. The Pre-Trial Chamber held that also after the sending of the request, “he [Gbagbo] was still detained by the Ivorian authorities and the conditions of his detention were within their competence.”¹⁰²⁸ Hence, no violation of the fundamental rights of Gbagbo could be attributed to the Court.¹⁰²⁹ From this reasoning, it seems to follow that the phrase ‘his/her accusers’ excludes the national authorities who execute the request for arrest and surrender, in the absence of further involvement of a Court organ.

Once more, the underlying problem turns out to be the fragmentation of the procedure over different jurisdictions. It was argued previously that it is often difficult for the national authorities to offer the remedy sought.¹⁰³⁰ This holds all the more true where the violations relate to the apprehension and the detention of the suspect or accused person in the custodial state. Once the person has been transferred to the tribunal, it will be difficult for the national Judge to offer the appropriate remedy (release).¹⁰³¹ Moreover, the national authorities may be reluctant to accept responsibility where they effectuated an arrest at the request of an international criminal tribunal. Therefore, it suffices to repeat the *leidmotiv* that the suspect or

¹⁰²⁶ ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Situation in the DRC, Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 37. Compare ECCC, Appeal Judgement, *KAING Guek Eav (Duch)*, Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 392.

¹⁰²⁷ ICC, Decision on the ‘Corrigendum of the Challenge to the Jurisdiction of the International Criminal Court on the Basis of Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute Filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)’, *Prosecutor v. Gbagbo, Situation in Côte d’Ivoire*, Case No. ICC-02/11-01/11-212, PTC I, 15 August 2012, par. 92, 107-112.

¹⁰²⁸ *Ibid.*, par. 110.

¹⁰²⁹ *Ibid.*, par. 110.

¹⁰³⁰ Compare, *supra* Chapter 6, I.7.1.

¹⁰³¹ C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 666.

accused person should never be the victim of the fragmentation of proceedings over different jurisdictions.¹⁰³² *Lacunae* in the protection of the suspect or accused should be prevented.¹⁰³³ The Court should take responsibility for all pre-trial violations of the rights of the suspect or the accused which occur *in the context of a case*. While the vagueness of this concept may be objected to, inspiration as how to further define can be found in the case law of the Appeals Chamber. As will be explained in the next chapter, the Appeals Chamber proved willing, in the assessment of the length to the pre-trial detention, to look to the pre-transfer detention, as long as it is part of the “process of bringing the Appellant to justice for the crimes that form the subject-matter of the proceedings before the Court.”¹⁰³⁴

VIII.3. The internationalised criminal tribunals

Whereas the STL avoids using the term ‘constructive custody’, the jurisprudence of the tribunal indicates that it may also seek to evade responsibility for pre-transfer violations of the rights of suspects in relation to arrest and detention. As explained previously, the STL Statute provides that the tribunal will request the Lebanese judicial authorities to defer competence over the investigation of the attack against Hariri and others.¹⁰³⁵ After this request was sent on 27 March 2009,¹⁰³⁶ the Lebanese authorities referred to the Prosecutor the results of the investigation and a copy of the court’s records regarding the *Hariri* case on 10 April 2009.¹⁰³⁷ The Pre-Trial Judge held that, from that day on, the tribunal had officially been seized of this case. According to the Pre-Trial Judge, this implies that the persons detained in connection with that case will “have been under the legal authority of the Tribunal since that

¹⁰³² A question raised by SLUITER. See G. SLUITER, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 1997-1999, Vol. III, Antwerp, Intersentia, 2001, p. 156 (arguing that “[i]t is imperative that the defendant receives the full protection of human rights instruments and should not be the victim of the fragmentation of the criminal procedure over two or even more jurisdictions”). Consider ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 220.

¹⁰³³ See *supra*, Chapter 6, III.

¹⁰³⁴ See *infra*, Chapter 8, II.3.6.

¹⁰³⁵ Article 4 (2) STL Statute and Rule 17 (A) STL RPE.

¹⁰³⁶ STL, Order Directing the Lebanese Judicial Authorities Seized with the Case of the Attack against Prime Minister Rafiq Hariri and Others to Defer to the Special Tribunal for Lebanon, Case No. CH/PTJ/2009/01, PTJ, 27 March 2009.

¹⁰³⁷ See STL, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06, PTJ, 29 April 2009, par. 5; STL, Order Setting a Time Limit for Filing of an Application by the Prosecutor in Accordance with Rule 17 (B) of the Rules of Procedure and Evidence, Case No. CWPTJ/2009/03, PTJ, 15 April 2009, par. 5.

date.”¹⁰³⁸ In this manner the STL may seek to avoid the attribution of any violations of the rights of the suspect during the pre-transfer arrest and detention in much the same manner as the international criminal courts and tribunals.¹⁰³⁹

PRELIMINARY FINDINGS

The principle, according to which the issuance of an arrest warrant presupposes a judicial authorisation, is firmly established in international criminal procedural law. Furthermore, all tribunals provide for a material threshold for the issuance of an arrest warrant where they make this issuance dependent on the showing either of a ‘*prima facie* case’ (ICTY, ICTR, STL) or of ‘reasonable grounds to believe’ (ICC, SPSC). How far these thresholds differ remains uncertain. The SCSL provides for a lower threshold, which is at odds with human rights law. The ECCC, while not providing for a material threshold for the issuance of an arrest warrant or an arrest and detention order, requires ‘well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary submission’ for the provisional detention of the charged person. Furthermore, it was established that only some tribunals provide for a requirement of necessity for the issuance of an arrest warrant and provide for legitimate grounds upon which the ordering of the arrest warrant should be based (ICC, STL). The ECCC require the presence of legitimate grounds for the ordering of the provisional detention of the charged person.

A further distinction can be drawn between the *ad hoc* tribunals, the Special Court, the STL and the SPSC on the one hand and the ICC on the other in their approach to the effectuation of arrests in instances for which some urgency is required. The ICC always requires a prior judicial authorisation, while the former tribunals in this case allow for the deprivation of liberty in the absence of a judicial authorisation. The ICC Statute only allows for a postponement in the presentation of the request for surrender and the documents supporting it.

¹⁰³⁸ See STL, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06, PTJ, 29 April 2009, par. 5; STL, Order Setting a Time Limit for Filing of an Application by the Prosecutor in Accordance with Rule 17 (B) of the Rules of Procedure and Evidence, Case No. CWPTJ/2009/03, PTJ, 15 April 2009, par. 5.

¹⁰³⁹ G. METTRAUX, The Internationalization of Domestic Jurisdictions by International Tribunals: The Special Tribunal for Lebanon Renders its First Decisions, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 917.

The only requirement for the deprivation of liberty in the absence of an arrest warrant at the *ad hoc* tribunals, the SCSL, and the STL ('Rule 40 requests') is the existence of 'reliable information, which tends to show that a person may have committed a crime within the jurisdiction of the court'. In the absence of further requirements, such arrest warrant is executed in accordance with the laws of the requested state. The ICTR provides for the additional requirement that an indictment is confirmed within 20 days following the transfer of the suspect to the tribunal. It was concluded that this provision insufficiently protects the rights of the suspect where this requirement does not guarantee the prompt transfer of the suspect to the tribunal. A better solution was found in the RPE of the Special Court, which requires that where a suspect is deprived of his or her liberty following a Rule 40 request, the Prosecutor should apply for his or her transfer within ten days.

The *ad hoc* tribunals (following the amendment of their RPE), the Special Court and the STL all provide for the transfer and the provisional detention of suspects at the seat of the tribunal ('Rule 40*bis* requests'). In stark contrast to the scarcity of the regulation regarding Rule 40 requests, the transfer and provisional detention of suspects is set out in considerable detail, offering better protection of the rights of the suspect. The prerequisites for this transfer include (1) the need for a judicial authorisation, (2) a material threshold (a consistent body of material which tends to show that the suspect may have committed a crime over which the tribunal has jurisdiction) and (3) the showing of a legitimate ground (necessity requirement). Furthermore (4) a strict time limitation (30 days, which can be extended to maximum 90 days) is provided for. In addition, (5) the inclusion in the order of provisional charges and (6) of a summary of the evidence on which the Prosecutor relies is also required.

In sum, it has been shown that the procedural schemes of the *ad hoc* tribunals and the Special Court do not prevent that the suspect ends up lingering in detention in the custodial state. The examples of suspects simply being forgotten about leave important marks on the legacy left behind by the ICTR. Where a Rule 40*bis* order is made, there is clearly no limitation on the amount of time the suspect may spend in pre-transfer detention. Similarly, where a Rule 40 request is made, such limitation is absent. Where a preference was expressed for Rule 40 SCSL RPE (given the time limitation it puts on the time a person can be detained in the custodial state before a request for his or her transfer is made), it should be acknowledged that this provision fails to prevent the person spending an inordinate amount of time in pre-transfer detention pending his transfer to the tribunal pursuant to Rule 40*bis*. It is regrettable that the

STL did not learn from these shortcomings and its procedural framework reveals the same gaps in the protection of the rights of the suspect.

The ECCC also provides for the deprivation of liberty without judicial authorisation where a person has been placed in police custody (*garde à vue*). This deprivation of liberty without judicial intervention is limited in time to 48 hours, which may be extended once by another 24 hours; no urgency is required.

The international criminal tribunals have in common that they have to rely on states for the effectuation of the arrest. While all international criminal tribunals allow for the possibility to address arrest warrants to international organisations, it is regrettable that no express provision is made under the ICC Statute for addressing warrants of arrests to international organisations and other non-state entities. As far as the *ad hoc* tribunals are concerned, a request for the arrest and surrender of a suspect or accused entails an obligation of result for that state. As far as the ICC is concerned, the arrest and surrender cooperation regime is far more detailed than is the case at the *ad hoc* tribunals. Leaving voluntary cooperation aside, there are situations where states not party may also be under an obligation to cooperate with the ICC. While no formal grounds of refusal are included in the ICC Statute, several provisions qualify the obligation of States Parties to immediately arrest and surrender the person in relation to parallel national proceedings.

It has been found that all international criminal tribunals as well as the STL provide for the possibility that indictments or warrants of arrest are issued under seal and not publicly disclosed.

Only the *ad hoc* tribunals provide for a specific procedure in cases of failure to execute an arrest warrant ('Rule 61 proceedings'). These proceedings have become obsolete and cannot be found in the procedural framework of the 'newer' international(ised) criminal tribunals. As far as the STL is concerned, this vehicle, which allows for the presentation of evidence by the Prosecutor in open court in the absence of the accused, would not serve a useful purpose because *in absentia* trials can be held.

Some tribunals (ICC, STL, ECCC) provide for an alternative to arrest and provisional detention where they foresee the possibility of a summons to appear. Practice has proven that

a summons is a viable alternative to the deprivation of liberty. It was argued that it should always be open for the Judge who authorises an arrest warrant to summon the person to appear before the court. This approach fully protects the principles of proportionality and subsidiarity. Conditions imposed upon the person should relate to the justifications for the deprivation or limitation of liberty provided for by the procedural framework of the tribunal concerned.

The procedural set-up of the ICC is preferable in that it further regulates the arrest proceedings in the custodial state, thereby adding to the protection of persons deprived of their liberty. The ICC Statute imposes obligations on states and provides certain rights to the persons arrested. Nevertheless, the precise scope of the rights these persons are entitled to and the proper process to be followed are not entirely clear. Moreover, the Court held that where the suspect is brought before the competent judicial authority in the custodial state, absent concerted action, there is no obligation to review the pre-transfer arrest and detention preceding the sending of the cooperation request. The limited role the Pre-Trial Chamber took upon itself in *reviewing* the arrest proceedings in the custodial state was criticised in light of its self-proclaimed role in protecting the rights of suspects and accused persons at the pre-trial stage. In particular, the Court should be clear that such review should encompass an assessment in light of international human rights norms and the rights provided for under Article 55 ICC Statute.

It has been noted with surprise that the legal framework of most tribunals (the *ad hoc* tribunals, the Special Court, the STL, and the ECCC) do not expressly provide suspects or accused persons with the right to be free from arbitrary or unlawful arrest and detention. This right follows from the application of human rights norms. Whereas international human rights law provides that where an arrest or detention is found to be unlawful, the remedy should be release, the international(ised) criminal tribunals were found to avoid granting this remedy.

Several other procedural and substantive rights were identified which derive from international human rights law and should be upheld by all tribunals where persons are deprived of their liberty. Firstly, the right to be promptly informed of the reasons of one's arrest should be clearly protected. Whereas this right is not always clearly provided for in international criminal procedural law, practice has established the existence thereof. The importance of this right lies where it enables persons to challenge their detention. While this

information should be provided ‘promptly’ or ‘at the time of the arrest’, it was found that the practice of the ICTR reveals several instances where this right was violated because information was conveyed much too late. Secondly, the existence of the right of every person deprived of liberty to be promptly brought before a judge or a ‘judicial officer’, while not always explicitly provided for, has also been confirmed. The obligation to promptly bring a person deprived of his or her liberty before a judge or judicial officer applies irrespective of the status of the person concerned or the place of the deprivation of liberty. As far as the *ad hoc* tribunals and the SCSL are concerned, it has been argued that to ensure that this right is also upheld during the pre-transfer deprivation of liberty, an arrest warrant, a request for the provisional arrest or a provisional arrest and transfer order should include a notification to the authorities of the requested state to bring the person promptly before a judge or a judicial officer or a clause reminding the national authorities to do so. It has been argued that whether the right is fully protected by Article 59 (2) ICC Statute remains uncertain, where the competent judicial authority cannot review whether the warrant of arrest was properly issued and where it cannot order release. The mechanism providing that the legality of the warrant of arrest may be challenged before the Pre-Trial Chamber may not fully resolve these shortcomings because this procedure is not automatic in nature. Where at the ECCC, the person deprived of liberty is brought before the Co-Investigating Judges, this was found not to be in violation with international human rights norms. Thirdly, the right to challenge the lawfulness of detention (*habeas corpus*) was found to be fully established in international criminal procedural law. This has been confirmed by the practice of all international criminal tribunals. This right was expressly provided in the TRCP (including a strict time limitation to hear this challenge). Disturbingly, the practice of the ICTR reveals several instances in which *habeas corpus* challenges were not heard. While the picture of the practice is mixed, it was argued that in the context of a *habeas corpus* challenge, the tribunal should also have the possibility to examine the reasonableness of the suspicion on which the original deprivation of liberty was based. The importance of this procedural right is that it protects the other rights identified previously. The person filing this challenge bears a duty of due diligence to pursue it.

With regard to instances of ‘irregular’ rendition of suspects or accused, it was noted that the relevant practice stems from one tribunal (ICTY). Hence, no general conclusions could be drawn regarding the law of international criminal procedure. The jurisprudence of the ICTY was positively evaluated insofar as it expressed a willingness of the tribunal to review the

manner in which the arrest was executed by states or international forces. The practice further revealed that the notion of state sovereignty in the context of the vertical relationship between the ICTY and states, does not play the same role as in an inter-state context. Accountability for the crimes within the tribunals' subject matter jurisdiction outweighs considerations of sovereignty. The jurisprudence was found to be unclear in several respects. For example, it fails to clearly state whether the involvement of the tribunal or one of its organs in illegal renditions should lead the tribunal to decline to exercise *in personam* jurisdiction.

It has been argued that where remedies for violations of the rights of suspects and accused persons related to the deprivation of liberty are considered, these remedies should be proportionate. Hence, the Judge should *proprio motu* consider all possible remedies. While none of the statutory frameworks of the *ad hoc* tribunals and the Special Court provide so, the practice of these tribunals has acknowledged the existence of an inherent or implied power to provide compensation to persons that have been the victim of unlawful or arbitrary arrest or detention. In turn, the ICC's Statute, the Statute of the STL as well as the TRCP explicitly provide for a right to compensation. The STL, short of providing a right to compensation for unlawful arrest or detention, provides for a right to *request* this compensation, and the awarding of this compensation is made dependent upon a showing of a 'serious miscarriage of justice'.

The international criminal tribunals have proven their willingness to acknowledge that the right to an effective remedy encompasses a right to financial compensation, provided that no other remedies (*e.g.* the reduction of sentence) would be effective (where the person is acquitted). Moreover, a reduction of the sentence can be granted or a simple declaration that the rights of the suspect or the accused have been violated in the course of the arrest and detention.

In exceptional circumstances, violations of the rights of the suspect or the accused related to the deprivation of liberty may lead the tribunal to refuse to *exercise* jurisdiction. The jurisprudence of the *ad hoc* tribunals confirmed that the abuse of process doctrine may be applied, as part of its inherent powers, where proceeding with the case would contravene the Court's sense of justice. This is the case where in light of serious or egregious violations of the rights of the suspect or accused, exercising jurisdiction would prove detrimental to the court's integrity. This implies that a fair trial is no longer possible, or where in the

circumstances of the case, proceeding with the case would contravene the court's sense of justice, due to pre-trial impropriety or misconduct. While the application of the abuse of process doctrine is discretionary in nature, the discretion may in some cases be very limited.

While the ICC has rejected the application of the abuse of process doctrine, it has confirmed the existence of its power, under Article 21 (3) ICC Statute, to stay or discontinue proceedings where a fair trial is no longer possible as a consequence of violations of the rights of suspects and accused persons by acts of his/her accusers. Where the *ad hoc* tribunals and the SCSL consider that, in declining to exercise jurisdiction, it is irrelevant what entity or entities are responsible for the violations, the ICC reserves the remedy of setting aside jurisdiction to violations committed by 'his/her accusers'.

It has been argued that the jurisprudence of the international criminal tribunals (some decisions to the contrary notwithstanding) should not be understood as reserving the application of the abuse of process doctrine to instances of torture or serious mistreatment. The seriousness of the crimes charged is taken into consideration where the tribunals consider setting jurisdiction aside. Likewise, the level of attribution of the violations to the tribunal or its organs is considered.

The *ad hoc* tribunals, the SCSL and the SPSC consider remedies for unlawful arrest or detention other than setting jurisdiction aside at the end of the proceedings (or in the case of the SPSC as part of a separate civil action). Alternatively, the ICC Statute and RPE, in line with the STL, provide that compensation should be sought within six months after being informed of the unlawfulness of the arrest or the detention as part of a distinct procedure. It has been argued that it is preferable that the remedy, other than the setting aside of jurisdiction, is decided upon at the end of the proceedings, where this allows the sentence imposed to be taken into consideration.

Some jurisprudence to the contrary notwithstanding, the *ad hoc* tribunals seemingly accepted the view that shared responsibilities exist between the tribunal and the requested state in the effectuation of the arrest and detention in the requested state. The tribunal is responsible for *some* aspects of the deprivation of liberty at its behest. In this regard, the Prosecutor has a duty of due diligence. Where some authors have argued that the court should take responsibility for *all* violations that have occurred in the context of the case (including all pre-

transfer violations of the rights of the suspect or accused person), this stance seems only to be confirmed with regard to the remedy of setting aside jurisdiction. However, this current stance of the jurisprudence has been criticised where it is illogical to take responsibility for the violations of third parties where these amount to an abuse of process but to refuse to take this responsibility for lesser violations by third parties. None of the international(ised) courts and tribunals under review proved willing to take responsibility for *all* violations of the person's rights, even where they cannot be attributed to the tribunal, as has been shown.

The ICC has, so far, refused to take responsibility for violations that occurred prior to the sending of the cooperation request where there had not been a concerted action. Also, where the Court considers staying the proceedings and declining to exercise jurisdiction, the test formulated by the ICC Appeals Chamber prevents the Court from taking responsibility for violations committed by third parties unrelated to the Court. One Pre-Trial Chamber interpreted this test as always requiring attribution to a Court organ, even after the sending of the cooperation request. In order to prevent gaps in the protection of the suspect or accused, it has been argued that the Court should take responsibility for all violations in the context of a case.

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INTRODUCTION

Following the discussion on the arrest and surrender of persons to the international(ised) criminal tribunals, the present chapter will focus on the pre-trial detention and release regime of the jurisdictions under review. Whereas provisional detention and release are equally relevant to the trial phase, the subject of detention on remand during trial will not be included here.¹ It is important to underline the fact that different, and sometimes more stringent, conditions apply to provisional release during the trial proceedings. The incarceration of suspects and accused persons before their guilt has been established highlights the tension between the presumption of innocence and the risks that a suspect or accused person poses to the criminal justice system and to society in general. This tension is equally present in all national criminal justice systems.

The analysis below reveals a rather diverse picture. It will be shown that no single procedural scheme can be distilled which could be readily applied to the different international criminal tribunals. Divergent views continue to exist with respect to such prominent questions as the need for material grounds to justify the (continued) deprivation of liberty, the party that carries the burden of proof in provisional release cases, the applicable standard of proof or the presence and scope of judicial discretion. Where questions of provisional detention and provisional release bear on the fundamental right to liberty and security of the person, the

¹ Consider *e.g.* ICTY, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.2, A. Ch., 14 December 2006, par. 6-10 (the Appeals Chamber noted that Rule 65 (B) ICTY RPE applies to provisional release issues during trial proceedings, just as it applies to pre-trial and pre-appeal proceedings); on the detention on remand during trial, consider *e.g.* C.L. DAVIDSON, No shortcuts on Human Rights: Bail and the International Criminal Trial, in «American University Law Review», Vol. 60, 2010, pp. 1-70 (labelling it a “de facto ‘detention for trial’ regime”).

jurisprudence is voluminous. Most relevant decisions on the subject are included in the analysis but not all decisions are exhaustively referenced.

Roughly three different approaches will be discerned regarding the detention-release issue. Initially, (1) the procedural model of the *ad hoc* tribunals (and, to some extent, the SCSL) clearly envisaged a procedural scheme where detention was the rule and release was the exception. Later, (2) following the amendment of their respective procedures, the *ad hoc* tribunals as well as the SCSL intended an approach whereby release would neither be the norm nor the exception. Finally (3) the ICC, as well as the internationalised criminal justice systems, proclaim that their respective procedures imply a system in which pre-trial release would be the norm and detention the exception. This chapter will scrutinise the validity of these claims, the implications of these procedural choices for their respective practice as well as the conformity of these approaches with international human rights norms. Prior to the discussion of these different approaches to pre-trial detention and release, this chapter will first seek to answer the question as to whether or not provisional release constitutes a ‘right’ for suspects and accused persons.

I. PROVISIONAL RELEASE, A PROPER RIGHT?

International human rights instruments do not provide a general right to provisional release.² One commentator, speaking on the ‘right to bail’, noted that “the concept of bail can be seen not as the ‘right’ it is generally assumed to be but, conversely, as a mechanism by which a state may qualify the liberty interests of an accused person.”³ Indeed, as previously stated, human rights instruments recognise that the right to liberty is not absolute. Rather, these instruments protect against arbitrary and unlawful interferences with this right.⁴

² Consider e.g. A. TROTTER, Pre-Conviction Detention in International Criminal Trials, in «Journal of International Criminal Justice», Vol. 11, 2013, p. 352.

³ M.A. FAIRLIE, The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, p. 1106. The author adds that where bail is seen from this perspective, “it is clear that the opportunity to utilize the mechanism provides a far more attractive alternative than the forfeiture of one’s freedom.” She adds that “[i]f one deems release to be “the right at stake”, the right may well be viewed too narrowly and ensuing analysis may, in turn, fail to conform to established standards.”

⁴ See *supra*, Chapter 7, V.1.

§ *Exceptional character of pre-trial detention*

It follows from a plain reading of Article 9 (3) ICCPR that “it may not be the general rule that persons awaiting trial are detained in custody.”⁵ In its General Comment No. 8, the HRC stressed the exceptional nature of pre-trial detention.⁶ This has also been confirmed by its case law.⁷ In a similar vein, the regional ECtHR and the IACtHR firmly established the principle that pre-trial detention will not be the rule but the *exception* and that release should not be limited to ‘exceptional circumstances’.⁸

⁵ According to Article 9 (3) ICCPR, “[i]t shall not be the general rule that persons awaiting trial shall be detained in custody.”

⁶ HRC, CCPR General Comment No. 8: Right to Liberty and Security of Persons (Art. 9), 30 June 1982, par. 3 (according to which “[p]re-trial detention should be an exception and as short as possible”).

⁷ HRC, *Hill and Hill v. Spain*, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997, par. 12.3 (“The HRC reaffirms its prior jurisprudence that pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party”).

⁸ ECtHR, *McKay v. The United Kingdom*, Application No. 543/03, Reports 2006-X, Judgment (Grand Chamber) of 3 October 2006, par. 41 (“The presumption is in favour of release”); ECtHR, *Ilijkov v. Bulgaria*, Application No. 33977/96, Judgment of 26 July 2001, par. 82 – 85 (the Court states that Article 5 is “a provision which makes detention an exceptional departure from the right to liberty and that is only permissible in exhaustively enumerated and strictly defined cases.” *In casu*, the Bulgarian code of criminal procedure only allowed for provisional release of accused persons charged with serious crimes in *exceptional circumstances* (which implied that release on bail was only possible where there did not even exist a theoretical possibility of absconding, re-offending or perverting the course of justice (Article 152 of the Bulgarian Code of Criminal procedure)). Comparable to the *ad hoc* tribunals, there existed a presumption that detention was necessary for serious crimes, which presumption was only rebuttable in exceptional circumstances. Where the defendant failed to prove the existence of exceptional circumstances, he was detained on remand throughout the proceedings.

Judge Robinson noticed the similarity between the *Ilijkov* case and the provisional release regime prior to the amendment of Rule 65 (B) (still to be discussed). See ICTY, Decision on Momočilo Krajišnik’s Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik and Plavšić*, Case No. IT-00-39 & 40-PT, T. Ch., 8 October 2001, Dissenting Opinion of Judge Patrick Robinson, par. 8. DEFRANK is critical of such comparison, where he reasons that “[u]ndoubtedly, these two rules are very similar; however they are not “exactly similar” as Judge Robinson asserts.” Whereas the Bulgarian criminal procedural code seemed to ‘presume’ that there was a danger of absconding, re-offending or obstructing the investigation, the tribunals’ pre-amendment procedural scheme ‘merely’ allocated the burden to the Defence, rather than presuming a risk of absconding, interfering or re-offending. However, this difference is smaller than suggested by this author. Where the defendant had to satisfy the Trial Chamber of the existence of exceptional circumstances *before* the existence of a risk of absconding, re-offending or interfering would be considered, the result is a *de facto* presumption of such risk, given the high burden put on the defendant to prove the presence of ‘exceptional circumstances’. See M.M. DEFRANK, Commentary: ICTY Provisional Release: Current Practice, a Dissenting Voice, and the Case for a Rule Change, in «Texas Law Review», Vol. 80, 2001 – 2002, pp. 1445 – 1446.

The IACtHR confirmed this exceptional nature in: IACtHR, *Case of Tibi v. Ecuador*, Series C, No. 114, Judgment of 7 September 2004, par. 106 (considering that “preventive imprisonment is the most severe measure that may be applied to the person accused of a crime, for which reason its application should be exceptional, since it is limited by the principles of lawfulness, presumption of innocence, necessity, and proportionality, indispensable in a democratic society”); IACtHR, *Case of Acosta-Caldéron v. Ecuador*, Series C No. 129, Judgment of 24 June 2005, par. 74; AICtHR, *Case of Children’s Rehabilitation*, Series C No. 112, Judgment of 2 September 2004, par. 228.

From the exceptional character of pre-trial detention follows “an *indirect entitlement for release from pre-trial detention in exchange for bail* or some other guarantee.”⁹ Consequently, there should at least be some nuance to statements that there is no right to bail or release during trial.¹⁰ In this context, the Appeals Chamber of the SCSL referred to a “right to *apply* for provisional release, rather than a ‘right to bail’.”¹¹

§ Link with the presumption of innocence

The statutory documents of all international(ised) criminal tribunals as well as human rights instruments provide for the presumption of innocence.¹² Although the formulation of the presumption in the Statutes of at least some of the international(ised) criminal tribunals may lead one to conclude that the presumption only applies to the trial phase, such a strict

⁹ M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd edition), Kehl am Rein, Engel, 2005, p. 234 (emphasis added). Consider *e.g.* HRC, *Hill and Hill v. Spain*, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997, par. 12.3. Such entitlement equally derives from the authority to order conditional release, as referred to in Article 9 (3) ICCPR.

Consider also S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, p. 503 (noting that where Article 5 (3) and Article 7 (5) ACHR do not expressly provide that detention should be the exception, “it is part of the spirit of the guarantee of personal liberty in the two other instruments”).

¹⁰ C.L. DAVIDSON, No shortcuts on Human Rights: Bail and the International Criminal Trial, in «American University Law Review», Vol. 60, 2010, p. 14. The author refers to the Decision of the SCSL’s Appeals Chamber refusing bail to Fofana, as proof that international human rights law rather “recognizes the right to have a court decide the lawfulness of a defendant’s detention promptly after arrest.” Nevertheless, in the paragraph referred to, the Appeals Chamber distinguishes between the right to challenge the legality of the detention and “additionally, in the event the detention is lawful, to apply for provisional liberty pending the conclusion of trial.” SCSL, Fofana - Appeal Against Decision Refusing Bail, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, A. Ch., 11 March 2005, par. 32.

¹¹ *Ibid.*, par. 32.

¹² It should be noted that the *ad hoc* tribunals, the SCSL, the STL and the SPSC seem to limit its application to accused persons and to exclude suspects. Compare Article 21 (3) ICTY Statute, Article 20 (3) ICTR Statute; Article 17 (3) SCSL Statute, Article 16 (3) STL Statute (“The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute”) and Section 6.1 TRCP (“All persons accused of a crime shall be presumed innocent”) with Article 66 ICC Statute (“Everyone”) and Rule 21 (1) (d) ECCC IR (“Every person suspected or prosecuted shall be presumed innocent”). However, other provisions in the ECCC’s procedural framework limit the right to accused persons. Consider Article 35 new ECCC Law (“The accused”) and Article 13 ECCC Agreement (“the accused”). On Article 66 ICC Statute, it should be noted that whilst Article 66 is to be found in ‘Part 6 The Trial’, it applies to ‘everyone’. See *e.g.* W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 785 (the author notes that it requires little explanation that the presumption also applies to the investigation stage); W.A. SCHABAS, Article 66, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes*, Article by Article, München, Verlag C.H. Beck, 2008, p. 1236 (noting that where the original ILC Draft reserved the presumption to “[a]n accused”, this was changed to “[e]veryone” by the Preparatory Commission). The presumption of innocence is recognised by all major human rights instruments: see Article 14 (2) ICCPR, Article 6 (2) ECHR, Article 8 (2) ACHR; Article 7 (1) (b) ACHPR; Article 11 (1) UDHR; Article 48 (1) Charter of the Charter of Fundamental Rights of the EU; Principle 36 (1) of the United Nations Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, U.N. Doc. A/RES/43/173, 9 December 1988.

application should be rejected.¹³ The presumption of innocence is equally relevant to the pre-trial stage.¹⁴ The HRC as well as several regional human rights courts subscribed to the idea that there is a link between the length of pre-trial detention and the presumption of innocence. The HRC concluded in *Cagas et al. v. The Philippines* that the excessive length of pre-trial detention violated the presumption of innocence as outlined in Article 14 (2) ICCPR.¹⁵ Similarly, Strasbourg case law has consistently held that it “takes into account the presumption of innocence when assessing whether the length of a period of pre-trial detention was justified.”¹⁶ In turn, the IACCommHR held that “[t]he guarantee of presumption of innocence becomes increasingly empty and ultimately a mockery when pre-trial

¹³ S. ZAPPALÀ, *Human rights in International Criminal Proceedings*, Oxford, Oxford University Press, 2003, pp. 84 - 85 (arguing that “the scope of the principle is very broad and covers all situations, even prior to the formulation of charges, irrespective of where the provisions on the presumption of innocence are placed in the Statute of the *ad hoc* Tribunals and the ICC.” The author distinguishes between three consequences of the presumption of innocence. “Firstly, there is the general consequence that it should affect the overall treatment of the individual, both within the proceedings and externally. Secondly, there is the more specific effect of imposing the burden of proof on the Prosecutor. Finally, the third effect relates to the establishment of a certain standard of proof and the procedure that must be followed in the determination of guilt.”) On these latter three ‘implications’, DAVIDSON argued that all three aspects are relevant to provisional release decisions. See C.L. DAVIDSON, *No shortcuts on Human Rights: Bail and the International Criminal Trial*, in «American University Law Review», Vol. 60, 2010, pp. 16 – 19.

¹⁴ Whereas international human rights instruments seem to limit the application of the principle to the trial phase, its applicability to the pre-trial stage has generally been upheld. Consider *e.g.* M. NOWAK, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edition), Kehl am Rein, Engel, 2005, pp. 329 – 330 (noting that “[t]he prevailing view, which is confirmed by Strasbourg holdings, is that the presumption of innocence [...] [is] available not only to the defendant in the strictest sense of the word but also to an accused person prior to the filing of a criminal charge”); S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, pp. 155 – 156. For a detailed comparative overview of the pre-trial application of the presumption of innocence to pre-trial detention in national criminal justice systems, consider: M.A. FAIRLIE, *The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled*, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, pp. 1109 – 1113.

¹⁵ HRC, *Cagas et al. v. the Philippines*, Communication No. 788/1997, U.N. Doc. CCPR/C/73/D/788/1997, 23 October 2001, par. 7.3. See also the Committee’s concluding observations to (among others) the following state reports, where the HRC is critical of national legislation determining that the maximum length of pre-trial detention is determined by the reference to the penalty of which the accused stands accused: HRC, *Concluding Observations of the Human Rights Committee: Argentina*, U.N. Doc. CCPR/CO/70/ARG, 15 November 2000, par. 10. (“holding that all aspects of pre-trial detention, should be reformed in accordance with the requirements of article 9 and the principle of innocence under article 14”); HRC, *Concluding Observations of the Human Rights Committee: Italy*, U.N. Doc. CCPR/C/79/Add.94, 18 August 1998, par. 15.

¹⁶ ECtHR, *Chraidi v. Germany*, Application No. 6565/01, Reports 2006-XII, Judgment of 26 October 2006, par. 51; ECtHR, *Kudla v. Poland*, Application No. 30210/96, Reports 2000-XI, Judgment (Grand Chamber) of 26 October 2000, par. 110; ECtHR, *Labita v. Italy*, Application No. 26772/95, Reports 2000-IV, Judgment (Grand Chamber) of 6 April 2000, par. 152. Where the applicants invoke Article 5 (3) and Article 6 (2) ECHR simultaneously, the Court will deal with the matter of the presumption of innocence in its consideration of Article 5 (3) ECHR (*lex specialis derogat generalis*). It held that “[c]ontinued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.” See *e.g.* ECtHR, *Smirnova v. Russia*, Application Nos. 46133/99, 48183/99, Reports 2003-IX, Judgment of 24 July 2003, par. 60; ECtHR, *W. v. Switzerland*, Application No. 14379/88, Series A, No. 254-A, Judgment of 26 January 1993, par. 30; ECtHR, *Tomasi v. France*, Application No. 12850/87, Series A, No. 241-A, Judgment of 27 August 1992, par. 84.

imprisonment is prolonged unreasonably.”¹⁷ Likewise, the literature has highlighted the intrinsic link between provisional release prior to trial and the presumption of innocence.¹⁸ The exceptional character of pre-trial detention, as provided for under Article 9 (3) ICCPR or Article 5 (3) ECHR, is reflective of such a presumption.¹⁹ Besides, it is exactly the presumption of innocence that puts limitations on the pre-trial detention regime and prohibits restrictions to the right of individual liberty going beyond what is strictly necessary for public interest considerations, be it the preservation of evidence or the prevention of flight.²⁰ Since pre-trial detention sits uneasily with the presumption of innocence, such detention should serve (a) goal(s) that is (are) not punitive in nature.²¹ The ICTY Trial Chamber clarified that the *rationale* behind the institution of detention on remand is to ensure that the accused will appear for trial. It does not have a penal character.²² At the same time, though, the ICTY Appeals Chamber confirmed that the presumption is not a “determinative” factor in provisional release applications. Otherwise, “no accused would ever be detained, as all are

¹⁷ IACCommHR, *Giménez v. Argentina*, Case No. 11.245, OEA/Ser.L/V/II.91, 1 March 1996, par. 80.

¹⁸ Consider, among others, C.A. MÜLLER, The Law of Interim Release in the Jurisprudence of the International Criminal Tribunals, in «International Criminal Law Review», Vol. 8, 2008, p. 590; M.A. FAIRLIE, The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, pp. 1109 – 1117 (“this approach is the right one, acknowledging the presumption of innocence as the ‘raison d’être’ of the right to bail” (p. 1113)); C.L. DAVIDSON, No shortcuts on Human Rights: Bail and the International Criminal Trial, in «American University Law Review», Vol. 60, 2010, pp. 14 – 20; P. WALD and J. MARTINEZ, Provisional Release at the ICTY: A Work in Progress, in R. MAY et al., *Essays on ICTY Procedure and Evidence*, Kluwer Law International, The Hague, 2001, p. 231 (“[a]llowance for pre-trial release is considered an accoutrement of the presumption of innocence”).

¹⁹ Consider e.g. M.A. FAIRLIE, The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, p. 1115 (“arguing that this rule “[is] ‘articulating’ the presumption by casting pretrial release as the norm”; C.L. DAVIDSON, No shortcuts on Human Rights: Bail and the International Criminal Trial, in «American University Law Review», Vol. 60, 2010, p. 16; C.J.M. SAFFERLING, *Towards an International Criminal Procedure*, Oxford, Oxford University Press, 2001, pp. 115, 135 (referring to Article 9 (3) ICCPR as “the result of the logical and consistent adaptation of the principle of presumption of innocence to the pre-trial stage”).

²⁰ Consider in that regard Article 10 (2) (a) ICCPR which requires that accused persons should, safe in exceptional circumstances, be segregated from convicted persons and should be subjected to a separate treatment *due to their status as unconvicted persons* (emphasis added).

²¹ IACtHR, *Suárez-Rosero v. Ecuador*, Series C, No. 35, Judgment of 12 November 1997, par. 77 (holding that the presumption of innocence entails an obligation “not to restrict the liberty of a detained person beyond the limits strictly necessary to ensure that he will not impede the efficient development of an investigation and that he will not evade justice; preventive detention is, therefore, a precautionary rather than a punitive measure”); D. J. REARICK, Innocent Until Alleged Guilty, Provisional Release at the ICTR, in «Harvard International Law Journal», Vol. 44, 2003, p. 577; M.A. FAIRLIE, The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, p. 1116 (adopting a ‘strict necessity requirement’, entailing that “courts must carefully assess punitive and nonpunitive distinctions where they are made” and that “the nonpunitive purpose must be established in the case at hand”); A. TROTTER, Pre-Conviction Detention in International Criminal Trials, in «Journal of International Criminal Justice», Vol. 11, 2013, p. 352 (“Pre-conviction detention is justifiable only by procedural necessity, not as pre-emptive punishment”).

²² ICTY, Decision on the Motion for Provisional Release of the Accused Momir Talić, *Prosecutor v. Brđanin et Talić*, Case No. It-99-36-T, T. Ch. II, 20 September 2002, p. 5.

presumed innocent.”²³ This argument, however, is mistaken. The presumption of innocence simply entails that the grounds for ordering an individual’s detention should not be punitive in nature. The notion does not prohibit pre-trial detention where an acceptable justification exists.

In turn, the SCSL Appeals Chamber adopted a narrow interpretation of the presumption of innocence (as the principle is sometimes given), treating it as an evidentiary principle which is relevant only to the trial stage. The Appeals Chamber held that:

“for all its resonance at criminal trials and appeals to put the Prosecution to proof of the elements of the offence charged, it has no application or relevance to the preconditions for bail which must be established under Rule 65 (B). Whether a defendant will turn up for trial or intimidate witnesses cannot logically be affected by the burden of proof that will prevail at trial.”²⁴

It based this narrow view on the jurisprudence of the U.S. Supreme Court, which adopts the view that the concept has no relevance during the pre-trial phase.²⁵ Such an interpretation of the presumption of innocence is too limited and should be rejected. It is clear that the presumption, as it is enshrined in human rights instruments, has some relevance before the start of the trial *sensu stricto*. Where detention on remand involves a balancing of the right to individual liberty (including the presumption of innocence) with public interest considerations, it is evident that where such a balance is not rightly struck, the presumption of innocence may be impaired.

It has been argued that the ICTY does not consider the relevance of the presumption of innocence in provisional release cases to be static. In fact, its value diminishes as the case proceeds. The ‘diminishing value’ of the presumption is inferred from the fact that the ICTY’s

²³ ICTY, Decision on Interlocutory Appeal of Denial of Provisional Release During the winter Recess, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.2, A. Ch., 14 December 2006, par. 11 – 12.

²⁴ SCSL, Fofana - Appeal Against Decision Refusing Bail, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T. A. Ch., 11 March 2005, par. 37.

²⁵ *Bell v. Wolfish*, 441 U.S. 520 (1979), p. 533 (“The presumption of innocence is a doctrine that allocates the burden of proof in criminal trial” [...] “But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun”).

jurisprudence requires a higher standard for provisional release ('sufficiently compelling humanitarian circumstances') once the Prosecutor has rested its case.²⁶

§ *Applicability of international human rights law*

The applicability of international human rights norms to the proceedings of the *ad hoc* tribunals and the SCSL was confirmed above.²⁷ The jurisprudence of the ICTY confirmed the relevance of international human rights norms on the presumption of innocence and on the release of persons awaiting trial for the interpretation of Article 65 (B) ICTY RPE, which provision deals with provisional release. In *Blagojević et al.*, an ICTY Trial Chamber noted (1) that the ICCPR and ECHR are part of public international law, (2) that as a tribunal of the UN, the ICTY is committed to the standards of the ICCPR and that parts of the former Yugoslavia are parties to the ICCPR and the ECHR, (3) that justice also entails respect for the alleged perpetrator's fundamental rights and, therefore (4) that no distinction can be drawn between persons facing criminal procedures in their home country or on an international level. Consequently, Rule 65 (B) should be read in light of the ICCPR, the ECHR and the relevant jurisprudence.²⁸

At the same time, however, the jurisprudence sometimes seems to favour a *contextual application* of these norms.²⁹ For example, in *Brđjanin and Talić*, a bench of the Appeals Chamber determined "that internationally recognised standards to release of persons awaiting trial are applicable to proceedings before the International Tribunal, that in applying them account has to be taken of the different circumstances and situations envisaged by those standards which did not visualise the nature and character of the International Tribunal, and that the International Tribunal does not have the same facilities as are available to national courts to enforce appearance."³⁰

²⁶ See Rule 65 (B) ICTY RPE; C.L. DAVIDSON, No shortcuts on Human Rights: Bail and the International Criminal Trial, in «American University Law Review», Vol. 60, 2010, p. 19.

²⁷ See *supra*, Chapter 2, III.

²⁸ ICTY, Decision on Vidoje Blagojević's Application of Provisional Release, *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-PT, T. Ch. II, 22 July 2002, par. 19 – 26.

²⁹ On the contextual application of international human rights norms, see *supra*, Chapter 2, III.5.

³⁰ ICTY, Decision on Application for Leave to Appeal, *Prosecutor v. Brđjanin and Talić*, Case No. IT-99-36-AR65, A. Ch., 7 September 2000, p. 3. Likewise, some authors seem sympathetic towards such arguments. Consider, e.g. K. DORAN, Provisional Release in Human Rights Law and International Criminal Law, in «International Criminal Law Review», Vol. 11, 2011, p. 743 ("The defence team [*sic*] at the *ad hoc* tribunals have continually stressed that the failure to have regard to the provisions of the European Convention and

II. PROVISIONAL DETENTION AS THE RULE OR AS AN EXCEPTION

II.1. The early practice: provisional release as the exception, detention as the rule

Rule 64 ICTY, ICTR and SCSL RPE provides for the mandatory detention upon transfer of an accused person to the seat of the tribunal. While an ‘Order for detention on remand’ will normally be issued, such an order is not strictly necessary.³¹ It was noted in Part I of this Chapter that contrary to other international(ised) criminal tribunals, the existence of legitimate grounds is not a prerequisite for the pre-trial detention of the suspect or the accused.³²

The Statutes of the *ad hoc* tribunals and the SCSL are silent on the matter of pre-trial release. The procedural regime that governs provisional release (before and also during and after trial) is outlined in Rule 65 of the ICTY, ICTR and SCSL RPE.³³ No provision is made for the provisional release of suspects or accused prior to their transfer to the tribunal. Prior to its amendment, one of the principal requirements put forward by Rule 65 (B) was the presence of ‘exceptional circumstances’. This criterion led to a ‘presumption against provisional release’.³⁴

ICCPR, is tantamount to breaching international human rights standards. However, is this necessarily the case? It has been illustrated that the ad hoc tribunals are operating under entirely different circumstances than that of international human rights’ bodies”).

³¹ Consider in this regard: ICTY, Decision on Motions by Momor Talić (1) To Dismiss the Indictment, (2) For Release, and (3) For Leave to Reply to Response of Prosecution to Motion for Release, *Prosecutor v. Brđanin*, Case No. IT-99-36-PT, T. Ch. II, 1 February 2000, par. 21 (noting that the order for detention made by the Trial Chamber “was, strictly, otiose”).

³² Consider in that regard the views of a Judge of the SCSL: “The one thing that does really bother me with our Rule 65, and I speak personally now, not necessarily as a judge of this court, is that there is an automatic mandatory detention. That is unusual in my experience. [...] However, in the concept of human rights law, take for example the ECHR and African human rights rules, a person is considered innocent until guilt is proven. And they are entitled to liberty until they are deprived of it after a hearing *or for good reason are held in remand*. The concept is that they should be at liberty unless there are reasons for detaining them. And this is really a reversal. So this does cause me personal concern from a human rights perspective *but as a judge of this tribunal I am aware procedures are available to an accused to apply for bail and have an impartial hearing.*”). See Interview with a Judge of the SCSL, SCSL-10, The Hague, 16 December 2009, p. 11.

³³ The silence of the Statute is symptomatic of the views originally held by some of the members of the ICTY. They considered pre-trial release unnecessary for different reasons, including the expectations that trials would be completed quickly, or the fact that most domestic criminal justice systems would not allow for provisional release for ‘serious crimes’. See P. WALD and J. MARTINEZ, Provisional Release at the ICTY: A Work in Progress, in R. MAY et al., *Essays on ICTY Procedure and Evidence*, Kluwer Law International, The Hague, 2001, p. 238; M.A. FAIRLIE, The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled, in «*Fordham International Law Journal*», Vol. 33, 2009 – 2010, p. 1119.

³⁴ F. GAYNOR, Provisional Release in the Law of the International Criminal Tribunal for the Former Yugoslavia, in J. DORIA, H-P GASSER and M.C. BASSIOUNI (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Leiden – Boston, Martinus Nijhoff Publishers, 2009, p. 183.

Under the former rule, granting provisional release depended on the fulfilment of four conjunctive conditions.³⁵ Besides (i) the presence of exceptional circumstances, the Defence had to satisfy the tribunal that (ii) the accused would appear for trial and (iii) that the person, if released, would not pose any danger to any victim, witness or other persons. Finally, (iv) the host country had to be heard. If no exceptional circumstances were identified by the tribunal, the other criteria were not considered.³⁶ The burden of proof rested on the accused.³⁷ Only one of these four criteria, the 'exceptional circumstances' criterion, will be discussed here. Where there were usually no exceptional circumstances identified, there was also no need to consider the other requirements.³⁸

The *length of the detention on remand* was an important element considered in the assessment of the presence of 'exceptional circumstances'.³⁹ Although the jurisprudence accepted that the length of detention may constitute an 'exceptional circumstance'---on top of the fact that many ICTR suspects and accused have argued that the exceptional circumstances requirement was fulfilled because of undue delay---, exceptional circumstances were never accepted.⁴⁰

³⁵ See *e.g.* ICTY, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić, *Prosecutor v. Delalić*, Case No. IT-96-21-T, T. Ch. II, 25 September 1996, par. 1.

³⁶ See, *e.g.*, ICTR, Decision on the Defence Motion for the Provisional Release of the Accused, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, T. Ch. II, 21 February 2001, par. 7; ICTR, Decision on the Request Filed by the Defence for Provisional Release of Georges Rutaganda, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Case No. ICTR-96-3-T, T. Ch. I, 7 February 1997; ICTY, Decision on Defence Motion for Provisional Release, *Prosecutor v. Drljača and Kovačević*, Case No. IT-97-24, T. Ch., 20 January 1998, par. 10; ICTR, Decision on the Defence's Motion for Provisional Release Pursuant to Rule 65 of the Rules, *Prosecutor v. Bicamumpaka*, Case No. ICTR-99-50-T, T. Ch. II, 25 July 2001, par. 13.

³⁷ The amendment of Rule 65 (B) left the allocation of the burden of proof untouched. This burden of proof will be discussed, *infra*, Chapter 8, II.2.2.

³⁸ P. WALD and J. MARTINEZ, Provisional Release at the ICTY: A Work in Progress, in R. MAY et al., *Essays on ICTY Procedure and Evidence*, Kluwer Law International, The Hague, 2001, p. 238.

³⁹ In *Bagosora*, the Trial Chamber underlined that while the length of detention is one factor in the assessment of the presence of 'exceptional circumstances', it is not the determining factor. See ICTR, Decision on Defence Motion for Release, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. III, 12 July 2002, par. 22.

⁴⁰ ICTR, Decision on the Defence Motion for the Provisional Release of the Accused, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, T. Ch. II, 21 February 2001, par. 9 (whereas the Trial Chamber accepted that the length of detention is a factor in the consideration of exceptional circumstances, it found the pre-trial detention of over five years to be in acceptable limits, in light of (1) the general complexity of the proceedings, (2) the number of motions filed by the parties and (3) the further complexity caused by the joinder of trials (par. 9 – 13)); ICTR, Defence Motion for Provisional Release of the Accused, *Prosecutor v. Muhimana*, Case No. ICTR-95-1-B-I, T. Ch. I, 1 October 2002, par. 8 (the Trial Chamber referred to the argumentation of the Prosecutor that it follows from the jurisprudence of the ECtHR and the ECommHR that the complexity of the case, the gravity of the offences charged and/or the severity of the corresponding penalty may warrant provisional detention up to five years); ICTR, Decision on the Defence's Motion for the Release or Alternatively Provisional Release of Ferdinand Nahimana, *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, T. Ch. I, 5 September 2002, par. 11-14 (noting that the Defence failed to show any irregularities with regard to the length of the current proceedings given the complexity and the seriousness of the case and also noting that the case is already at an advanced stage); ICTR, Decision on the Defence's Motion for Provisional Release Pursuant to Rule 65 of the Rules, *Prosecutor v. Bicamumpaka*, Case No. ICTR-99-50-T, T. Ch. II, 25 July 2001, par. 19 (the Trial Chamber

Factors routinely discussed in the assessment of the length of detention included: the actual length of the detention, the length of the detention in light of the nature of the alleged crimes, the relation between the length of the detention and the sentence that may be imposed, the general (legal and factual) complexity of the case and the investigations, including the need to obtain evidence abroad, the conduct of the parties in the proceedings and the physical, psychological and other consequences of detention beyond the normal consequences of detention.⁴¹ Most disturbingly, the ICTR Trial Chamber did not consider a pre-trial detention of over six-and-a-half years to constitute ‘exceptional circumstances’.⁴² The Trial Chamber reasoned that:

concluded that the length of the detention remains within acceptable limits and within the interests of justice, taking into consideration (1) the gravity and factual and legal complexity of the charges, (2) the ‘gravity’ of the sentences he may be facing if convicted (3) the additional complexity caused by the joined proceedings and (4) the necessity to deliberate and render decisions on pre-trial motions filed by the parties); ICTR, Decision on Sagahutu’s Preliminary Provisional Release and Severance Motions, *Prosecutor v. Sagahutu et al.*, Case No. ICTR-00-56-T, T. Ch. II, 25 September 2002, par. 51 (the Trial Chamber noted, somewhat confusingly that “the length of the proceedings, the general complexity of the case, and the length of the Applicant’s detention remain within acceptable limits and in the interests of justice”); ICTR, Decision on the Defence Motion for the Provisional Release of the Accused, *Prosecutor v. Ndayambaje*, Case No. ICTR-98-42-T, T. Ch. II, 21 October 2002, par. 19 – 20; ICTR, Decision on Bizimungu’s Motion for Provisional Release Pursuant to Rule 65 of the Rules, *Prosecutor v. Bizimungu*, Case No. ICTR-99-50-T, T. Ch. II, 4 November 2002, par. 32 (the Trial Chamber referred to the general complexity of the proceedings and the gravity of the offences before concluding that a pre-trial detention of three years and five months remained within acceptable limits); ICTY, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić, *Prosecutor v. Delalić*, Case No. IT-96-21-T, T. Ch. II, 25 September 1996, par. 26, 30 (the Trial Chamber did not find a four months delay to constitute ‘exceptional circumstances’); ICTY, Order Denying a Motion for Provisional Release, *Prosecutor v. Blaškić*, Case No. IT-95-14, T. Ch., 20 December 1996, p. 4; ICTY, Decision on Defence Motion for Provisional Release, *Prosecutor v. Drljača and Kovačević*, Case No. IT-97-24, T. Ch., 20 January 1998, par. 22; ICTR, Decision on Defence Motion for Release, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. III, 12 July 2002, par. 25 - 28 (the Trial Chamber did not find that a pre-trial detention of more than five years constituted exceptional circumstances, in light of the offences within the subject-matter jurisdiction of the Tribunal, and referred also to the overbooked trial docket, the inadequate resources, factors which, as will be explained (see *infra*, Chapter 8, II.2.10), do not constitute permissible delays).

⁴¹ ICTY, Order Denying a Motion for Provisional Release, *Prosecutor v. Blaškić*, Case No. IT-95-14, T. Ch., 20 December 1996, p. 4; In the *Delalić* case (ICTY, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić, *Prosecutor v. Delalić*, Case No. IT-96-21-T, T. Ch. II, 25 September 1996, par. 26), the Trial Chamber identified seven factors, which were drawn from ECtHR, *Neumeister v. Austria*, Application No. 1936/63, Series A, No. 8, Judgment of 27 June 1968, par. 31. The Commission held that “reasonable time” pursuant to Article 5 (3) ECHR necessitates the evaluation of the individual case pursuant to seven factors or criteria, to know (i) the actual length of detention; (ii) the length of detention in relation to the nature of the offence; (iii) the material, moral or other effects of detention upon the detained person beyond the normal consequences of detention; (iv) the conduct of the accused ((a) did he contribute to the delay or expedition of the investigation or trial? (b) were proceedings delayed by applications for release pending trial, appeals of other remedies? (c) did he request release on bail or offer other guarantees to appear for trial?); (v) the difficulties in the investigation of the case (its complexity in respect of the number of witnesses or accused, the need to obtain evidence abroad, etc.); (vi) the manner in which the investigation was conducted ((a) the system of the investigation applicable, (b) the conduct of the investigation by the authorities (their diligence in dealing with the case and the manner in which they organized the investigation)); (vii) the conduct of the judicial authorities (a) in dealing with applications for release pending trial and (b) in completing the trial).

⁴² The Trial Chamber underlined that while the length of detention is one factor in the assessment of the presence of ‘exceptional circumstances’, it is not the determining factor. See ICTR, Decision on Defence Motion for

“the length of current or potential future detention of the Accused cannot be considered material in these circumstances because it does not mitigate in any way that the Accused, who is charged with the grave offences coming under the subject matter jurisdiction of this Tribunal, which offences carry maximum term of imprisonment is life [*sic*], may be a flight risk or may pose a threat to witnesses or to the community if he were to be released. Detention under Rule 65 is intended to ensure the safety of the community and the integrity to the trial process.”⁴³

Another element scrutinised under the ‘exceptional circumstances’ requirement was the existence of a *serious illness* (humanitarian grounds). The jurisprudence clarified a serious illness as a case in which it would be impossible for the tribunal to administer adequate medical treatment.⁴⁴ The suspect or accused should show that his or her state of health is incompatible with any form of detention.⁴⁵ The suspect or accused must indicate why he or she cannot be treated in the host state or host prison.⁴⁶ According to the ICTR Trial Chamber, the illness does not amount to an ‘exceptional circumstance’ if the accused’s condition is not ‘terminal’ or ‘immediately life threatening calling for an immediate change in the conditions of custody’.⁴⁷ On this basis, *Dukić* and *Simić* were granted provisional release.⁴⁸ Under former Rule 65 (B) ICTY RPE, short-term release was also granted on humanitarian grounds in two instances to allow the accused to attend a relative’s funeral.⁴⁹ In fact, provisional release has only ever been granted under pre-amendment Rule 65 (B) on humanitarian grounds.

Release, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. III, 12 July 2002, par. 22. Note that the length of pre-trial detention will be discussed in detail, *infra*, Chapter 8, II.2.10.

⁴³ *Ibid.*, par. 27.

⁴⁴ ICTR, Decision on the Request filed by the Defence for Provisional Release of Georges Rutaganda, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Case No. ICTR-96-3-T, T. Ch. I, 7 February 1997, p. 2 (the Trial Chamber is not convinced of a serious regression of the medical condition of the accused, which calls for an immediate change of the conditions under which the accused is held); ICTR, Decision on the Defence’s Motion for Provisional Release Pursuant to Rule 65 of the Rules, *Prosecutor v. Bicamumpaka*, Case No. ICTR-99-50-T, T. Ch. II, 25 July 2001, par 22-25.

⁴⁵ ICTY, Decision on Defence Motion for Provisional Release, *Prosecutor v. Drljača and Kovačević*, Case No. IT-97-24, T. Ch., 20 January 1998, par. 12.

⁴⁶ *Ibid.*, par. 14.

⁴⁷ *Ibid.*, par. 24.

⁴⁸ ICTY, Decision on Provisional Release of the Accused, *Prosecutor v. Simić*, Case No. IT-95-9-PT, T. Ch., 26 March 1998; ICTY, Decision Rejecting the Application to Withdraw Indictment and Order for Provisional Release, *Prosecutor v. Dukić*, Case No. IT-96-20-T, T. Ch., 24 April 1996.

⁴⁹ ICTY, Order on Motion of the Accused Marko Čerkez for Provisional Release, *Prosecutor v. Kordić et al.*, Case No. IT-95-14/2-T, T. Ch., 14 September 1999 (provisional release during a short period to visit his father who was in critical condition); ICTY, Decision on Motion of Defence Counsel for Drago Josipović (Request for Permission to Attend Funeral), *Prosecutor v. Kuprešić et al.*, Case No. IT-95-16, T. Ch., 6 May 1999 (provisional release to attend funeral).

Other factors which were normally considered in determining whether ‘exceptional circumstances’ were present included the reasonable suspicion that the person committed the crime(s) charged as well as the accused’s alleged role in the said crime.

Overall, the former Rule 65 (B), which limited provisional release to exceptional circumstances, was a clear violation of international human rights law and jurisprudence, according to which pre-trial detention will not be the rule but the exception.⁵⁰ Commentators have also been highly critical of the ‘exceptional circumstances’ requirement.⁵¹ The criterion was unduly vague. As several commentators state, “[t]he judges were often clear in what did not constitute exceptional circumstances; less so in defining what they were.”⁵²

§ Justification for the ‘exceptional circumstances’ requirement

The analysis of early ‘pre-amendment’ jurisprudence of the *ad hoc* tribunals reveals that two factors were used to justify the ‘exceptional circumstances’ requirement and the deviation from international instruments on pre-trial detention. They reflect at least some of the distinctive characteristics of international criminal tribunals *vis-à-vis* national criminal justice systems. These are (1) the extreme gravity of the offences concerned and (2) the unique circumstances under which the tribunal operates, including the absence of a police force and the absence of any control over the areas in which the accused would reside if released.⁵³ The tribunal necessarily has to rely on national governments and other entities.

The literature provided additional justifications for the divergence between international human rights law and the ‘detention as a rule’ approach as evidenced by the ‘exceptional circumstances’ requirement. WALD and MARTINEZ discern 5 factors that distinguish

⁵⁰ As discussed, *supra*, Chapter 8, I.

⁵¹ Consider *e.g.* D. J. REARICK, *Innocent Until Alleged Guilty, Provisional Release at the ICTR*, in «Harvard International Law Journal», Vol. 44, 2003, p. 585 (“this requirement should be removed on the legal grounds that it is impermissibly vague and because it adds nothing to the analysis”).

⁵² G. BOAS, J.L. BISCHOFF, N.L. REID and B. DON TAYLOR III, *International Criminal Law Practitioner Library*, Vol. III: *International Criminal Procedure*, Cambridge, Cambridge University Press, 2011, pp. 123 – 124.

⁵³ ICTY, *Decision on Motion for Provisional Release Filed by the Accused Zejnir Delalić, Prosecutor v. Delalić*, Case No. IT-96-21-T, T. Ch. II, 25 September 1996, par. 19 - 20; ICTY, *Decision on Motion for Provisional Release Filed by the Accused Hamzin Delić, Prosecutor v. Delalić et al.*, Case No. IT-96-21, T. Ch., 24 October 1996; ICTY, *Decision Denying a Request for Provisional Release, Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, T. Ch., 23 January 2008, p. 4; ICTY, *Order on Miodrag Jokić Motion for Provisional Release, Prosecutor v. Jokić*, Case No. IT-01-42-PT, T. Ch., 20 February 2002, par. 11.

provisional release in the international context from the national context. They include: (1) the gravity of the crimes charged (including the likelihood of a severe sentence if convicted (in this regard, reference is made to domestic jurisdictions which often reverse the burden for murder and other serious crimes)), (2) the perceived inconsistency in requesting the UN and international peacekeeping forces to risk their lives to apprehend indicted war criminals and to subsequently release them,⁵⁴ (3) the necessary reliance on national agents to check on the accused, exacerbated by the absence of the tribunal's own enforcement capacity, (4) the lack of sanctions available in case of any violation of the release conditions (including the absence of an additional penalty for the failure to appear) also given the absence of a police force of its own⁵⁵ as well as (5) difficulties in detecting and preventing intimidation of victims, witnesses or other persons where the accused has been released to a place that is geographically removed from the tribunal.⁵⁶ Other commentators have listed further justifications, including the 'desire to avoid a public outcry',⁵⁷ or even 'judicial insecurity'.⁵⁸

⁵⁴ Consider in this regard M.A. FAIRLIE, *The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled*, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, p. 1130 (criticising such justification for a reversal of the burden where such course of action affects all cases (also where there is no risk of absconding and danger caused to the persons responsible for apprehending the individual) whereas human rights jurisprudence has emphasised that release determinations should be made on a case-by-case basis).

⁵⁵ WALD and MARTINEZ recognize that according to Rule 65 (H) ICTY RPE, the Trial Chamber can issue a new arrest warrant to ensure the presence of the accused where he or she has previously been released, but notes that the execution of such warrants would be hampered where the state had previously guaranteed the return of the accused but was subsequently not living up to this guarantee. See P. WALD and J. MARTINEZ, *Provisional Release at the ICTY: A Work in Progress*, in R. MAY et al., *Essays on ICTY Procedure and Evidence*, Kluwer Law International, The Hague, 2001, p. 236.

⁵⁶ *Ibid.*, pp. 234-237; D. J. REARICK, *Innocent Until Alleged Guilty, Provisional Release at the ICTR*, in «Harvard International Law Journal», Vol. 44, 2003, pp. 581 -582; For a different set of factors, consider G. MCINTYRE, *Defining Human Rights*, in G. BOAS and W.A. SCHABAS (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Brill Academic Publishers, Leiden, 2003, p. 233 (referring to the extremely serious violations of international humanitarian law the detained persons are charged with; the lack of support of a domestic framework; the sentences to be expected if an accused is convicted and the fact that certain authorities have been prepared to harbour indictees as proof of the unique circumstances under which the ICTY operates).

⁵⁷ D.D. NTANDA NSEREKO, *Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, in «Criminal Law Forum», Vol. 5, 1994, p. 532 (it remains unclear what is the source of this justification: it seems that this justification derives from an intuitive reasoning and not from inside information). Consider also M.A. FAIRLIE, *The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled*, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, p. 1132 (“if public reaction in some way affected either the drafting of the original Rule 65 (B) or its subsequent interpretation, it did not so in a way that conforms to internationally accepted standards. Rather than allowing for case-by-case determinations, which would permit detention in a narrow set of circumstances, detention was presumed for all accused”).

⁵⁸ M.A. FAIRLIE, *The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled*, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, pp. 1132-1133 (arguing that “financial dependence and the wish to be re-elected may entice members of the judiciary to act in a manner that they anticipate will be positively perceived by the U.N. organs.” Consequently, Judges may be inclined to deny requests for provisional release (to avoid interferences with justice or the commission of further offences) and “succumb to external pressures” where they “find that they are navigating veritable landmines in determining the pre-trial fate of certain accused individuals”).

On a more practical level, during the early days of the ICTY, the number of accused persons before the ICTY was low. Consequently, there were no considerable delays during which the accused were detained.⁵⁹ Besides, the Dutch government opposed the release of accused persons on its own territory.⁶⁰

II.2. The *ad hoc* tribunals and the SCSL: release as neither the rule nor the exception

§ Removal of the 'exceptional circumstances' requirement

Rule 65 ICTY RPE was amended in 1999 during the twenty-first plenary session.⁶¹ There are divergent views regarding the rationale behind this rule amendment. According to the Annual Report, the amendment was made "to reflect the circumstances in which the International Tribunal found itself (long delays, together with the number of detainees in custody), while continuing to protect the interests of the International Tribunal."⁶² According to Judge Robinson, the Rule was changed "because the original [r]ule, in imposing a burden on the accused to establish exceptional circumstances to justify his release, came close to a system of mandatory detention."⁶³ The rule change was intended to bring the provision in line with "customary international law as reflected in the international human rights instruments."⁶⁴

⁵⁹ F. GAYNOR, Provisional Release in the Law of the International Criminal Tribunal for the Former Yugoslavia, in J. DORIA, H-P GASSER, and M.C. BASSIOUNI (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Leiden – Boston, Martinus Nijhoff Publishers, 2009, p. 183.

⁶⁰ ICTY, Letter to Registrar, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, 18 July 1996.

⁶¹ Rule 65 as amended during the 21st plenary session, 7 December 1999 (IT32/17.Rev.17).

⁶² ICTY, Seventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc A/55/271-S/2000/777, 7 August 2000, par. 293. The amended Rule 65 (B) was first put to the test in ICTY, Decision on Motion for Provisional Release of Miroslav Kvočka, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, T. Ch., 2 February 2000 and ICTY, Decision on Miroslav Tadić's Application for Provisional Release, *Prosecutor v. Simić et al.*, Case No, IT-95-9-PT, T. Ch., 4 April 2000. Consider also G. BOAS, Developments in the Law of Procedure and Evidence at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court, in «Criminal Law Forum», Vol. 12, p. 170 (noting that "frustrations expressed at the length of trials have been the subject of considerable media attention").

⁶³ ICTY, Decision on Momočilo Krajišnik's Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik and Plavšić*, Case No. IT-00-39 & 40-PT, T. Ch., 8 October 2001, Dissenting Opinion of Judge Patrick Robinson, par. 8.

⁶⁴ *Ibid.*, par. 2. This view was shared by ICTR Trial Chamber III where it noted that "[the] ICTY [has] indeed amended its Rule 65 regarding provisional release in order to harmonize its provisions with internationally recognized standards" (emphasis added). See ICTR, Decision on Defence Motion for Release, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. III, 12 July 2002, par. 24. For a similar view, consider R. SZNAJDER, Provisional Release at the ICTY: Rights of the Accused and the Debate that Amended a Rule, in «Northwestern University Journal of International Human Rights», Vol. 11, 2013, p. 111.

Judge WALD and MARTINEZ disagree and provide a different narrative, holding that the rule was amended as a matter of practicality rather than necessity.⁶⁵ The amendment was “prompted in part by an investigation into the death of two defendants in the detention unity, [when] the judges became increasingly concerned about the depressive effects of lengthy pre-trial detention without regular contact with the Court.”⁶⁶ They add that “[t]he Tribunal nevertheless rejected suggestions that the Rule be amended to adopt the ECHR approach in full, with a presumption in favour of release and automatic review of detention every 90 days.”⁶⁷

Ultimately, it seems that the rule-change was part of an exercise to liberalise the practice in cases where the defendant had voluntarily surrendered, following recommendations by the U.N. More precisely, an expert group indicated that the tribunal “may wish to consider a rule that would expand the ‘exceptional circumstances’ possibility for provisional release to avoid unduly long pre-trial detention of an accused who had voluntarily surrendered following public notice of his indictment.” “This might facilitate the provisional release of some indictees and in such cases reduce unduly long pre-trial detentions.”⁶⁸ Importantly, in the experts’ opinion, this more liberal approach should be combined with the possibility of the accused person to waive his or her right to be tried in person.⁶⁹ The Working Group report referred to concerns that had been raised concerning the ‘generally recognised right to a speedy trial’. They also raised the more practical concern that the detention facilities in Arusha and The Hague might become overtaxed.⁷⁰ The ICTY commented on this recommendation by stating that the Rule

⁶⁵ P. WALD and J. MARTINEZ, Provisional Release at the ICTY: A Work in Progress, in R. MAY et al., Essays on ICTY Procedure and Evidence, The Hague, Kluwer Law International, 2001, p. 233. Also other authors have questioned the reason stated by Judge Robinson. See, e.g., M.M. DEFRANK, Commentary: ICTY Provisional Release: Current Practice, a Dissenting Voice, and the Case for a Rule Change, in «Texas Law Review», Vol. 80, 2001 – 2002, pp. 1446 – 1448.

⁶⁶ P. WALD and J. MARTINEZ, Provisional Release at the ICTY: A Work in Progress, in R. MAY et al., Essays on ICTY Procedure and Evidence, The Hague, Kluwer Law International, 2001, p. 233.

⁶⁷ *Ibid.*, p. 233.

⁶⁸ UNITED NATIONS, Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, U.N. Doc. A/54/634, 22 November 1999, par. 54.

⁶⁹ *Ibid.*, par. 54. Consequently, at the provisional release hearing, the Trial Chamber may be in a better position to grant provisional release where (1) the accused had freely and knowingly consented to trial *in absentia*, and (2) the personal circumstances of the accused, including character, and integrity as well as formalised state guarantees for cooperation and for his appearance, bail and other proper conditions, were such that the likelihood of him not appearing at trial was minimal. If the accused consequently fails to appear for trial, his prosecution could nevertheless go forward to a conclusion, as the accused previously agreed to that.

⁷⁰ *Ibid.* par 51.

65 (B) had already been amended and the ‘exceptional circumstances’ criterion deleted.⁷¹ The tribunal and the OTP were more critical of the proposal that provisionally released persons waive their right to be present. The accused’s presence at large in the former Yugoslavia may, according to the OTP, have an impact on the Prosecution’s ability to maintain witness cooperation.⁷² In the end, the Working Group’s recommendation was not implemented.⁷³ Nevertheless, other amendments to the RPE were adopted to help reduce the length of pre-trial detention, including the introduction of a Pre-Trial Judge and the recognition of a role for senior legal officers in pre-trial management.⁷⁴ Remarkably, the conclusions mention that the amendment of the rule may have led to an increase of the number of voluntary surrenders.⁷⁵

The corresponding ICTR Rule 65 (B) was amended considerably later, in 2003.⁷⁶ Since the ICTR did not follow the ICTY amendment, several accused argued that the ICTR should apply the ICTY Rule 65 (B), as this amendment was in accordance with internationally recognised standards on the rights of the accused that the tribunal is bound to respect. However, such arguments have been uniformly rejected.⁷⁷ The ICTR kept defending the provision as “an appropriate rule governing provisional release, especially in light of the

⁷¹ UNITED NATIONS, Comments on the Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, U.N. Doc. A/54/850, 27 April 2000, par. 5.

⁷² *Ibid.* par. 7.

⁷³ The proposal was discussed during the plenary meeting of July 2000, at which occasion a policy paper on the issue was circulated, but no amendment to the Rules was agreed upon. See UNITED NATIONS, Comprehensive Report on the Results of the Implementation of the Recommendations of the Expert Group to Conduct a Review of the Effective operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, U.N. Doc. A/56/853, 4 March 2002, par. 17.

⁷⁴ *Ibid.*, par 18. See Article 65^{ter} ICTY RPE and Rule 65^{ter} (D) (i) ICTY RPE on the role of the senior legal officers.

⁷⁵ *Ibid.*, par 20. The report notes that in 2001, eight indictees surrendered themselves to the custody of the Tribunal.

⁷⁶ Rule 65 (B), as amended at the thirteenth plenary session of 27 May 2003; Consider also Rule 65 (B) SCSL RPE, as adopted at the plenary meeting of judges on 7 March 2003.

⁷⁷ ICTR, Decision on the Defence Motion for the Provisional Release of the Accused, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, T. Ch. II, 21 February 2001, par. 4-5 (according to Article 14 ICTR Statute, the Judges adopt the ICTY RPE “with such changes as they deem necessary.” Consequently, the ICTY amendment of Rule 65 (B) could only be incorporated in the ICTR RPE if the Judges of the ICTR decide to do so, and to the extent they deem necessary); ICTR, Decision on the Defence’s Motion for the Release or Alternatively Provisional Release of Ferdinand Nahimana, *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, T. Ch. I, 5 September 2002, par. 10 – 11; ICTR, Defence Motion for Provisional Release of the Accused, *Prosecutor v. Muhimana*, Case No. ICTR-95-1-B-I, T. Ch. I, 1 October 2002, par 1 (a) and 5; ICTR, Decision on the Defence Motion for the Provisional Release of the Accused, *Prosecutor v. Ndayambaje*, Case No. ICTR-98-42-T, T. Ch. II, 21 October 2002, par. 19 – 20; ICTR, Decision on Bizimungu’s Motion for Provisional Release Pursuant to Rule 65 of the Rules, *Prosecutor v. Bizimungu*, Case No. ICTR-99-50-T, T. Ch. II, 4 November 2002, par. 25 – 27.

gravity of the charges.”⁷⁸ The ICTR noted that even where the ‘exceptional circumstances’ requirement was removed from ICTY Rule 65, “provisional release continues to be the exception and not the rule” and that “the ICTY has generally denied provisional release, unless the accused demonstrated exceptional circumstances or similarly strong grounds for release.”⁷⁹

§ Provisional release following the amendment of Rule 65 (B)

When the amended Rule 65 (B) was first applied in the *Kvočka* case, the Trial Chamber clarified that the amended provision did not have the effect of establishing release as the norm and detention as the exception.⁸⁰ This constituted the majority view which has been upheld in subsequent jurisprudence.⁸¹ The minority view was that, based on international human rights standards, detention should now be the exception *de jure*. Because of the lack of enforcement powers, however, detention *de facto* appears to be the rule.⁸² Later decisions confirmed that the effect of the amendment was that it neither made release the rule, nor that detention

⁷⁸ ICTR, Decision on the Defence’s Motion for the Release or Alternatively Provisional Release of Ferdinand Nahimana, *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, T. Ch. I, 5 September 2002, par. 10.

⁷⁹ *Ibid.* par. 11.

⁸⁰ ICTY, Decision on Motion by Momir Talić for Provisional Release, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36, T. Ch. II, 28 March 2001, par. 17 (“it cannot be said that provisional release is now the rule rather than the exception”); ICTY, Decision on Motion for Provisional Release of Miroslav Kvočka, *Prosecutor v. Kvočka*, Case No. IT-98-30-PT, T. Ch., 2 February 2000, p. 2.

⁸¹ See, e.g. ICTY, Decision on Motion by Momir Talić for Provisional Release, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36, T. Ch. II, 28 March 2001, par. 17; ICTY, Decision on Motion by Radoslav Brđanin for Provisional Release, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36-PT, T. Ch. II, 25 July 2000, par. 12; ICTY, Decision on Momočilo Krajišnik’s Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik and Plavšić*, Case No. IT-00-39 & 40-PT, T. Ch., 8 October 2001, par. 12; SCSL, Decision on the Motion by Morris Kallon for Bail, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-PT, T. Ch., 23 February 2004, par. 29.

⁸² See e.g. ICTY, Decision Granting Provisional Release to Enver Hadžihasanović, *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-PT, T. Ch. II, 19 December 2001, par. 7. Similarly, see ICTY, Decision Granting Provisional Release to Amir Kubura, *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, T. Ch. II, 19 December 2001, par. 7; ICTY, Decision on Darko Mrđa’s Request for Provisional Release, *Prosecutor v. Mrđa*, Case No. IT-02-59-PT, T. Ch. II, 15 April 2003, par. 29; ICTY, Decision on Momočilo Krajišnik’s Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik and Plavšić*, Case No. IT-00-39 & 40-PT, T. Ch., 8 October 2001, par. 12 (“Furthermore, the change in the rule does not alter the position that provisional release continues to be the exception and not the rule, a position justified by the absence of any power in the International Tribunal to execute its own arrest warrants”). At the SCSL, this view is reflected in SCSL, Decision on the Urgent Defence Application for Release from Provisional Detention, *Prosecutor v. Kondewa*, Case No. SCSL-2003-12-PT, T. Ch., 21 November 2003, par. 38-39; and SCSL, Decision on the Urgent Defence Application for Release from Provisional Detention, *Prosecutor v. Fofana*, Case No. SCSL-2003-11-P[T], T. Ch., 21 November 2003, par. 38-39. In these two cases, the Trial Chamber cited the decision in the *Hadžihasanović* case with approval but added that the Trial Chamber “wishes to insist on the fact that it is indispensable necessary to bear in mind its specificity as opposed to any other domestic tribunal or court; indeed, given the very serious nature of crimes which fall under its jurisdiction, certain procedural guarantees may require to be applied differently before it.” “It is ‘the Chamber’s’ view that this would certainly be the case with regard to provisional release”).

remained the rule, but suggested that *the focus should be on the particular circumstances of each individual case.*⁸³

One important exception should be mentioned. Some of the SCSL's earlier decisions on bail held that deleting the 'exceptional circumstances' criterion created a regime whereby release was the rule and detention the exception. The consequence is a burden which is *equally shared* between the accused and the Prosecutor. As the eventual beneficiary of the provisional release, the accused bears the onus to satisfy the Chamber that he fulfils the conditions for provisional release. After this, the burden shifts to the Prosecutor to satisfy the Judge or Trial Chamber that the accused is, rather, not likely to fulfil the necessary conditions.⁸⁴ Therefore, the Prosecutor has an 'equally formidable burden' to negate the facts advanced by the Defence and to prove that the requirements of Rule 65 (B) have not been met.⁸⁵ Single Judge Itoe ultimately based such holding on the presumption of innocence, as enshrined in 17 (3) SCSL Statute.⁸⁶ In *Fofana*, the Appeals Chamber rejected such holding and held that the burden "falls squarely on the accused."⁸⁷ In line with the *ad hoc* tribunals' case law, the Appeals Chamber held that there is no presumption either way and that each case must be decided on its own merits.

The Prosecution asserted in the *Simić* case that the amendment of Rule 65 (B) was *ultra vires* and, therefore, should be disregarded. Nevertheless, the Trial Chamber determined that the amendment was not inconsistent with any provision of the ICTY Statute and was consistent with "internationally recognised standards regarding the rights of the accused which the International Tribunal is obliged to respect."⁸⁸

⁸³ ICTY, Order on Miodrag Jokić Motion for Provisional Release, *Prosecutor v. Jokić*, Case No. IT-01-42-PT, T. Ch., 20 February 2002, par. 17; ICTY, Order on Motion for Provisional Release, *Prosecutor v. Ademi*, Case No. IT-01-46-PT, T. Ch., 20 February 2002, par. 18.

⁸⁴ SCSL, Ruling on a Motion Applying for Bail or for Provisional Release Filed by the Applicant, *Prosecutor v. Brima*, Case No. SCSL-03-06-PT, T. Ch., 22 July 2002, p. 9; SCSL, *Fofana* - Decision on Application for Bail Pursuant to Rule 65, *Prosecutor v. Norman et al.*, T. Ch., 5 August 2004, par. 93.

⁸⁵ *Ibid.*, par. 95.

⁸⁶ SCSL, Ruling on a Motion Applying for Bail or for Provisional Release Filed by the Applicant, *Prosecutor v. Brima*, Case No. SCSL-03-06-PT, T. Ch., 22 July 2002, p. 9.

⁸⁷ SCSL, *Fofana* - Appeal against Decision Refusing Bail, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, A. Ch., 11 March 2005, par. 41.

⁸⁸ ICTY, Decision Miroslav Tadić's Application for Provisional Release, *Prosecutor v. Simić et al.*, Case No, IT-95-9-PT, T. Ch., 4 April 2000, pp. 5-6.

Currently, there are five requirements to obtain provisional release which can be discerned: (1) the host state should be heard, as well as (2) the state or entity to which the person seeks to be released,⁸⁹ (3) the Trial Chamber should be satisfied, on a balance of probabilities, that the person will appear for trial and (4) the Trial Chamber⁹⁰ should be satisfied, on a balance of probabilities, that the person will not pose a danger to any victim, witness or other person when released. Finally, (5) there is an overarching requirement that the detention on remand be proportionate (nevertheless, this condition does not seem to be consistently applied). These material conditions will be discussed later on.⁹¹

In practice, the amendment of Rule 65 (B) led to an upheaval in the tribunal's provisional release practice and an important increase in the number of provisional releases granted.⁹² While the boost in requests for provisional release granted can, to some extent, be explained by the 1999 amendment, other factors are probably as (if not more) important in explaining the phenomenon. Without a doubt, the most important factor in explaining this increase are the stabilisation of the political situation in the territories of the former Yugoslavia and the better cooperation by these countries with the tribunal.⁹³ Where cooperation improved, the chances that the accused would try to abscond during his or her release, diminished.⁹⁴ Further proof that the amendment of Rule 65 (B) ICTY and the deletion of the 'exceptional circumstances' requirement is not the only factor explaining the increase of the number of provisional releases follows from the comparison with the respective ICTR 'post-amendment'

⁸⁹ This requirement was inserted in ICTY Rule 65 following an amendment adopted on 30 January 1995, during the fifth plenary session (U.N. Doc. IT/32/Rev.3).

⁹⁰ Note that the notion of 'Trial Chamber' under Rule 65 (B) entails that also the Appeals Chamber may consider requests for provisional release pending appeal. Consider ICTY, Order of the Appeals Chamber on the Motion of the Appellant for a Provisional and Temporal Release, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, A. Ch., 19 February 1999 and the dissenting opinion of Judge Bennouna attached thereto.

⁹¹ See *infra*, Chapter 8, II, 2.6.

⁹² DAVIDSON notes that as of 2010, 35 defendants had been released pre-trial and 32 had been released during varying times after the commencement of the trial. See C.L. DAVIDSON, No shortcuts on Human Rights: Bail and the International Criminal Trial, in «American University Law Review», Vol. 60, 2010, p. 36.

⁹³ D. J. REARICK, Innocent Until Alleged Guilty, Provisional Release at the ICTR, in «Harvard International Law Journal», Vol. 44, 2003, p. 592; A. ZAHAR and G. SLUITER, International Criminal Law: a Critical Introduction, Oxford, Oxford University Press, 2008, pp. 340 - 341; F. GAYNOR, Provisional Release in the Law of the International Criminal Tribunal for the Former Yugoslavia, in J. DORIA, H-P GASSER, and M.C. BASSIOUNI (eds.), The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko, Leiden – Boston, Martinus Nijhoff Publishers, 2009, pp. 184 – 185 (referring to the end of the Tudman regime in Croatia, the collapse of the Milošević regime in Serbia and the increased cooperation by Croatia and by the entities in Bosnia).

⁹⁴ *Ibid.*, p. 185.

practice. While ICTR Rule 65 (B) was also amended, this identical amendment did not have any impact on the number of provisional releases granted.⁹⁵

The lack of any pre-trial release at the SCSL and the ICTR is remarkable. Interviews with practitioners of the ICTR and the SCSL highlighted a number of factors that may help explain this divergent practice. The most commonly referred to factor is the lack of voluntary surrenders to the tribunal.⁹⁶ In this regard, many interviewees referred to the risk that if persons were released, they would go into hiding.⁹⁷ While this is certainly a relevant consideration, this factor taken in isolation cannot suffice to explain the absence of any provisional release practice. In cases where accused persons voluntarily surrendered to the ICTR and requested provisional release, their applications were also refused.⁹⁸

Staff interviewed considered the different *context* in which the tribunal operates to be equally important. Accused persons cannot readily return to their home countries, and they do not enjoy the support of states which agree to provide security in the case of provisional release, to drive them to the airport, fly them back and bear the costs of the provisional release etc., unlike the ICTY.⁹⁹ Where the defendants at the ICTR are in exile from their home country,

⁹⁵ Neither the ICTR nor the SCSL have ever granted provisional release.

⁹⁶ Interview with Judge Short of the ICTR, ICTR-04, Arusha, 23 May 2008, p. 6 (“most of the people before this Tribunal were arrested from various countries after they fled from Rwanda. They did not voluntary surrender, except for one or two cases”); Interview with Judge De Silva of the ICTR, ICTR-06, Arusha, 2 June 2008, p. 5; Interview with a Legal Officer of the ICTR, ICTR-28, Arusha, 30 May 2008, p. 8; Interview with a member of the OTP, ICTR-16, Arusha, 4 June 2008, p. 11.

⁹⁷ Interview with Judge De Silva of the ICTR, ICTR-06, Arusha, 2 June 2008, p. 5; Interview with a Judge of the ICTR, ICTR-07, Arusha, 16 May 2008, p. 7.

⁹⁸ ICTR, Decision on Defence Request for Provisional Release, *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-1, T. Ch. I, 5 June 2007, par. 3 (while the accused person voluntarily surrendered to the tribunal, the Trial Chamber argued that the accused had not demonstrated that he was fully aware of the seriousness of the charges at the moment of his arrest. In *casu*, the arrest warrant had been subjected to confidentiality and only made public during the initial appearance of the accused. This holding puts an insurmountable burden on the accused and is contrary the established case law of the *ad hoc* tribunals in that the fact that an arrest warrant was issued under seal cannot be held against the accused (*infra*, Chapter 8, II, 2.6.1.) It is relevant to underscore that this was the only factor considered by the Trial Chamber in concluding that it is was not convinced that the person would appear for trial and in turning down the application). Consider also ICTR, Decision on Defence Motion for Provisional Release, *Prosecutor v. Nshogoza*, Case No. ICTR-07-91-PT, T. Ch. III, 17 December 2008 (the Trial Chamber stated that the accused person had surrendered voluntarily and that in a similar contempt case before the ICTY, an accused had been granted provisional release. However, while the Trial Chamber considered that “the voluntary surrender of the Accused may be seen as an indication that he would not try to evade justice if provisionally released, it held that the Defence failed to provide supporting material to show that the Accused would appear for trial”). On the practice of sealed arrest warrants and its influence on provisional release applications, see *infra*, Chapter 8, II, 2.6.1.

⁹⁹ Interview with a Legal Officer of the ICTR, ICTR-30, Arusha, 30 May 2008, p. 8 (in that regard, the interviewee notes that “[t]he nature of the conflict may dictate a lot of factors that may facilitate things like provisional release or make it more difficult which has nothing to do with the Judges and their approach”).

the accused before the ICTY are supported by governments and granted the necessary state guarantees.¹⁰⁰ On one hand, there is no incentive for the Rwandan authorities to accept detainees of the former regime. On the other hand, however, there is likely a fear of retaliation that prevents the accused from seeking to be released to Rwanda.¹⁰¹ As far as the SCSL is concerned, the fact that the Court was situated in the country where the crimes were committed plays an important role in explaining why no bail was ever granted.¹⁰² In *Sesay*, the Court made reference to the fact that if the Trial Chamber grants bail, the person will be released in the same country where he is alleged to have committed the crimes that he has been indicted for.¹⁰³

Overall, it is the lack of countries willing to accept the person released and willing to offer the necessary state guarantees which seems to be a primary factor in explaining the divergent practice between the ICTY and the ICTR.¹⁰⁴ The ICTR's jurisprudence confirms the importance of this single factor, as will be explained below.¹⁰⁵ In cases where the person seeks to be released to the host state (Tanzania) or other African states, logistical problems¹⁰⁶ as well as financial constraints¹⁰⁷ may play a role in the decision regarding their release. In this sense, the lack of resources at the disposal of African states and the state of their security systems may render any monitoring of provisionally released persons rather problematic.¹⁰⁸ Responsibilities including observing the accused, meeting with the police, transportation from and to the airport, etc. put a substantial burden on any state that agrees to receive the

¹⁰⁰ Interview with Mr. Peter Robinson, Defence Counsel, ICTR-18, Arusha, 22 May 2008, p. 7.

¹⁰¹ D. J. REARICK, *Innocent Until Alleged Guilty, Provisional Release at the ICTR*, in «Harvard International Law Journal», Vol. 44, 2003, p. 592.

¹⁰² SCSL, Interview with a Defence Counsel at the SCSL, SCSL-04, Freetown, 19-20 October 2009, p. 26 («What I will say is that the fact that this Tribunal took place in the country, made getting bail illusory. [...] There is no right to bail in Sierra Leone, simply because we are in the country where the war happened»).

¹⁰³ SCSL, Decision on Application of Issa Sesay for Provisional Release, *Prosecutor v. Sesay*, Case No. SCSL-04-15-PT, T. Ch., 31 March 2004, par. 55.

¹⁰⁴ Interview with Judge Short of the ICTR, ICTR-04, Arusha, 23 May 2008, p. 6; Interview with Mr. Gumpert, Defence Counsel, ICTR-20, Arusha, 22 May 2008, p. 10; Interview with Mr. Gershom Otachi BW'Omanwa, Defence Counsel, ICTR-27, Arusha, 30 May 2008, p. 11; Interview with a Defence Counsel at the ICTR, ICTR-25, Arusha, 29 May 2008, p. 6; Interview with Peter Robinson, Defence Counsel ICTR, Arusha, 22 May 2008, p. 7.

¹⁰⁵ See *infra*, Chapter 8, II.2.6.1.

¹⁰⁶ Interview with a Legal Officer of the ICTR, ICTR-30, Arusha, 30 May 2008, p. 8; Interview with a Judge of the ICTR, ICTR-07, Arusha, 16 May 2008, p. 8; Interview with Mr. Tom Moran, Defence counsel, ICTR-24, Arusha, 29 May 2008, p. 9.

¹⁰⁷ Interview with a Judge of the ICTR, ICTR-07, Arusha, 16 May 2008, p. 8; Interview with a Legal Officer of the ICTR, ICTR-33, Arusha, 4 June 2008, p. 5.

¹⁰⁸ Interview with a Legal Officer of the ICTR, ICTR-38, Arusha, 5 June 2008, pp. 9-10 (noting that fewer resources are available and states are less accustomed to the rule of law).

accused.¹⁰⁹ Such constraints also apply to the Special Court. The SCSL Appeals Chamber emphasised the reality on the ground, including the overall security situation in these countries, and the lack of police facilities to enforce and monitor conditions of bail.¹¹⁰ Since it is difficult for African states to guarantee that a person will return for trial, they may be reluctant to authorise provisional release.¹¹¹ For instance, the Sierra Leonean government noted that it is not in a position to prevent an accused from fleeing or hiding.¹¹² In some instances, there may not even be a functioning state.¹¹³ Moreover, legitimate concerns may exist about the accused's security when released.¹¹⁴

More disturbing are the references made by one Judge of the ICTR and one legal officer of the ICTR Chambers as to the possible impact of political considerations on provisional release applications.¹¹⁵ In a similar vein, most defence counsels before the ICTR held that the reasons for the divergent practice were primarily political.¹¹⁶ Some defence counsels speak in this

¹⁰⁹ D. J. REARICK, *Innocent Until Alleged Guilty*, Provisional Release at the ICTR, in «Harvard International Law Journal», Vol. 44, 2003, p. 592.

¹¹⁰ SCSL, *Fofana - Appeal Against Decision Refusing Bail*, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, A. Ch., 11 March 2005, par. 31. Consider also Interview with a Defence counsel at the SCSL, SCSL-02, Freetown, 22 October 2009, p. 9 (“What guarantee would the Court have had to go after them if they decided to jump bail?”).

¹¹¹ Consider *e.g.* Interview with a Legal Officer of the ICTR, ICTR-33, Arusha, 4 June 2008, p. 5.

¹¹² SCSL, Decision on the Motion by Morris Kallon for Bail, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-PT, T. Ch., 23 February 2004, par. 13, 43; SCSL, Decision on Application of Issa Sesay for Provisional Release, *Prosecutor v. Sesay*, Case No. SCSL-04-15-PT, T. Ch., 31 March 2004, par. 20, 49.

¹¹³ Interview with a Legal Officer of the ICTR, ICTR-33, Arusha, 4 June 2008, p. 5.

¹¹⁴ Interview with Judge Egorov, Arusha, 20 May 2008, p. 6; Interview with a Judge of the ICTR, ICTR-02, Arusha, 16 May 2008, p. 5; Interview with Mr. Philpot, Defence Counsel, ICTR-25, Arusha, 29 May 2008, p. 6 (with regard to the possibility of releasing the accused person in Tanzania, the interviewee notes that he would be safer in prison).

¹¹⁵ Interview with a Judge of the ICTR, ICTR-05, Arusha, 2 June 2008, p. 7 (noting, where asked about the different provisional release practice at the ICTR and the ICTY, that “especially in Rwanda, the reaction was sometimes very emotional. There even has been some interruption of cooperation. This is not something I should take into account as a Judge: to consider the reactions of others, or if something will not be pleasant for Rwanda [...] Still, I think it could play a role in the thinking of some Judges: “If I make such a decision, what will be the reaction of the countries in the region?”); Interview with a Legal Officer of the ICTR, ICTR-33, Arusha, 4 June 2008, p. 5 (noting that “[t]he reasons that explain the differences and the disparities between the ICTY practice *vis-à-vis* provisional release at the ICTR have much more to do with political factors.” In addition, he notes that “[w]e all know that this institution does not function in a vacuum,” and that “I am not sure whether the Tribunal itself, in light of all of the pressures that are levied on the Tribunal, if the Tribunal itself is actually willing to take on the regime in Rwanda and argue the case for provisional release.” “So I think that there are political sensitivities that are incapacitating or debilitating the ability of the Tribunal to grant accused persons these rights.” “But I think that these sensitivities lead down to disadvantage for the accused, and you could actually say that they violate the rights of the accused.”)

¹¹⁶ Interview with Mr. Taku, Defence counsel, ICTR-21, Arusha, 23 May 2008, p. 14 (“They will not grant [provisional release], because of persistent pressure from the government of Rwanda”); Interview with Mr. Gumpert, Defence Counsel, ICTR-20, Arusha, 22 May 2008, p. 10 (“[T]he political consequences of allowing the current detainees to go free pending or during trial would be mountainous. The Rwandese government would throw a fit. And the Tribunal has enough trouble with that. When they have done things that the Rwandans have not liked in the past the Rwandese have simply stopped the flow of witnesses”). One defence counsel of the

regard of a “racist implementation of policy.”¹¹⁷ Although it is impossible to verify the claims that political considerations play a role in the Trial Chamber’s assessment of applications for provisional release, these claims are nevertheless a matter of concern. Where several interviewees referred to the domestic context and the fact that the serious nature of the alleged crimes would be an obstacle to release, such an argument must be rejected as it is not helpful in explaining discrepancies between the respective practices of the ICTY and the ICTR/SCSL (these tribunals deal with crimes of a similar gravity).¹¹⁸ Lastly, it should be noted that several defence counsels stated that they did not apply for provisional release where they had the expectation that such a request would not be granted.¹¹⁹ As evidenced by the *Zigiranyirazo* case, such a strategy may not always be in the defendant’s best interests. In this case, the Trial Chamber used the fact that the defendant never applied for provisional release to support the argument that the defendant may have contributed to the continued pre-trial detention himself.¹²⁰

§ *Provisional release applications pending surrender*

The procedural rules of the *ad hoc* tribunals do not provide the possibility of a suspect’s or accused person’s provisional release prior to his or her surrender to the tribunal. However, two instances may be noted in which accused persons remained at liberty in France, pending the ICTR Prosecutor’s request for the referral of these cases to France (Rule 11*bis* ICTR RPE). By not ordering their provisional detention, the French court relied on the accused

SCSL argued that the insertion of a provision on bail in the SCSL RPE is solely to be explained on policy grounds. See Interview with a Defence counsel at the SCSL, SCSL-02, Freetown, 22 October 2009, p. 9 (“What I will say about that is that that rule was put there for policy reasons. There was no way the Judges were going to grant bail to any of the accused persons”).

¹¹⁷ Interview with a Defence Counsel of the ICTR, ICTR-26, Arusha, 29 May 2008, p. 10; Interview with Mr. Black, Defence Counsel, ICTR-19, Arusha, 22 May 2008, p. 8 (referring to the incident where an accused was refused provisional release as well as transfer in custody to allow him to attend the funeral of his son).

¹¹⁸ Interview with a Legal Officer of the ICTR, ICTR-30, Arusha, 30 May 2008, p. 9; Interview with a Legal Officer of the ICTR, ICTR-36, Arusha, 4 June 2008, p. 5.

¹¹⁹ Interview with Mr. Gershom Otachi BW’Omanwa, Defence Counsel, ICTR-27, Arusha, 30 May 2008, p. 11 (“It appears to people that you do not need to apply for bail here because you will not get it. Many people seem to have that feeling. I do recall that in the first case that I was handling, we did discuss that with my client that we should apply for bail, but he also felt like, first of all, they will not grant it, and if they do grant it, where will they take me, will they take me to Rwanda? No, let me just stay here.”); Interview with a Defence Counsel at the ICTR, ICTR-25, Arusha, 29 May 2008, p. 6. (“I have thought about it and I know I cannot apply it”); Interview with Mr. Peter Robinson, Defence Counsel, ICTR-18, Arusha, 22 May 2008, p. 7 (“We do not apply for release and as a practical matter, you cannot even construct a proposal because there is no place your client can be residing”).

¹²⁰ ICTR, Decision on Protais Zigiranyirazo’s Motion for Damages, *Prosecutor v. Zigiranyirazo*, T. Ch. III, 18 June 2012, par. 38 (“there is no evidence that the Claimant ever applied for provisional release, pursuant to Rule 65, and in this sense he can be said to have contributed to his own continued pre-trial detention”).

persons' "very solid guarantees of appearance in France" and their prior record of respecting their obligations during release.¹²¹

The next section will examine the general principles underlying the procedural set-up of the pre-trial detention regime at the *ad hoc* tribunals and the SCSL. They will be helpful in the further comparative analysis. These principles include the burden of proof, the standard of proof as well as the presence (or absence) of discretion.

II.2.1. Unfettered discretion to refuse release

The wording of Rule 65 (B) ('[p]rovisional release *may* be ordered') indicates that even where the conditions under Rule 65 (B) are fulfilled, the Trial Chamber retains the discretion to refuse provisional release.¹²² In general, the Judges hold an unfettered discretion to deny provisional release.¹²³ Consequently, Rule 65 (B) does not exhaustively list the reasons why provisional release may be refused.¹²⁴ In this regard, the *ad hoc* tribunals (and the SCSL) adopt a *bifurcated approach*.¹²⁵ While the Trial Chamber will only grant provisional release where the requirements of Rule 65 (B) are satisfied, the Chamber maintains its discretion to refuse provisional release. As clarified by the case law, it is at the Chamber's discretion to *refuse* the order where the conditions have been met but, it is not at their discretion to *grant* the order notwithstanding the non-fulfillment of one or more of the requirements.¹²⁶ Since the removal of the 'exceptional circumstances' requirement, the *ad hoc* tribunals have applied

¹²¹ Decision on Request for Release, Re: Laurent Bucyibaruta, Case No. 2007/05293, Paris Court of Appeal, First Examining Chamber, 19 September 2007; Decision on Request for Release, Re: Wenceslas Munyeshyaka, Case No. 2007/05357, Paris Court of Appeal, First Examining Chamber, 19 September 2007.

¹²² Overall, the negative formulation of Rule 65 (B) (provisional release cannot be ordered *unless* a number of requirements are fulfilled) confirms the existence of discretion.

¹²³ ICTY, Decision on Defence Motion for Provisional Release, *Prosecutor v. Kovačević*, Case No. IT-97-24, T. Ch., 20 January 2000, par. 7.

¹²⁴ See e.g. ICTY, Order on Provisional Release of Jadranko Prlić, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, T. Ch. I, 30 July 2004, par. 18.

¹²⁵ M.M. DEFRANK, Commentary: ICTY Provisional Release: Current Practice, a Dissenting Voice, and the Case for a Rule Change, in «Texas Law Review», Vol. 80, 2001 – 2002, p. 1432.

¹²⁶ ICTY, Decision on Motion by Radoslav Brđanin for Provisional Release, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36-PT, T. Ch. II, 25 July 2000, par. 22. As Noted by DEFRANK, the wording ('in general') seems to leave open the door for the Trial Chamber to grant provisional release where the other requirements have not been met: M.M. DEFRANK, Commentary: ICTY Provisional Release: Current Practice, a Dissenting Voice, and the Case for a Rule Change, in «Texas Law Review», Vol. 80, 2001 – 2002, p. 1438. In this regard, the Trial Chamber in *Brđanin* argued, in relation to the length of pre-trial detention, that "it is difficult to envisage *likely* circumstances where provisional releases would be granted to an accused by reason of the likely length of his pre-trial detention where he has been unable to establish that he will appear for trial." See *ibid.*, par. 25.

their discretion to allow the denial of a provisional release request where the other requirements of Rule 65 (B) have been met.

For example, provisional release may be refused in situations where the accused showed obstructive behaviour other than absconding or interfering with witnesses (*e.g.* the destruction of documentary evidence, the effacement of crime traces, conspiring with co-accused who remain at large or where there are serious reasons to believe that the accused would commit further serious offences).¹²⁷

Judge Hunt argued that while the burden of proof is on the accused to prove that he or she will appear for trial and that he or she will not interfere with victims, witnesses or other persons,¹²⁸ the burden shifts once the accused has satisfied the Trial Chamber. There is no additional onus on the accused to persuade the Trial Chamber to exercise its discretion *in favour* of granting a provisional release.¹²⁹ The onus of proof regarding the Trial Chamber's exercise of discretion under Rule 65 (B) is on the Prosecutor. As Hunt argued, such an approach would be in conformity with the ECtHR's jurisprudence, preventing the reinstatement of an 'exceptional circumstances' requirement by requiring the accused to address all possible unidentified factors to persuade the Trial Chamber to use its discretion to grant a motion of provisional release. While this approach is followed by most jurisprudence,¹³⁰ some Trial Chambers have considered the discretionary element to be one which enables release rather than one that prohibits it.¹³¹

¹²⁷ ICTY, Order on Motion for Provisional Release, *Prosecutor v. Ademi*, Case No. IT-01-46-PT, T. Ch., 20 February 2002, par. 22; ICTY, Order on Miodrag Jokić Motion for Provisional Release, *Prosecutor v. Jokić*, Case No. IT-01-42-PT, T. Ch., 20 February 2002, par. 21; ICTY, Order on Provisional Release of Jadranko Prlić, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, T. Ch. I, 30 July 2004, par. 18. Consider also ICTY, Decision on Provisional Release, *Prosecutor v. Šainović et al.*, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, par. 74 (noting that in light of the presumption of innocence "some care would have to be exercised to ensure that there was at least a real prospect that such conspiracy would occur, rather than a mere suspicion that it may occur").

¹²⁸ See the discussion *infra*, Chapter 8, II.2.2.

¹²⁹ ICTY, Decision on Provisional Release, *Prosecutor v. Šainović et al.*, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, Dissenting Opinion of Judge David Hunt on Provisional Release, par. 82.

¹³⁰ ICTY, Order on Miodrag Jokić Motion for Provisional Release, *Prosecutor v. Jokić*, Case No. IT-01-42-PT, T. Ch., 20 February 2002, par. 21 ("a Trial Chamber will still retain a discretion *not* to grant provisional release").

¹³¹ See *e.g.* ICTY, Decision on Defence Motion for Provisional Release, *Prosecutor v. Milošević*, Case No. IT-98-29/1-PT, T. Ch. II, 13 July 2005, par. 4 ("This Trial Chamber considers that even if the Accused fully discharges his burden in relation to each element, he must then satisfy the Chamber having regard to all the circumstances, that it should exercise its discretion to order provisional release." Note that the Trial Chamber refers in this regard to the holding by the Trial Chamber in the *Brđanin and Talić* Decision of 25 July 2000, which does not seem to support this reasoning); ICTY, Decision on the Motion for Provisional Release of the

Overall, there is no exhaustive list detailing what factors may lead the Trial Chamber to decline the order of provisional release where the other requirements are met. In that regard, Rule 65 (B) is “impermissibly vague”.¹³² FAIRLIE notes that “the judges have truly made themselves the unrestrained masters of an accused person’s destiny by ‘failing to give direction as to how to exercise [their] discretion, so that this exercise may be controlled.’”¹³³

II.2.2. The burden of proof rests with the accused

The question of who carries the burden of proof is closely related to the question of whether or not detention is the exception or the rule.¹³⁴ However, the question has been raised as to whether or not a burden of proof should be allocated, where Rule 65 (B) ICTY RPE makes provisional release dependant on the Trial Chamber being satisfied that certain requirements are fulfilled, without an indication as to what party should fulfil these requirements. However, such an idea was dismissed in the case law.¹³⁵ On one occasion, an ICTY Trial Chamber hinted to the importance of allocating the burden of proof, where it stated that it could not conduct its own investigations but, rather, that it should rely on the submissions made by the

Accused Momir Talić, *Prosecutor v. Brđanin et Talić.*, Case No. It-99-36-T, T. Ch. II, 20 September 2002, par. 22; ICTY, Decision on Vinko Pandurević’s Application for Provisional Release, *Prosecutor v. Pandurević and Trbić*, Case No. IT-05-86-PT, T. Ch. II, 18 July 2005, par. 9 (“[i]t should be noted that by the terms of Rule 65 (B) it is a discretion to order provisional release, not a discretion to refuse to order provisional release”); ICTY, Decision Concerning Motion for Provisional Release of Milan Gvero, *Prosecutor v. Tolimir et al.*, Case No. IT-04-80-PT, T. Ch II, 19 July 2005, par. 8 (“However, if the Trial Chamber is satisfied regarding these two preconditions [the conditions of Rule 65 (B)], the Chamber must then determine whether it should exercise its discretion to order release. Hence, if the Chamber is not satisfied that the discretion should be exercised, there is no order for release. It is not a discretion to refuse to order release, as the Prosecution submission suggests”); ICTY, Decision Concerning Motion for Provisional Release of Radivoje Miletić, *Prosecutor v. Tolimir et al.*, Case No. IT-04-80-PT, T. Ch. II, 19 July 2005, par. 8.

¹³² M.A. FAIRLIE, *The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled*, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, p. 1171.

¹³³ *Ibid.*, p. 1173.

¹³⁴ ICTY, Decision on Motion by Momir Talić for Provisional Release, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36, T. Ch. II, 28 March 2001, par. 17; SCSL, Decision on the Motion by Morris Kallon for Bail, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-PT, T. Ch., 23 February 2004, par. 29. But consider M.M. DEFRANK, *Commentary: ICTY Provisional Release: Current Practice, a Dissenting Voice, and the Case for a Rule Change*, in «Texas Law Review», Vol. 80, 2001 – 2002, p. 1449 (arguing that “no direct causal relationship exists between the defense’s burden of proof and a general rule of detention”).

¹³⁵ ICTY, Decision on Momočilo Krajišnik’s Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik and Plavšić*, Case No. IT-00-39 & 40-PT, T. Ch., 8 October 2001, Dissenting Opinion of Judge Patrick Robinson, par. 14 (however, Judge Robinson rejected the idea because “if at the end of the day there is a balance in the evidence, for and against bail or provisional release, the only way the issue can be settled is on the basis of an appreciation as to whether the burden is on the Prosecutor or the Defence”); M.A. FAIRLIE, *The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled*, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, pp. 1137 -1138 (the author rejects the idea where she holds that “[t]he adversarial aspect inherent in the process that accompanies provisional release determinations is pervasive.” Such adversarial scheme, where the evidence is produced by the parties and witnesses are summoned by the parties on their own motions, necessitates a determination of the question of the allocation of the burden of proof).

parties.¹³⁶ Where this argument holds true on a practical level, it is argued that Rule 98 ICTY, ICTR and SCSL RPE allows the Judges (also pre-trial) to order the parties to produce additional evidence or to summon witnesses *proprio motu*. Therefore, the argument that Rule 65 ICTY, ICTR and 65 SCSL RPE can be read as not allocating a burden of proof is not to be dismissed too lightly.

However, notwithstanding the amendment of Rule 65 (B) ICTY, ICTR and SCSL RPE, the practice reveals that the burden of proof clearly rests on the accused person.¹³⁷ Besides, the burden is a *substantial* one, in light of the tribunal's jurisdictional and enforcement limitations, including the need to rely on local or international authorities to monitor the movements and conduct of the accused and to effect its arrest warrants.¹³⁸ As the Trial Chamber stated in *Brđanin*, "placing the burden of proof on the applicant for provisional release to prove these two matters is justified by the absence of any power in the Tribunal to execute its own arrest warrants. [...] [T]he Tribunal is dependent upon local authorities and

¹³⁶ ICTY, Second Decision on Nebojsa Pavković Provisional Release, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, T. Ch. III, 18 November 2005, par. 12.

¹³⁷ See e.g. ICTY, Decision on Mr. Perišić Motion for Provisional Release, *Prosecutor v. Perišić*, Case No. IT-04-81-T, T. Ch. I, 31 March 2010, par. 12; ICTY, Decision on Application for Leave to Appeal, *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-AR65, A. Ch., 7 September 2000, p. 3; ICTY, Decision on Momočilo Krajišnik's Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik and Plavšić*, Case No. IT-00-39 & 40-PT, 8 October 2001, par. 13 ("[t]here is nothing in customary international law to prevent the placing of such a burden [on the accused] in circumstances where an accused is charged with very serious crimes, where an International Tribunal has no power to execute its own arrest warrants, and where the release of an accused carries with it the potential for putting the lives of victims and witnesses at risk. These factors add further weight to the placing of the burden of proof upon the accused"); SCSL, Fofana - Appeal against Decision Refusing Bail, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, A. Ch., 11 March 2005, par. 33 ("absent legislation to the contrary, the burden of proving a proposition in a court room rests upon the party obliged to assert it, and the language of Rule 65 (B) [...] confirms that the burden lies squarely on the applicant"). Such view is also supported by the ICTY Manual on Developed practices: ICTY Manual on Developed Practices, Turin, UNICRI Publisher, 2009, p. 65. As noted by FAIRLIE, the placing of such burden on the accused is consistent with the *actori incumbit probatio* principle, which entails that the party who asserts the fact, should provide proof thereof. See M.A. FAIRLIE, The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, p. 1139, referring to M. KAZAZI, Burden of Proof and Related Issues: A Study of Evidence Before International Tribunals, Kluwer Law International, The Hague – London – Boston, 1996, pp. 116 – 117.

¹³⁸ See *supra*, Chapter 7, II.3.1. ICTY, Decision on Motion by Radoslav Brđanin for Provisional Release, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36-PT, T. Ch. II, 25 July 2000, par. 18; ICTY, Decision on Motions for Re-consideration, Clarification, Request for Release and Applications for Leave to Appeal, *Prosecutor v. Prljić et al.*, Case Nos. IT-04-74-AR65.1; IT-04-74-AR65.2; IT-04-74-AR65.3, A. Ch., 8 September 2001, par. 25; ICTY, Decision on Defence Renewed Motion for Provisional Release of Fatmir Limaj, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, T. Ch. II, 26 October 2005, par. 8; ICTY, Decision Concerning Motion for Provisional Release of Radivoje Miletić, *Prosecutor v. Tolimir et al.*, Case No. IT-04-80-PT, T. Ch. II, 19 July 2005, par. 8; ICTY, Decision Concerning Motion for Provisional Release of Milan Gvero, *Prosecutor v. Tolimir et al.*, Case No. IT-04-80-PT, T. Ch. II, 19 July 2005, par. 8.

international bodies to act on its behalf.”¹³⁹ Thus, similar to the *ad hoc* tribunals’ justifications for the ‘exceptional circumstances’ requirement, the jurisprudence refers to the unique circumstances under which the international criminal tribunals operate as allowing for a stricter approach to provisional release. Nevertheless, in *Brđanin*, the Trial Chamber underlined the fact that the substantial burden placed on the accused does *not* imply a re-introduction of the ‘exceptional circumstances’ requirement but is “simply an acceptance of the reality of the situation in which both the Tribunal and the applicants for provisional release find themselves.”¹⁴⁰ Judge Robinson criticised this reversed burden. In his dissenting opinion to the *Krajišnik* case, he argued that the tribunal has given undue prominence to its lack of a police force, its inability to execute arrest warrants in states and its corresponding reliance on states for such execution.¹⁴¹ Judge Robinson added that “[a] judicial body cannot rely on peculiarities in its system to justify derogations from a rule of customary international law.”¹⁴²

While Judge Robinson accepted that certain modifications should be made where norms normally applied at the domestic level are transposed to the international level, he held that such modifications should be the result of *norm interpretation* (in conformity with Article 31 of the VCLT).¹⁴³ In most cases, modifications will result from an appropriate use of the teleological and contextual methods of interpretation.¹⁴⁴ He concluded that there is no legal basis in international human rights treaties for a different interpretation at the municipal or the international level. Besides, there is no provision in the Statute of the ICTY for a derogation of these international human rights norms, which are customary in nature. As mentioned earlier, Judge Robinson argued that the purpose of the amendment of Rule 65 (B) ICTY RPE and the deletion of the ‘exceptional circumstances’ requirement was to bring the rule in line with international human rights law.¹⁴⁵ Consequently, he held that “[t]he history of the amendment does not support any interpretation of the Rule as imposing a burden on the

¹³⁹ ICTY, Decision on Motion by Momir Talić for Provisional Release, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36, T. Ch. II, 28 March 2001, par. 18.

¹⁴⁰ ICTY, Decision on Motion by Radoslav Brđanin for Provisional Release, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36-PT, T. Ch. II, 25 July 2000, par. 18.

¹⁴¹ ICTY, Decision on Momočilo Krajišnik’s Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik and Plavšić*, Case No. IT-00-39 & 40-PT, 8 October 2001, Dissenting Opinion of Judge Patrick Robinson, par. 11.

¹⁴² *Ibid.*, par. 11.

¹⁴³ *Ibid.*, par. 10 (“it is the interpretative function that must yield these modifications”).

¹⁴⁴ *Ibid.*, par. 10.

¹⁴⁵ See *supra*, Chapter 8, II.2.

accused to prove the matters set out therein, because that would reflect the exceptional character of provisional release, which [...] was changed in November 1999.”¹⁴⁶ Nevertheless, one could argue that a plain reading of the wording of the provision unveils that the burden is on the accused. Otherwise, the formulation would state that the Prosecutor must satisfy the Trial Chamber that the accused will not return for trial and that he or she will pose a danger to any victim, witness or other person.¹⁴⁷

Whether shifting the burden of proof to the accused person is permissible under international human rights norms is doubtful. In the aforementioned *Ilijkov* case, the ECtHR held that:

“[s]hifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is permissible in exhaustively enumerated and strictly defined cases.”¹⁴⁸

In the *Bykov* case, the Grand Chamber of the ECtHR held even more strongly:

“[i]n this connection, the Court reiterates that the burden of proof in these matters should not be reversed by making it incumbent on the detained person to demonstrate the existence of reasons warranting his release.”¹⁴⁹

The presumption of innocence arguably requires that no burden be incumbent on the accused to prove that they do not pose a risk of absconding and of interfering with victims, witnesses and other persons.¹⁵⁰

¹⁴⁶ *Ibid.*, par. 17-18. Judge Robinson clarified that this conclusion is limited to the proper interpretation of Rule 65 (B) as amended. He did not argue that in a system where detention is not mandatory, the burden can never be put on the accused that he satisfies the criteria for bail. He underscored that there are instances where the legislation of many countries impose such a burden on the accused where he is charged with very serious offences. However, the compatibility of such legislation with the jurisprudence of the ECtHR is doubtful.

¹⁴⁷ M.M. DEFRANK, Commentary: ICTY Provisional Release: Current Practice, a Dissenting Voice, and the Case for a Rule Change, in «Texas Law Review», Vol. 80, 2001 – 2002, pp.1442 - 1443.

¹⁴⁸ ECtHR, *Ilijkov v. Bulgaria*, Application No. 33977/96, Judgment of 26 July 2001, par. 85. Reiterated in other cases against Bulgaria, e.g. ECtHR, *Bochev v. Bulgaria*, Application No. 73481/01, Judgment of 13 November 2008, par. 57; ECtHR, *Polonskiy v. Bulgaria*, Application No. 30033/05, Judgment of 19 March 2009, par. 140. See also ECtHR, *Khodorkovskiy v. Russia*, Application No. 5829/04, Judgment of 31 May 2011, par. 185.

¹⁴⁹ As confirmed in ECtHR, *Bykov v. Russia*, Application No. 4378/02, Judgment (Grand Chamber) of 10 March 2009, par. 64.

¹⁵⁰ Similarly, see C.L. DAVIDSON, No shortcuts on Human Rights: Bail and the International Criminal Trial, in «American University Law Review», Vol. 60, 2010, p. 17; S. ZAPPALÀ, Human rights in International Criminal Proceedings, Oxford, Oxford University Press, 2003, p. 85; R. SZNAJDER, Provisional Release at the

§ *Corresponding prosecutorial burden*

Although the burden of proof is on the Defence, such a burden corresponds with some sort of ‘prosecutorial burden’, at least as far as the requirement that the accused will not pose a danger to victims, witnesses and other persons is concerned.¹⁵¹ Indeed, as noted by one ICTY Trial Chamber, the format of Rule 65 leads to a practical problem insofar that it puts the onus on the accused person to satisfy the Trial Chamber that he or she will appear for trial and will not pose a danger to any victim, witness or other person. “In the absence of any submission from the Prosecution setting out a basis indicative of the potential of such danger, it is difficult to see that a Trial Chamber could do other than conclude that the Accused will not pose such a danger.”¹⁵² The Chamber added that, since the Trial Chamber is not in a position to conduct an investigation but reliant on the material presented by the parties in view of the general adversarial nature of provisional release hearings, it would be far more satisfactory if the onus were placed upon the Prosecutor to show that the Accused would not appear for trial and would pose a danger. “There seems no reason, consistent with the presumption of innocence, why that should not be the order of things.”¹⁵³ The Appeals Chamber in *Haradinaj* also referred to this problem and held that the Chamber may demand the presence of at least *some* evidence that the accused person poses a danger, at which point the burden is on the Defence to refute it.¹⁵⁴ This holding confirmed the Appeals Chamber’s earlier holding in the

ICTY: Rights of the Accused and the Debate that Amended a Rule, in «Northwestern University Journal of International Human Rights», Vol. 11, 2013, p. 113.

¹⁵¹ In this regard, it was noted by one commentator that “it can be noted that, in disposing of a number of more recent requests for provisional release, each ICTY trial chamber has at one point or another implicitly assigned a prosecutorial burden of proof as regards the dangerousness prong [requirement that the person will not interfere with victims, witnesses or other persons] of the provisional release rule.” See M.A. FAIRLIE, *The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled*, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, p. 1153.

¹⁵² ICTY, Second Decision on Nebojša Pavković Provisional Release, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, T. Ch. III, 18 November 2005, par. 12.

¹⁵³ *Ibid.*, par. 12 (referring to the dissenting opinion of Judge Robinson). This decision followed a decision of the Appeals Chamber remanding the matter to the Trial Chamber for reconsideration. Notably, in its decision, the Appeals Chamber quashed the prior decision by the Trial Chamber where it found that “the Trial Chamber appears, in effect, to have switched the burden to the Prosecution to show that the Accused would pose a danger if released. In the putative absence of such information, the Trial Chamber appears to have assumed the lack of a danger posed by the Accused’s release. If the Trial Chamber found, as it must have done so here, that the Accused upon release will pose no danger to persons, then it must provide the reasons for reaching that finding.” See ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković’s Provisional Release, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.1, A. Ch., 1 November 2005, par. 11.

¹⁵⁴ ICTY, Decision on Ramush Haradinaj’s Modified Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006, par. 41.

Stanišić case that “the Prosecution has failed to provide any evidence showing that the Accused would represent a concrete risk of harm to victims and witnesses upon release.”¹⁵⁵

Consequently, the burden incumbent on the accused is to ‘make the bare assertion’ that he or she will not abscond and will not pose a danger to victims, witnesses or other persons. Once such assertion has been made by the Defence, the onus shifts to the Prosecutor to rebut this assertion.¹⁵⁶ This ‘prosecutorial burden’ should be seen in light of the jurisprudence which requires a concrete danger to witnesses, victims or other persons.¹⁵⁷ According to the Appeals Chamber, such an obligation on the Prosecutor does not entail a reversal of the burden of proof. Rather it is “the means by which the Prosecutor may rebut the evidence adduced by the accused in satisfaction of the burden placed upon him.”¹⁵⁸

Fairness concerns have been leveled against such a prosecutorial burden, particularly where it has not been uniformly applied and where, in the absence of a legal presumption, it results in “a guessing game for the prosecution as to whether it is required in a given case to put on evidence with regard to the asserted accused-based burden.”¹⁵⁹ Besides, it has been argued that such a burden does not contribute to the efficiency of the proceedings, where the accused should be given the opportunity to respond to the Prosecutor’s accusations.¹⁶⁰

¹⁵⁵ ICTY, Decision on Interlocutory Appeal against Trial Chamber’s Decision Granting Provisional Release, *Prosecutor v. Tolimir et al.*, Case No. IT-04-80-AR65.1, A. Ch., 19 October 2005, par. 27. Also ICTY Trial Chambers have routinely accepted such prosecutorial burden. Consider *e.g.* ICTY, Decision on Second Application for Provisional Release, *Prosecutor v. Ljubičić*, Case No. IT-00-41-PT, T. Ch., 26 July 2005, par. 26 (“Considering that no suggestion has been made that the Accused has interfered with the administration of justice since the Indictment was confirmed against him, the Prosecution’s suggestion that, if released, the Accused may pose a danger to witnesses and victims is insufficiently supported by the evidence. No concrete danger has been identified”); ICTY, Decision on Second Application for Provisional Release, *Prosecutor v. Milutinović*, Case No. IT-99-37-PT, T. Ch. III, 14 April 2005, par. 24.

¹⁵⁶ F. GAYNOR, Provisional Release in the Law of the International Criminal Tribunal for the Former Yugoslavia, in J. DORIA, H-P GASSER, and M.C. BASSIOUNI (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Leiden – Boston, Martinus Nijhoff Publishers, 2009, p. 196.

¹⁵⁷ See *infra*, Chapter 8, II.2.6.2.

¹⁵⁸ ICTY, Decision on Motions for Re-consideration, Clarification, Request for Release and Applications for Leave to Appeal, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.1; IT-04-74-AR65.2; IT-04-74-AR65.2, A Bench of the A. Ch., 8 September 2004, par. 28.

¹⁵⁹ M.A. FAIRLIE, The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, pp. 1154-1156.

¹⁶⁰ *Ibid.*, p. 1150, 1155, 1158. It should be noted that there is no obligation for the Trial Chamber to organise an oral hearing before deciding on a request for provisional release. See ICTY, Decision on Ljube Boskoški’s Interlocutory Appeal on Second Motion for Provisional Release, *Prosecutor v. Boskoški and Tarčulovski*, Case No. IT-04-82-AR65.3, A. Ch., 28 August 2006, par. 12; ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Savo Todović’s Application for Provisional Release, *Prosecutor v. Rasević and Todović*, Case No. IT-97-25/1-AR65.1, A. Ch., 7 October 2005, par. 29.

GAYNOR has noted that putting the onus on the Defence is ‘unusual’ in criminal proceedings, but “[i]t is even rarer to require him to prove that a *future* event is likely to occur or, trickier still, *not* to occur.”¹⁶¹ Indeed, Rule 65 (B) ICTY, ICTR and SCSL RPE requires the accused to prove a negative, to prove that he or she will not abscond and will not pose a danger to any victim, witness or other person. Nevertheless, while it has been held historically that it is more difficult to prove a negative, the idea that the burden should always be on the party making an affirmative allegation has been rejected.¹⁶² In that regard, FAIRLIE refers to the writing of SAUNDERS who claims that there is no inherent difficulty in proving negative statements.¹⁶³ Rather, difficulties arise from the nature of the proposition that needs to be proven and whether they are *existential* or *universal* propositions (the former refers to *some* individual or entity while the latter refers to *every* individual or entity in the universe).¹⁶⁴ To establish an existential proposition, only information related to one entity or individual should be provided, while large (unquantified) amounts of information (regarding all individuals or entities) are necessary to establish a universal proposition.¹⁶⁵

Consequently, while there is no problem with the accused having to prove a negative proposition, the same cannot be said about requiring the accused to prove that a *future event* will *not* occur. As FAIRLIE states, the accused is required to establish “that he will not likely do *anything* that may harm *any* person if released.”¹⁶⁶ Corresponding to such an unquantifiable burden of proof is a prosecutorial burden requiring “the demonstration that an accused will likely do *something* that will endanger *someone*.”¹⁶⁷ This latter burden only

¹⁶¹ F. GAYNOR, Provisional Release in the Law of the International Criminal Tribunal for the Former Yugoslavia, in J. DORIA, H-P GASSER, and M.C. BASSIOUNI (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Leiden – Boston, Martinus Nijhoff Publishers, 2009, p. 195.

¹⁶² M.A. FAIRLIE, The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled, in «*Fordham International Law Journal*», Vol. 33, 2009 – 2010, pp. 1140-1141. For a different view, consider REARICK, who argues that “the accused is forced to prove a negative.” “For someone already accused of genocide, this task is nearly impossible.” See D.J. REARICK, Innocent Until Alleged Guilty, Provisional Release at the ICTR, in «*Harvard International Law Journal*», Vol. 44, 2003, p. 582.

¹⁶³ M.A. FAIRLIE, The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled, in «*Fordham International Law Journal*», Vol. 33, 2009 – 2010, pp. 1141 -1143; K. W. SAUNDERS, The Mythic Difficulty in Proving a Negative, in «*Seton Hall Law Review*», Vol. 15, 1984 -1985, pp. 280-282.

¹⁶⁴ *Ibid.*, pp. 281, 288.

¹⁶⁵ *Ibid.*, p. 281.

¹⁶⁶ M.A. FAIRLIE, The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled, in «*Fordham International Law Journal*», Vol. 33, 2009 – 2010, p. 1143 (emphasis in original).

¹⁶⁷ *Ibid.*, p. 1143.

requires “a finite piece of evidence.”¹⁶⁸ It is difficult to see how the accused are to satisfy this burden, in the absence of concrete indications of concrete submissions by the Prosecution.¹⁶⁹

II.2.3. Standard of proof

It follows from the wording of Rule 65 (B) ICTY, ICTR and SCSL that the Trial Chamber may only grant provisional release where it is *satisfied* that the accused will appear for trial, and if released will not pose a danger to any victim, witness or other person.¹⁷⁰ Although the provision does not clearly set forth the standard of proof that is required, this provision has uniformly been understood as implying a ‘balance of probabilities’ standard (that more probably than not what is asserted is true).¹⁷¹ However, in the *Šainović and Ojdanić* case, the Prosecution argued that the standard should be higher and the burden of proof incumbent on the accused should be *that there is no real risk* that he or she will fail to appear for trial or pose any danger to victims or witnesses.¹⁷² While the issue was not addressed in the Appeals Chamber’s decision, it was addressed by Judge Hunt in his dissenting opinion attached to it. He rejected the idea of a ‘no real risk’ burden and concluded that there is no intermediate standard between ‘preponderance of probabilities’ and the ‘beyond reasonable doubt’ standard.¹⁷³ Previous case law of the ICTY, including a decision in the *Brđanin et al.* case, referred to the *substantial burden of proof that rests on the accused to satisfy the court that he*

¹⁶⁸ *Ibid.*, p. 1143.

¹⁶⁹ *Ibid.*, p. 1144 (FAIRLIE notes that “[p]resumably, an accused can put forth general evidence of a good character and peaceful nature, but it’s fair to question how much weight will be given to such assertions made by an accused war criminal and those close to him”).

¹⁷⁰ Rule 65 (B) ICTY, ICTR and SCSL RPE (emphasis added).

¹⁷¹ See e.g. ICTY, Decision on Mr. Perišić Motion for Provisional Release, *Prosecutor v. Perišić*, Case No. IT-04-81-T, T. Ch. I, 31 March 2010, par. 12; ICTY, Decision on Stojan Župljanin’s Motion for Provisional Release, *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-PT, T. Ch. III, 30 June 2009, par. 5; ICTY, Decision on Motion for Provisional Release, *Prosecutor v. Halilović*, Case No. IT-01-48-T, T. Ch. I, Section A, 1 September 2005, p. 6; ICTY, Decision on Savo Todović’s Application for Provisional Release, *Prosecutor v. Rasević and Todović*, Case No. IT-97-25/1-PT, T. Ch., 22 July 2005, par. 8; ICTY, Decision on Vinko Pandurević’s Application for Provisional Release, *Prosecutor v. Pandurević and Trbić*, Case No. IT-05-86-PT, T. Ch. II, 18 July 2005, par. 9; ICTY, Decision on Defence Motion for Provisional Release, *Prosecutor v. Milošević*, Case No. IT-98-29/1-PT, T. Ch. II, 13 July 2005, par. 4; ICTY, Decision on Momčilo Perišić’s Motion for Provisional Release, *Prosecutor v. Perišić*, Case No. IT-04-81-PT, T. Ch., 9 June 2005, p. 2; ICTY, Order on Provisional Release of Valentin Čorić, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, T. Ch. I, 30 July 2004, par. 14. Consider also ICTY, Decision on Momočilo Krajišnik’s Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik and Plavšić*, Case No. IT-00-39 & 40-PT, 8 October 2001, Dissenting Opinion of Judge Patrick Robinson, par. 30.

¹⁷² ICTY, Decision on Provisional Release, *Prosecutor v. Šainović and Ojdanić*, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, Dissenting Opinion of Judge David Hunt on Provisional Release, par. 27.

¹⁷³ *Ibid.*, par. 29.

or she will appear for trial.¹⁷⁴ Nevertheless, according to Judge Hunt, this only refers to the difficulties that the accused will have, given the specific context in which the tribunal operates.¹⁷⁵ Judge Shahabuddeen indicated in his separate opinion to the Appeals Chamber's decision that the burden of proof should be higher than the 'balance of probabilities'. He drew inspiration from the intermediate 'clear and convincing evidence' standard which is applied in the United States as an intermediate standard between the 'preponderance of probabilities' and the 'beyond reasonable doubt' standard.¹⁷⁶ In his opinion, while the presumption of innocence should be taken into consideration, attention should also be given to the particular circumstances of the tribunal, including its inability to execute its own arrest warrants.¹⁷⁷ He concluded that the appropriate test is *to produce substantial grounds to the Trial Chamber to make it believe* that the accused would in fact appear for trial and, if released, would not pose a danger to any witness, victim or other person.¹⁷⁸

While such a heightened burden was rightly rejected by the subsequent case law, there are some intriguing examples to the contrary. In one decision, the Appeals Chamber seems to have applied yet another standard of proof by requiring 'a convincing showing' that the accused, if released, would appear for trial and would not pose a danger to any victim, witness or other person.¹⁷⁹ Such a standard closely resembles the standard proposed by Judge Shahabuddeen. Similarly, a string of decisions stemming from ICTY Trial Chamber II interprets Rule 65 (B) as requiring a 'clear and strong case'.¹⁸⁰ It is self-evident that these

¹⁷⁴ In *Brđanin*, the Trial Chamber underlined that the circumstances "place a substantial burden on any applicant for provisional release to satisfy the Trial Chamber that he will indeed appear for trial if released." Rather than such holding being a re-introduction of the requirement that exceptional circumstances be established, it is simply an acceptance of the situation the Tribunal and the applicants are in. See, ICTY, Decision on Motion by Radoslav Brđanin for Provisional Release, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36-PT, T. Ch. II, 25 July 2000, par. 18. Consider also ICTY, Decision on Motion by Momir Talić for Provisional Release, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36, T. Ch. II, 28 March 2001, par. 18 ("placing the burden of proof on the applicant for provisional release to prove these two matters is justified by the absence of any power in the Tribunal to execute its own arrest warrants. [...] [T]he Tribunal is dependent upon local authorities and international bodies to act on its behalf.")

¹⁷⁵ ICTY, Decision on Provisional Release, *Prosecutor v. Šainović and Ojdanić*, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, par. 30. Note that Judge Hunt was the Presiding Judge of Trial Chamber II which issued the provisional release decision in the *Brđanin et al.* case.

¹⁷⁶ *Ibid.*, Separate Opinion of Judge Shahabuddeen, par. 17 and following.

¹⁷⁷ *Ibid.*, par. 38.

¹⁷⁸ *Ibid.*, par. 41.

¹⁷⁹ ICTY, Decision on Ramush Haradinaj's Modified Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006, par. 26.

¹⁸⁰ ICTY, Decision on Defence Renewed Motion for Provisional Release of Fatmir Limaj, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, T. Ch. II, 26 October 2005, par. 8 and footnotes (explicitly referring to the Separate Opinion of Judge Shahabuddeen mentioned above); ICTY, Decision Concerning Renewed Motion for Provisional Release of Johan Tarčulovski, *Prosecutor v. Bošković and Tarčulovski*, Case No. IT-04-82-PT, T. Ch.

different standards of proof lead to an undesirable unpredictability as to the exact standard of proof that is to be met.

It should equally be asked what the standard of proof is for the ‘corresponding prosecutorial burden’ that was established earlier. On one occasion, the Trial Chamber hinted towards the applicable standard where it held that the standard “must not be set too high; else it would never be met.”¹⁸¹ Such a vague position does not allow for a clear establishment of the required standard of proof. There is concern that such a standard is lower than the corresponding onus on the accused, thus decreasing the value of such a corresponding prosecutorial burden.¹⁸²

II.2.4. General principle of proportionality

A considerable string of cases examined the proportionality of continued detention in the assessment of applications for provisional release.¹⁸³ It was concluded in Chapter 6 that a principle of proportionality applies to and delimits all coercive measures imposed, whether

II, 17 January 2007, par. 9; ICTY, Decision Concerning Motion for Provisional Release of Milan Gvero, *Prosecutor v. Tolimir et al.*, Case No. IT-04-80-PT, T. Ch II, 19 July 2005, par. 8; ICTY, Decision Concerning Motion for Provisional Release of Radivoje Miletić, *Prosecutor v. Tolimir et al.*, Case No. IT-04-80-PT, T. Ch. II, 19 July 2005, par. 8.

¹⁸¹ ICTY, Further Decision on Brahimaj’s Motion, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, T. Ch. II, 3 May 2006, par. 39.

¹⁸² M.A. FAIRLIE, The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, p. 1163.

¹⁸³ ICTY, Decision Granting Provisional Release to Enver Hadžihasanović, *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, T. Ch. II, 19 December 2001; ICTY, Decision Granting Provisional Release to Mehmed Alagić, *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, T. Ch. II, 19 December 2001, par. 8; ICTY, Decision Granting Provisional Release to Amir Kubura, *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, T. Ch. II, 19 December 2001, par. 8; ICTY, Decision on Vidoje Blagojević’s Application of Provisional Release, *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-PT, T. Ch. II, 22 July 2002, par. 29; ICTY, Decision on Dragan Obrenović’s Application of Provisional Release, *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-PT, T. Ch. II, 22 July 2002, par. 39; ICTY, Decision on the Motion for Provisional Release of the Accused Momir Talić, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36-T, T. Ch. II, 20 September 2002, p. 4, ICTY, Decision on Darko Mrđa’s Request for Provisional Release, *Prosecutor v. Mrđa*, Case No. IT-02-59-PT, T. Ch. II, 15 April 2003, par. 31; ICTY, Order on Provisional Release of Jadranko Prlić, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, T. Ch. I, 30 July 2004, par. 15; ICTY, Decision on Second Motion for Provisional Release, *Prosecutor v. Martić*, Case No. IT-95-11-PT, T. Ch. I, 12 September 2005, par. 13. The Appeals Chamber confirmed this ‘principle of proportionality’ in ICTY, Decision on Fatmir Limaj’s Request for Provisional Release, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-AR65, A. Ch., 31 October 2003, par. 13. For the SCSL consider: SCSL, Decision on the Urgent Defence Application for Release from Provisional Detention, *Prosecutor v. Kondewa*, Case No. SCSL-2003-12-PT, T. Ch., 21 November 2003, par. 40-42; SCSL, Decision on the Urgent Defence Application for Release from Provisional Detention, *Prosecutor v. Fofana*, Case No. SCSL-2003-11-P[T], T. Ch., 21 November 2003, par. 40-42. In relation to a change in the conditions of detention, consider SCSL, Motion for Modification of the Conditions of Detention, *Prosecutor v. Norman*, Case No. SCSL-2003-08-PT, President, 23 July 2003.

custodial or non-custodial in nature.¹⁸⁴ Coercive measures are proportional only when they are (1) suitable, (2) necessary and where (3) their degree and scope remain in a reasonable relationship to the envisaged target. The provisional measures should at no time be capricious or excessive. A principle of subsidiarity applies and the more lenient measure must be applied where that would be sufficient.

From that point of view, it should be noted with concern that part of the jurisprudence does not contemplate the application of such a principle. Proof of the divergent views and the hesitation regarding the scope of the principle of proportionality can be found in Judge Hunt's dissent in the *Šainović et al.* case. He argued that although some 'ingredients' of the proportionality test are relevant considerations in the application of the tribunal's discretion under Rule 65 (B), its general application may be problematic. He argued that it is "unwise to introduce such a concept of "proportionality" as an additional matter, beyond the express requirements of Rule 65 (B), which "must" be taken into account under Rule 65 (B)."¹⁸⁵ Judge Hunt reminds that the *ad hoc* tribunals have substantially departed from ECtHR jurisprudence in relation to provisional release by recognising that it operates in a very different context at the *ad hoc* tribunals than in domestic states. In that sense, the terms of Rule 65 (B) already provide for the required balance between the public interest and respect for the presumption of innocence and the right to individual liberty. Nevertheless, the considerations of public interest, including the right to individual liberty, are relevant considerations in the Trial Chamber's exercise of its discretion.¹⁸⁶ Again, the peculiarities of the international criminal tribunals are relied upon to justify a further deviation from international human rights norms. While it may be argued that the drafting of Rule 65 (B) ICTY, ICTR and SCSL RPE reflects, on one hand, the balance between the right to individual liberty and the presumption of innocence and public interest considerations on the other, Judge Hunt's dissent lacks any explanation as to why the peculiarities of the international criminal tribunals entail that the principle of proportionality may be dismissed in the international criminal context.

¹⁸⁴ See *supra*, Chapter 6, I.5.

¹⁸⁵ ICTY, Decision on provisional Release, *Prosecutor v. Šainović et al.*, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, Dissenting Opinion of Judge David Hunt on Provisional Release, par. 76.

¹⁸⁶ *Ibid.*, par. 76.

Furthermore, confusion persists regarding the *scope* of the principle of proportionality. It has been noted in the literature that such a principle forms part of the Trial Chamber's discretionary power pursuant to Rule 65 (B) ICTY, ICTR and SCSL RPE.¹⁸⁷ It was noted that "effectively, this scheme means that the requirement of proportionality [...] first comes into play when the prerequisites for bail in Rule 65 (B) are met, but is not an overall prerequisite for the deprivation of liberty."¹⁸⁸ Such a proposition should be rejected. As discussed earlier, if the Trial Chamber's discretionary power is limited to the discretion to *refuse* provisional release in a given case, the application of a principle of proportionality is limited to an assessment of whether provisional release should be *rejected* when the conditions of Rule 65 (B) have been fulfilled. This entails a limited and negative application of proportionality as an additional mechanism to deny provisional release in cases where provisional detention is considered proportionate.

The principle of proportionality can also not be put on the same level as the other requirements of Rule 65 (B), where these are conjunctive in nature. This would entail that three conditions would have to be fulfilled including the condition that detention would be disproportionate. Therefore, it is argued that the principle of proportionality should be considered an overarching principle instead. Such an interpretation is in line with the jurisprudence of the ICTY which did not envisage limiting the principle of proportionality in such a way but, rather, considered that "when interpreting Rule 65, the general principle of proportionality must be taken into account."¹⁸⁹

II.2.5. Interlocutory appeals against provisional release decisions

In 1997, Rule 65 ICTY RPE was amended, adding the possibility to appeal provisional release decisions upon leave from a bench of three Judges of the Appeals Chamber and upon

¹⁸⁷ F. GAYNOR, Provisional Release in the Law of the International Criminal Tribunal for the Former Yugoslavia, in J. DORIA, H-P GASSER, and M.C. BASSIOUNI (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Leiden – Boston, Martinus Nijhoff Publishers, 2009, p. 198.

¹⁸⁸ H. FRIMAN, Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the Special Court for Sierra Leone 2003 – 2004*, Vol. IX, Antwerp, Intersentia, 2006, p. 346.

¹⁸⁹ Consider *e.g.* ICTY, Decision Granting Provisional Release to Enver Hadžihasanović, *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, T. Ch. II, 19 December 2001; ICTY, Order on Provisional Release of Jadranko Prlić, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, T. Ch. I, 30 July 2004, par. 15.

showing ‘serious cause’.¹⁹⁰ Before this amendment, accused tried to appeal decisions on provisional release under Rule 72 (B) (ii) ICTY RPE (which provided for interlocutory appeals against preliminary motions upon leave by a bench). Nevertheless, the Appeals Chamber refused to entertain interlocutory appeals under the said provision. Rule 72 (B) (ii) ICTY RPE included a similar requirement of ‘serious cause’ as was included in the amended Rule 65 (D) ICTY RPE, and which the Appeals Chamber had been interpreted as encompassing:

“a serious cause, [...] either [...] a grave error in the decision which would cause substantial prejudice to the accused or is detrimental to the interests of justice or [the application] raise[s] issues which are not only of general importance but are also directly relevant to the future development of trial proceedings, in that the decision of the Appeals Chamber would seriously impact upon further proceedings before the Trial Chamber.”¹⁹¹

In November, Rule 65 (D) ICTY RPE was amended a second time and the ‘serious cause’ requirement was replaced by a ‘good cause’ requirement.¹⁹² According to the Appeals Chamber, ‘good cause’ requires that the party seeking leave to appeal should satisfy the bench of the Appeals Chamber that the Trial Chamber *may have erred in making its decision*.¹⁹³

¹⁹⁰ Rule 65 (D) as amended during the thirteenth plenary session (U.N. Doc IT/32/Rev.11, 25 July 1997). No explanation for the said amendment is provided in the annual report (ICTY, Fourth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/52/375, S/1997/729, 18 September 1997, par. 56). Note that the corresponding Rule 65 (E) SCSL RPE requires the leave from a Single Judge of the Appeals Chamber.

¹⁹¹ Consider *e.g.* ICTY, Decision on Application for Leave to Appeal (Provisional Release), *Prosecutor v. Delalić*, Case No. IT-96-21, A Bench of the A. Ch., 15 October 1996, par. 11; ICTY, Decision on Application for Leave to Appeal (Provisional Release) by Hazim Delić, *Prosecutor v. Delalić*, Case No. IT-96-21, A Bench of the A. Ch., 22 November 1996, par. 12 (the Bench of the Appeals Chamber stated that the absence of a right to appeal a decision on provisional release is not a violation of Article 14 (5) ICCPR (and Article 25 ICTY Statute) which only applies to appeals following conviction and sentence (par. 20-21)).

¹⁹² Rule 65 (D) ICTY RPE as amended during the fourteenth plenary session (U.N. Doc. IT/32/Rev.12, 12 November 1997). Compare with Rule 65 (D) ICTR RPE as amended during the fifth plenary session, 1 – 8 June 1998, introducing for the first time a possibility for interlocutory appeal against provisional release decisions.

¹⁹³ ICTY, Decision on Application for Leave to Appeal, *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-AR65, A Bench of the A. Ch., 7 September 2000, p. 3; ICTY, Decision on Application by Dragan Jokić for Leave to Appeal, *Prosecutor v. Blagojević*, Case No. IT-05AR65, A Bench of the A. Ch., 18 April 2002, par. 3; ICTY, Decision on Application by Blagejović and Obrenović for Leave to Appeal, *Prosecutor v. Blagejović et al.*, Case No. IT- 02-60-AR65.3 & 02-60-AR65.4, A Bench of the A. Ch., 16 January 2003, par. 8; ICTY, Decision Refusing Milutinović Leave to Appeal, *Prosecutor v. Milutinović*, Case No. IT-99-37-AR65.3, A Bench of the A. Ch., 3 July 2003, par. 3; ICTY, Decision on Fatmir Limaj’s Request for Provisional Release, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-AR65, A Bench of the A. Ch., 31 October 2003, par. 6-7 (holding that “[a] Trial Chamber “may have erred” when it did not apply the law correctly or failed to take into account and assess all the decisive facts of a case”). It suffices that the party seeking leave to appeal shows that the impugned decision is inconsistent with other decisions of the tribunal on the same issues, see ICTY, Decision on

Still, in most instances, leave to appeal the decision was denied.¹⁹⁴ Applications for appeal should be filed within seven days of the decision. In July 1998, the provision was amended once again to provide that where a decision on provisional release was rendered orally, the appeal should be filed within seven days from the oral decision.¹⁹⁵

Later on, the RPE saw yet another amendment of Rule 65 (D), which deleted the parties' obligation to obtain leave to appeal a decision on a motion for provisional release and provided such possibility as of right.¹⁹⁶ According to the Annual Report, such an amendment was based "on a combination of judicial economy and expedition in a way that strengthens the rights of the accused."¹⁹⁷ The RPE of the SCSL, however, still provide for the requirement of obtaining leave in order to appeal decisions on provisional release. Leave is to be granted by a Single Judge rather than by a bench of Judges.¹⁹⁸

The Trial Chamber's decision on provisional release applications is discretionary in nature. Therefore, the accused is required to prove a discernable error where the Trial Chamber either (1) misdirected itself as to the principle to be applied, (2) misdirected itself as to the law

Application for Leave to Appeal, *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-AR-65, A Bench of the A. Ch., 26 August 2002, p. 3 and ICTY, Decision on Joint Motion for Leave to Appeal Decision on Provisional Release, *Prosecutor v. Čermak and Markač*, Case No. IT-03-73-AR65.1, A Bench of the A. Ch., 13 October 2004, par. 4. Consider also ICTY, Decision Granting Leave to Appeal, *Prosecutor Šainović and Ojdanić*, Case No. IT-99-37-AR65, A Bench of the A. Ch., 16 July 2002, p. 2 (clarifying that in special cases, 'good cause' may include situations where there is a need for a full bench of the Appeals Chamber to give an opinion as to issues relating to provisional release which arise in a particular case).

¹⁹⁴ Consider *e.g.* Seventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/55/273, S/2000/777, 7 August 2000, par. 100 (all six applications for leave to appeal pursuant to Rule 65 (D) ICTY RPE were denied); Eighth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/56/352, S/2001/865, 17 September 2001, par. 159 (one application for leave to appeal, which was denied); Ninth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/57/379, S/2002/985, 4 September 2002, par. 167 (two applications, of which one was subsequently denied).

¹⁹⁵ Rule 65 (D) as amended during the fifteenth plenary session (U.N. Doc. IT/32/Rev.13, 9 – 10 July 1998); An exception is provided where the party challenging the decision was not present or represented when the oral decision was announced or where the Trial Chamber announced that a written decision will follow: Rule 65 (D) (i) and (ii) ICTY RPE. Compare Article 65 (D) ICTR RPE as amended during the twelfth plenary session, 5-6 July 2002.

¹⁹⁶ Rule 65 (D) ICTY as amended at the thirty-second plenary session on 21 July 2005 (U.N. Doc. IT/32/Rev.36, 8 August 2005). A similar amendment to Rule 65 (D) ICTR RPE was adopted during the sixteenth plenary session, 7 July 2006.

¹⁹⁷ Twelfth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/60/267, S/2005/532, 17 August 2005, par. 32.

¹⁹⁸ Rule 65 (E) SCSL RPE.

which is relevant for the exercise of discretion, (3) gave weight to extraneous or irrelevant considerations or (4) failed to give weight or sufficient weight to relevant considerations, (5) made an error as to the facts upon which it has exercised its discretion or (6) rendered a decision so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.¹⁹⁹

II.2.6. Material conditions for release

In the subsequent paragraphs, an overview will be provided of the most important factors that the *ad hoc* tribunals and the SCSL take into consideration in their assessment of the fulfilment of the two material conditions provided for under Rule 65 (B). At the beginning, it should be noted that decisions on provisional release are fact-intensive. Consequently, rather than trying to outline all potentially relevant factors in the consideration of these material conditions, the emphasis will be on the most important factors which can be discerned in the tribunals' practice. No exhaustiveness is claimed.

In general, the Trial Chamber is not obligated to indicate all possible factors a Trial Chamber can take into account in its decision as to whether it is satisfied or not the person will appear for trial and will not interfere with witnesses, victims or other persons. However, the Trial Chamber *should indicate all relevant factors that a reasonable Trial Chamber would have been expected to take into account before coming to a decision.*²⁰⁰ The Trial Chamber should

¹⁹⁹ See, e.g. (among many authorities) ICTY, Decision on Lahi Brahimi's Interlocutory Appeal against the Trial Chamber's Decision Denying his Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.2, 9 March 2006, par. 16; ICTY, Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, *Prosecutor v. Popović et al.*, A. Ch., 30 June 2006, par. 8; ICTY, Decision on Appeal against Decision Denying Motion for Provisional Release, *Prosecutor v. Milošević*, Case No. IT-98-29/1-AR65.1, A. Ch., 17 October 2006, pp. 2-3.

²⁰⁰ See e.g. ICTY, Decision on Provisional Release, *Prosecutor v. Šainović and Ojdanić*, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, par. 6; ICTY, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, A. Ch., 17 October 2005, par. 8; ICTY, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, *Prosecutor v. Stanišić and Simatović*, A. Ch., 26 June 2008, par. 35; ICTY, Decision on the Accused Stojić's Motion for Provisional Release, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, T. Ch. III, 17 July 2008, par. 5; ICTY, Decision on Prosecution's Appeal From *Décision relative à la demande de mise en liberté provisoire de l'accusé Stojić*, Dated 8 April 2008, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.9, A. Ch., 29 April 2008, par. 9; ICTY, Decision on "Prosecution's Appeal from *Décision relative à la Demande de mise en liberté provisoire de l'Accusé Petković*", Case No. IT-04-74-AR65.8, A. Ch., 21 April 2008, par. 7. FAIRLIE is critical of such appellate culture "that calls the Trial chambers to draft overly inclusive 'kitchen-sink' decisions and for parties to raise an inexhaustible array of arguments." There need to be cause to include certain factors in a Trial Chamber's decision. Nevertheless, the Appeals Chamber held that failure to raise relevant factors may give rise to the consideration that such factors have not been considered.

give reasons for its decision on these factors. What the relevant considerations are, the weight to be given to individual factors as well as the relevance of these factors is decided on a case-by-case basis.²⁰¹ Such a requirement follows from the obligation to render a reasoned opinion, which ultimately derives from the fair trial guarantee.²⁰² Jurisprudence has underlined that attention should not only be given to circumstances as they exist at the moment when the Trial Chamber renders its decision but also to foreseeable future circumstances when the case is due for trial and the accused is expected to return to the tribunal.²⁰³ It is for the Trial Chamber to indicate all the factors that it relied upon and demonstrate, through a discussion of all these relevant factors, how the accused met or failed to meet his burden of proof that he would appear for trial and that he would not pose a danger to victims, witnesses or other persons.²⁰⁴

II.2.6.1. Whether the accused, if released, will appear for trial

One issue that all international(ised) tribunals consider in their assessment of a request for release and the necessity of continued detention of the accused is the risk of flight and the question of whether the accused, if released, will re-appear for trial.²⁰⁵ Such a factor corresponds with the “genuine requirement of public interest” recognised by the ECtHR, that if the person will not appear for trial, continued detention is permissible.²⁰⁶ Also, the HRC

See M. FAIRLIE, Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2003*, Vol. XIV, Antwerp, Intersentia, 2008, pp. 223-224, 225.

²⁰¹ Consider e.g. ICTY, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, *Prosecutor v. Stanišić and Simatović*, A. Ch., 26 June 2008, par. 35.

²⁰² As provided for in Article 21 (2) ICTY Statute; Article 20 (2) ICTR Statute and Article 17 (2) SCSL Statute. See e.g. ICTY, Decision Refusing Milutinović Leave to Appeal, *Prosecutor v. Milutinović*, Case No. IT-99-37-AR65.3, A. Ch., 3 July 2003, par. 22.

²⁰³ ICTY, Decision on Provisional Release, *Prosecutor v. Šainović and Ojdanić*, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, par. 7 and 11; ICTY, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, A. Ch., 17 October 2005, par. 8; ICTY, Decision on Defence’s Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin Provisional Release, *Prosecutor v. Popović et al.*, A. Ch., 30 June 2006, par. 8; ICTY, Decision on Defence Appeal against Trial Chamber’s Decision on Sredoje Lukić’s Motion for Provisional Release, *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-AR65.1, A. Ch., 16 April 2007, par. 7.

²⁰⁴ ICTY, Decision on Defence’s Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin Provisional Release, *Prosecutor v. Popović et al.*, A. Ch., 30 June 2006, par. 8; ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković’s Provisional Release, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.1, A. Ch., 1 November 2005, par. 3; ICTY, Decision on Provisional Release, *Prosecutor v. Šainović and Ojdanić*, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, par. 6.

²⁰⁵ See *infra*, Chapter 8, II.2.6.1; Chapter 8, II.3.5.1; Chapter 8, II.4.1-3.

²⁰⁶ See *infra*, Chapter 8, II.2.6.1.

accepted that pre-trial detention may be exceptionally ordered on the basis of the likelihood that the person would abscond.²⁰⁷ This risk of absconding increases where investigations continue and the evidence against the accused ‘gradually accumulates’.²⁰⁸

Several factors have been taken into consideration by the *ad hoc* tribunals and the SCSL in assessing this requirement for provisional release. Without claiming exhaustivity, a list of factors that the Trial Chamber usually takes into consideration when assessing this requirement is provided below. The factors which are only relevant with regard to provisional release during trial are not included. At the outset, it is noted that no suspect or accused provisionally released by the ICTY has absconded while on provisional release.²⁰⁹

§ *Circumstances of surrender*

The *voluntariness of the accused’s surrender* is the predominant factor when considering whether the accused will appear for trial. This implies that the accused surrendered out of free will and in the absence of compulsion.²¹⁰ In almost all instances where provisional release was granted, the accused had surrendered voluntarily. That being said, this criterion alone is not sufficient for establishing that the accused will return for trial, meaning that other factors will be considered.

²⁰⁷ HRC, *Hill and Hill v. Spain*, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997, par. 12.3.

²⁰⁸ ECommHR, *W. R. v. The Federal Republic of Germany*, Application No. 3376/67, Collection 29, Decision of 4 February 1969, pp. 31-49.

²⁰⁹ Consider e.g. A. TROTTER, Pre-Conviction Detention in International Criminal Trials, in «Journal of International Criminal Justice», Vol. 11, 2013, p. 364; C. DAVIDSON, May it Please the Court? The Role of Public Confidence, Public Order, and Public Opinion in Bail for International Criminal Defendants, in «Columbia Human Rights Law Review», Vol. 43, 2012, p. 355.

²¹⁰ See e.g. ICTY, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, A. Ch., 17 October 2005, par. 14; ICTY, Decision on Motion by Radoslav Brđanin for Provisional Release, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36-PT, T. Ch. II, 25 July 2000, par. 17; ICTY, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, A. Ch., 17 October 2005, par. 12; ICTY, Order on Motion for Provisional Release, *Prosecutor v. Ademi*, Case No. IT-01-46-PT, T. Ch., 20 February 2002, par. 24; ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković’s Provisional Release, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.1, A. Ch., 1 November 2005, par. 9; ICTR, Decision on the Defence’s Motion for the Release or Alternatively Provisional Release of Ferdinand Nahimana, *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, T. Ch. I, 5 September 2002; ICTR, Decision on Defence Motion for Reconsideration of Decision Denying Provisional Release, *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-R65, T. Ch. III, 3 April 2009, par. 15.

The *Haradinaj* case, in which Prime Minister Haradinaj stepped down from office within hours of learning about an indictment against him, is a notorious example of a voluntary surrender. The Trial Chamber referred to this as “exemplary and stand[ing] out in positive contrast against the conduct of other accused of his rank in comparable circumstances.”²¹¹

However, the voluntary nature of the surrender is not always clear. In the *Šainović et al.* case, the Appeals Chamber determined that the Trial Chamber committed an error in considering the surrender of *Šainović* and *Ojdanić* to be voluntary. According to the Appeals Chamber, the Trial Chamber should have considered statements that *Šainović* and *Ojdanić* made to the media that they would not surrender voluntarily. The Appeals Chamber also suggested that they should have considered the fact that both accused only surrendered in April 2002, after the adoption of the Law on Cooperation of the FRY, whereas they had been indicted in May 1999.²¹² However, the Defence argued that prior to the adoption of the law, it would not have been possible for them to surrender.²¹³ In the case of *Stanišić (Jovica)* and *Simatović*, the accused were already detained prior to their surrender to the ICTY. In such cases, the Trial Chamber took other evidence into consideration on efforts to be surrendered to the tribunal. *In casu*, the Trial Chamber, among others, took into consideration that the accused had requested to be granted release to have the possibility to surrender to the ICTY.²¹⁴ In *Stanišić (Mićo)*, the Appeals Chamber found that the Trial Chamber had not erred in its determination that the accused had voluntarily surrendered because the accused’s surrender was conditional upon a governmental guarantee to support his future application for provisional release.²¹⁵ In cases where surrender is contingent on the fulfilment of certain conditions, this does not go to the factual determination of the voluntariness of the surrender, but to the weight to be given to the surrender.²¹⁶

²¹¹ ICTY, Decision on Ramush Haradinaj’s Motion for Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, T. Ch. II, 6 June 2005, par. 30-33.

²¹² ICTY, Decision on Provisional Release, *Prosecutor v. Šainović and Ojdanić*, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, par. 10.

²¹³ *Ibid.*, par. 10.

²¹⁴ ICTY, Decision on Provisional Release, *Prosecutor v. Stanišić*, Case No. IT-03-69, T. Ch., 28 July 2004, par. 20; ICTY, Decision on Provisional Release, *Prosecutor v. Simatović*, Case No. IT-03-69, T. Ch., 28 July 2004, par. 17 – 20.

²¹⁵ ICTY, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, A. Ch., 17 October 2005, par. 14.

²¹⁶ *Ibid.*, par. 14; ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vinko Pandurević’s Application for Provisional Release, *Prosecutor v. Pandurević and Trbić*, A. Ch., 3 October 2005, par. 8.

In *Brdjanin*, the Trial Chamber was confronted with the situation where the original indictment had been issued under seal. The Chamber held that it “is an unfortunate consequence of the use of sealed indictments,[...] it cannot be assumed one way or the other that, had he been given that opportunity, Brdjanin would have taken or rejected it.”²¹⁷ The Trial Chamber in *Krajišnik* clarified that “[t]he Trial Chamber considers this to be a *neutral factor* which does not lend support to the contentions of either side. It does not permit the accused to rely on it in support of his application on the fact that he has surrendered. On the other hand, it does not permit the Prosecution to claim that he was evading arrest.”²¹⁸ Where an indictment was issued under seal, evidence may be advanced that seeks to demonstrate that the accused would have surrendered voluntarily if he knew about the indictment.²¹⁹

§ *Absence of police force*

The absence of a police force of the tribunal adds another obstacle to the Defence to satisfy the Trial Chamber that the accused person or suspect will appear. In *Brdjanin*, the Trial Chamber underlined that the absence of a police force and the need to rely on national authorities or international bodies to effectuate arrests “place a substantial burden on any applicant for provisional release to satisfy the Trial Chamber that he will indeed appear for trial if released.” Rather than re-introducing the requirement that exceptional circumstances must be established, such a holding is simply an acceptance of the situation that the tribunal and the applicants are in.²²⁰

²¹⁷ *Ibid.*, par. 17.

²¹⁸ ICTY, Decision on Momočilo Krajišnik’s Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik and Plavšić*, Case No. IT-00-39 & 40-PT, T. Ch., 8 October 2001, par. 20 (emphasis added). Judge Robinson exposed himself skeptically about the neutrality of such factor where the Trial Chamber subsequently relied on the voluntariness of Mrs. Plasvić’ arrest to distinguish her case from Krajišnik’s (see *ibid.*, Dissenting Opinion of Judge Patrick Robinson, par. 36). Consider also ICTY, Decision on Savo Todović Application for Provisional Release, *Prosecutor v. Rasević and Todović*, Case No. IT-97-25/1, T. Ch. II, 22 July 2005, par. 20; SCSL, Decision on the Motion by Morris Kallon for Bail, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-PT, T. Ch., 23 February 2004, par. 41 (where the accused did not know of the existence of an indictment against him, the Designated Judge held that the issue of voluntary surrender is not applicable to the present case); ICTR, Decision on Bizimungu’s Motion for Provisional Release Pursuant to Rule 65 of the Rules, *Prosecutor v. Bizimungu*, Case No. ICTR-99-50-T, T. Ch. II, 4 November 2002, par. 30.

²¹⁹ SCSL, Decision on Appeal against Refusal of Bail, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-AR65, A. Ch., 14 December 2004, par. 31.

²²⁰ ICTY, Decision on Motion by Radoslav Brđanin for Provisional Release, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36-PT, T. Ch. II, 25 July 2000, par. 18.

§ Personal guarantees

Personal guarantees are not given much value in practice, in light of the fact that where the accused faces a substantial sentence if convicted, there is a considerable incentive to abscond.²²¹ Nevertheless, they are a relevant factor that the Trial Chamber should consider.²²² In the *Boskoški and Tarčulovski* case, the Appeals Chamber did not find that the Trial Chamber had erred when it did not explicitly deal with Boškoški's claim that he wanted to return to public life after the trial proceedings were over. While the accused claimed that considerable weight was given to comparable arguments made in the *Haradinaj* case, the Appeals Chamber noted that it was not satisfied that this factor could outweigh other factors and that these factors should be weighed in the circumstances of each case.²²³ Similarly, guarantees offered by family or friends have been considered to be "generally unpersuasive."²²⁴ No Trial Chamber has accorded these guarantees much weight.

§ Governmental (state) guarantees

In light of the absence of their own enforcement mechanism or police mechanism, the *ad hoc* tribunals ascribe considerable weight to guarantees provided by the government to monitor the suspect or accused and to apprehend him or her in case of lack of voluntary surrender. As will be shown, it can safely be concluded that this factor has been elevated to a condition *sine qua non* for any provisional release. The most important element which is taken into consideration by the tribunal in its assessment of governmental guarantees is the state's (or entity's) history of cooperating with the tribunal.²²⁵ The reliability of state guarantees should not be assessed in general. Rather, the Trial Chamber should determine what would happen if

²²¹ ICTY, Decision on Momočilo Krajišnik's Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik and Plavšić*, Case No. IT-00-39 & 40-PT, 8 October 2001, par. 17; ICTY, Decision on Motion by Radoslav Brđanin for Provisional Release, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36-PT, T. Ch. II, 25 July 2000, par. 16 ("[i]t is a matter of common experience that the more serious the charge, and the greater the likely sentence if convicted, the greater the reasons for not appearing for trial").

²²² See e.g. ICTY, Decision on Provisional Release, *Prosecutor v. Šainović and Ojdanić*, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, par. 6.

²²³ ICTY, Decision on Ljube Boskoški's Interlocutory Appeal on Provisional Release, *Prosecutor v. Boskoški and Tarčulovski*, Case No. IT-04-82-AR65.2, A. Ch., 28 September 2005, par. 7-8.

²²⁴ M.M. DEFRANK, Commentary: ICTY Provisional Release: Current Practice, a Dissenting Voice, and the Case for a Rule Change, in «Texas Law Review», Vol. 80, 2001 – 2002, p. 1436.

²²⁵ Consider e.g. ICTY, Decision on the Motion for Provisional Release of the Accused Momir Talić, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36-T, T. Ch. II, 20 September 2002, p. 4 (where the Court emphasised that it attaches weight to the fact that the Law of Cooperation was passed by the FRY).

the state or authority were obliged to arrest the person concerned under its guarantee.²²⁶ While the general level of cooperation “does have some relevance” in such an assessment, it is not itself a fact in issue.²²⁷ Furthermore, the *ad hoc* tribunals recognised that the reliability of governmental guarantees, to some extent, depends on the vagaries of politics, power alliances, international pressure or even the likelihood of a future change of government.²²⁸

Importantly, the failure to obtain such governmental guarantees has been a major factor in explaining the absence of provisional releases at the ICTR.²²⁹ The jurisprudence uniformly held that “it is *advisable* for the accused to provide guarantees from the relevant governmental authorities.”²³⁰ Nevertheless, both *ad hoc* tribunals have underlined that there is no *prerequisite* pursuant to Rule 65 (B) to provide a governmental guarantee ascertaining the appearance at trial.²³¹ However, the same jurisprudence recognised that such a guarantee, if

²²⁶ ICTY, Decision on Appeal against Refusal to Grant Provisional Release, *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-AR65, A. Ch., 8 October 2002, par. 11.

²²⁷ *Ibid.*, par. 11 (the Appeals Chamber underscored that it is “both unnecessary and unwise to include in the Trial Chamber’s decision a separate finding concerning the general level of cooperation – unnecessary because any such finding can only be applicable to a particular point in time, and unwise because it could easily be misunderstood by the parties in relation to subsequent applications for provisional release”); ICTY, Decision on Interlocutory Appeal against Trial Chamber’s Decision Denying Provisional Release, *Prosecutor v. Čermak and Markač*, Case No. IT-03-73-AR65.1, A. Ch., 2 December 2004, par. 32; ICTY, Decision on Interlocutory Appeal against Trial Chamber’s Decisions Granting Provisional Release, *Prosecutor v. Tolimir et al.*, Case No. IT-04-80-AR65.1, A. Ch., 19 October 2005, par. 14.

²²⁸ ICTY, Decision on Appeal against Refusal to Grant Provisional Release, *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-AR65, A. Ch., 8 October 2002, par. 11.

²²⁹ Consider *e.g.* ICTR, Decision on the Motion for Provisional Release of Father Emmanuel Rukundo, *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-I, T. Ch. II, 15 July 2004, par. 17-18.

²³⁰ ICTR, Decision on Application by Hormisdas Nsengimana for Leave to Appeal the Trial Chamber’s Decision on Provisional Release, *Prosecutor v. Nsengimana*, A. Ch., 23 August 2005, p. 3; ICTR, Decision on Defence Motion for Provisional Release, *Prosecutor v. Nshogoza*, Case No. ICTR-07-91-PT, T. Ch. III, 17 December 2008, par. 14 – 16.

²³¹ See in particular ICTR, Decision on Mathieu Ngirumpatse’s Appeal against Trial Chamber’s Decision Denying Provisional Release, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR65, A. Ch., 7 April 2009, par. 11-12 (the Appeals Chamber holds that the Trial Chamber erred in stating that, as the host state is the guarantor of public safety and order on its territory, the host state is the only entity that can provide guarantees that the accused will not flee, as such effectively transforms the obtaining of governmental guarantees into a *prerequisite* for provisional release); ICTR, Decision on Defence Motion for Review of Provisional Measures, or Alternatively, for Provisional Release, *Prosecutor v. Nshogoza*, Case No. ICTR-07-91-PT, T. Ch. III, 17 December 2008, par. 16. At the ICTY, consider ICTY, Decision on Application by Dragan Jokić for Leave to Appeal, *Prosecutor v. Blagojević*, Case No. IT-05AR65, A Bench of the A. Ch., 18 April 2002, par. 7 (“There is not reference in Rule 65 (B), or elsewhere in Rule 65, to an obligation upon the accused, as a prerequisite to obtaining provisional release, to provide guarantees from that state, or from anyone else, that he will appear for trial. It is nevertheless usual, and it is certainly advisable, for an applicant for provisional release to provide such a guarantee from a governmental body, in order to satisfy the Trial Chamber that he will appear for trial. That is because the Tribunal has no power to execute its own arrest warrant upon an applicant who is in the territory of the Former Yugoslavia in the event that he does not appear for trial, and it needs to rely upon local authorities within that territory or upon international bodies to effect arrests on its behalf”); ICTY, Decision on Application by Dragan Jokić for Provisional Release, *Prosecutor v. Blagojević et al.*, Case No. IT-02-53-AR65, A. Ch., 28 May 2002, p. 2; ICTY, Decision on Interlocutory Appeal against Trial Chamber’s Decision Denying Provisional

deemed credible, may carry considerable weight in support of an application. The absence of a state guarantee weighs in heavily against release.²³² On one occasion, ICTR Trial Chamber III went even further and stated that “[t]he Defence must provide at least *prima facie* evidence that the country in question agrees or would agree to accept the Accused on its territory, and that the country will guarantee the Accused’s return to the Tribunal at such times as the Chamber may order.”²³³

The importance given to state guarantees where the tribunal lacks its own police force should not come as a surprise. As one commentator observes “an accused has yet to prevail in a motion for release in the absence of such a guarantee.”²³⁴ Besides, the Appeals Chamber confirmed that since the Trial Chamber holds the discretion to impose such conditions on the provisional release as it considers appropriate for ensuring the accused’s presence at trial (pursuant to Rule 65 (C) ICTR, ICTY or SCSL RPE), it may make its order of provisional release dependent on the furnishing of such guarantees.²³⁵

Release, *Prosecutor v. Ćermak and Markač*, Case No. IT-03-73-AR65.1, A. Ch., 2 December 2004, par. 30; ICTY, Order on Provisional Release of Jadranko Prlić, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, T. Ch. I, 30 July 2004, par. 31.

²³² ICTY, Decision on Ljube Boškoski’s Interlocutory Appeal on Provisional Release, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-AR65.2, A. Ch., 28 September 2005, par. 23.

²³³ ICTR, Decision on Defence Motion to Fix a Date for the Commencement of the Trial of Father Emmanuel Rukundo or, in the Alternative, to Request his Provisional Release, *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-I, T. Ch. III, 18 August 2003, par. 22; ICTR, Decision on Augustin Ndindiliyimana’s Emergency Motion for Temporary Provisional Release, *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-2000-56-I, T. Ch. II, 11 November 2003, par. 18.

²³⁴ M. FAIRLIE, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2002 - 2003, Vol. XI, Antwerp, Intersentia, 2007, p. 221. The author refers to comments made by the ICTY to the report of the Expert Group. See UNITED NATIONS, Comments on the Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, U.N. Doc. A/54/850, 27 April 2000, par. 5 (noting that, while the ‘exceptional circumstances’ requirement was removed, *provisional release will not be granted in those cases where no guarantee is given by the relevant state* (emphasis added)). Consider also M.A. FAIRLIE, The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, p. 1165.

²³⁵ ICTR, Decision on the Various Motions Relating to Mathieu Ndirumpatse’s Health, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 6 February 2009, par. 15; ICTR, Décision on renvoi sur la requête de Mathieu Ndirumpatse en demande de mise en liberté provisoire, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 10 September 2009, par. 6; ICTR, Decision on Mathieu Ndirumpatse’s Appeal Against Trial Chamber’s Decision Denying Provisional Release, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR65, A. Ch., 7 April 2009, par. 13 (noting that it should not become a ‘threshold consideration’); ICTY, Decision on Defence’s Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin Provisional Release, *Prosecutor v. Popović et al.*, A. Ch., 30 June 2006, par. 36; ICTY, Decision on Interlocutory Appeal against Trial Chamber’s Decision Denying Provisional Release, *Prosecutor v. Ćermak and Markač*, Case No. IT-03-73-AR65.1, A. Ch., 2 December 2004, par. 30; ICTY, Decision on Application by Dragan Kojić for Leave to Appeal, *Prosecutor v. Blagojević*, Case No. IT-05-AR65, A Bench of the A. Ch., 18 April 2002, par. 8.

The *reliability* of state guarantees depends on the particular circumstances of each case.²³⁶ In *Krajišnik*, where the Trial Chamber had to consider the guarantees offered by the Republika Srpska, the Trial Chamber noted that the government had not arrested anyone yet and that the guarantee consequently did not have the force it would have if the government had done so.²³⁷ Some more recent jurisprudence has also illustrated scepticism towards guarantees offered by the Republika Srpska.²³⁸ Where guarantees of the government of the Republic of Bosnia and Herzegovina were offered in the *Delalić and Delić* case, the Trial Chamber noted “overwhelming” problems in implementing these guarantees.²³⁹

The accused’s former position may influence the *reliability* of governmental guarantees. Former senior (military or political) leaders may have certain valuable information about a government that could work as a disincentive for that government to enforce guarantees given by the state to which the accused seeks to be released.²⁴⁰ The Appeals Chamber held that the Trial Chamber should take this into account when considering whether the accused will appear for trial if provisionally released. The Trial Chamber should appraise the weight of

²³⁶ Consider in that regard: ICTY, Decision on Appeal against Refusal to Grant Provisional Release, *Prosecutor v. Mrksić*, Case No. IT-95-13/1-AR65, A. Ch., 8 October 2002, par. 9 (the Appeals Chamber noted that “[a] Trial Chamber may accept such a guarantee as reliable in relation to Accused A, whereas the same or another Trial Chamber may decline to accept [...] the same authority’s guarantee as reliable in relation to Accused B, without there being any inconsistency (or “double standards”) involved in those two decisions); ICTY, Decision on Interlocutory Appeal Against Trial Chamber’s Decision Denying Provisional Release, *Prosecutor v. Čermak and Markač*, Case No. IT-03-73-AR65.1, A. Ch., 2 December 2004, par. 31.

²³⁷ ICTY, Decision on Momočilo Krajišnik’s Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik and Plavišić*, Case No. IT-00-39 & 40-PT, T. Ch., 8 October 2001, par. 18.

²³⁸ ICTY, Decision on Defence’s Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin Provisional Release, *Prosecutor v. Popović et al.*, A. Ch., 30 June 2006, par. 37 (The Appeals Chamber did not find a discernable error where the Trial Chamber questioned how the accused could avoid arrest for two and a half years while residing with family in ‘obvious places’ and where the Trial Chamber concluded that cooperation by the Republika Srpska remained insufficient due to failure to provide information that could lead to the arrest of *Karadžić* and *Mladić*).

²³⁹ ICTY, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić, *Prosecutor v. Delalić*, Case No. IT-96-21-T, T. Ch. II, 25 September 1996, par. 32; ICTY, Decision on Motion for Provisional Release Filed by the Accused Hamzin Delić, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, T. Ch., 24 October 1996.

²⁴⁰ ICTY, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, A. Ch., 17 October 2005, par. 17; ICTY, Decision on Appeal against Refusal to Grant Provisional Release, *Prosecutor v. Mrksić*, Case No. IT-95-13/1-AR65, A. Ch., 8 October 2002, par. 9 (“[...] accused B may have been a high level government official at the time he is alleged to have committed the crimes charged, and he may have since then lost political influence but yet possess very valuable information which he could disclose to the Tribunal if minded to cooperate should he be kept in custody. There would be a substantial disincentive for that authority to enforce its guarantee to arrest that particular accused if he did not comply with the conditions of his provisional release”). It should be recalled that pursuant to Article 29 (2) of the ICTY Statute, states are under the obligation to arrest and transfer an accused person to the Tribunal.

governmental guarantees provided in light of an accused's previously held senior position.²⁴¹ This can have an important bearing upon the state's readiness and willingness to re-arrest the accused when he or she refuses to surrender him or herself, negatively influencing the prospects of the accused appearing at trial.²⁴² It is also relevant to ask what would occur if the relevant authority were obliged, under its guarantee, to arrest the accused in light of the accused's former position, regardless of where that position was held.²⁴³

For a while, there were different views in the jurisprudence as to whether or not state guarantees could also include guarantees offered by state entities, in particular by the Republika Srpska. The *Obrenović* case illustrates these divergent views in that the Trial Chamber dismissed a guarantee provided by the Republika Srpska where Rule 2 ICTY RPE only refers to states.²⁴⁴ However, the Appeals Chamber held on appeal that the Trial Chamber erred by not following its earlier position in the *Blagojević et al.* case. The Appeals Chamber found that a guarantee by the Republika Srpska was valid because there was nothing in the ICTY Statute or the RPE that limited the body giving an undertaking to a 'state' under international law.²⁴⁵ The Trial Chamber did not concede, leading the Appeals Chamber to reiterate its previous holdings and to consider the matter itself.²⁴⁶

²⁴¹ ICTY, Decision on Provisional Release, *Prosecutor v. Šainović and Ojdanić*, Case No. IT-99-37-AR65, A. Ch., 31 October 2002, par. 9; ICTY, Decision on Interlocutory Appeal Against Trial Chamber's Decision Granting Provisional Release, *Prosecutor v. Tolimir et al.*, Case No. IT-04-80-AR65.1, A. Ch., 19 October 2005, par. 20. Consider also: ICTY, Decision on Motion by Radoslav Brđanin, *Prosecutor v. Brđanin*, Case No. IT-99-36-PT, T. Ch. II, 25 July 2000, par. 15; ICTY, Decision on Motion by Momir Talić for Provisional Release, *Prosecutor v. Talić*, Case No. IT-99-36/1, T. Ch. II, 28 March 2001, par. 26; ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković's Provisional Release, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.1, A. Ch., 1 November 2005, par. 8 (the Appeals Chamber held that "a reasoned opinion should include a discussion of this factor, as it is relevant to the determination").

²⁴² ICTY, Decision on Provisional Release, *Prosecutor v. Šainović and Ojdanić*, Case No. IT-99-37-AR65, A. Ch., 31 October 2002, par. 9; In the *Haradinaj* case, the Trial Chamber held that the accused's former position as Prime Minister meant that guarantees by UNMIK carry more weight than were they to be provided by his government, see ICTY, Decision on Ramush Haradinaj's Motion for Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, T. Ch. II, 6 June 2005, par. 41.

²⁴³ ICTY, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, A. Ch., 17 October 2005, par. 19 (the Chamber added that "[...] the Trial Chamber is simply to consider whether the evidence suggests that an accused, by virtue of a prior senior position, may have any information that would provide a disincentive for the State authority providing a guarantee on behalf of that accused to enforce that guarantee").

²⁴⁴ ICTY, Decision on Dragon Obrenović's Application for Provisional Release, *Prosecutor v. Obrenović*, Case No. IT-0260-PT, T. Ch. II, 22 July 2002, par. 60.

²⁴⁵ ICTY, Decision on Application by Dragan Jokić for Leave to Appeal, *Prosecutor v. Blagojević*, Case No. IT-05-AR65, A Bench of the A. Ch., 18 April 2002, par. 9-10; as confirmed by ICTY, Decision on Application by Dragan Jokić for Provisional Release, *Prosecutor v. Blagojević et al.*, Case No. IT-02-53-AR65, A. Ch., 28 May 2002; ICTY, Decision on Provisional Release on Vidoje Blagojević and Dragan Obrenović, *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-AR65 & IT-02-60-AR65.2, A. Ch., 3 October 2002, par. 6. Consider also the Separate Opinion of Judge Hunt, arguing that "what is important in these cases is the power of arrest, which

§ Guarantees offered by UNMIK

Guarantees have also been offered by the UNMIK transitional administration. In the *Limaj* case, the Trial Chamber requested UNMIK in 2003 to provide guarantees but UNMIK replied that it was unable to do so. UNMIK concluded that the flight risk would be ‘appreciable’ because of Kosovo’s borders and geography, the police resources available to UNMIK and the support resources available to the accused.²⁴⁷ Contrastly, in 2005, Trial Chamber II granted Haradinaj provisional release.²⁴⁸ An important consideration in the Trial Chamber’s decision to allow Haradinaj’s provisional release and in the assessment of the likelihood that he would appear for trial were the guarantees provided by UNMIK to detain the accused, if necessary.²⁴⁹ The Trial Chamber was convinced that UNMIK’s resources “were substantially enhanced in the meantime.”²⁵⁰

§ Influence of Rule 11bis proceedings

A pending motion for a Rule 11bis referral may “aggravate the risk” that the accused will not appear for trial.²⁵¹ Logically, this equally holds true when such a motion has been positively decided upon. The ICTY Trial Chamber concluded in the *Rasević and Todović* case that, as a consequence of the reality that the trial will be conducted in Bosnia and Herzegovina, there was “a significantly increased risk that the accused will not appear for trial if granted provisional release.”²⁵² The Appeals Chamber found this consideration to be reasonable, specifically in light of statements that the accused had made reflecting his “rather serious concerns” about being incarcerated in Bosnia and Herzegovina; concerns that he raised in the

Republika Srpska does have, and the political will to effect an arrest of the particular accused in question so far as Republika Srpska is concerned in the particular case” (*ibid.*, Separate Opinion of Judge Hunt, par. 7).

²⁴⁶ ICTY, Decision on Provisional Release Application of Blagojević, *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-AR65.4, 17 February 2004, par. 14.

²⁴⁷ ICTY, Decision on Provisional Release of Fatmir Limaj, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-PT, T. Ch., 12 September 2003, pp. 6-7; ICTY, Decision on Ramush Haradinaj’s Motion for Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, T. Ch. II, 6 June 2005, par. 38.

²⁴⁸ ICTY, Decision on Ramush Haradinaj’s Motion for Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, T. Ch. II, 6 June 2005.

²⁴⁹ *Ibid.*, par. 37 and following. In a written report, UNMIK stated that it has full authority and control over law enforcement in Kosovo and is in a position to provide specific guarantees regarding the accused, should the Tribunal request such, see *ibid.*, par. 10.

²⁵⁰ *Ibid.*, par. 40.

²⁵¹ ICTY, Decision on Defence Motion for Provisional Release, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-PT, T. Ch. II, 9 March 2005, par. 25.

²⁵² ICTY, Decision on Savo Todović’s Application for Provisional Release, *Prosecutor v. Rasević and Todović*, Case No. IT-97-25/1-PT, T. Ch., 22 July 2005, par. 27 (emphasis added).

course of the Rule 11*bis* proceedings.²⁵³ When an 11*bis* referral decision is pending or has been decided upon, governmental guarantees should not refer just to the delivery of the accused to the custody of the tribunal but also to the delivery of the accused to the state to which the case is or could be referred.²⁵⁴

§ *Seriousness of the crimes and the length of the expected sentence*

Another factor which is taken into consideration is the seriousness of the crimes that the accused has been charged with and the prospect that he or she will receive a severe sentence. These factors may encourage the accused to flee.²⁵⁵ However, the case law of the tribunals holds that the seriousness of the crimes alleged cannot, by itself, justify long periods of detention on remand.²⁵⁶ For this reason, the Appeals Chamber dismissed the fact that in most national systems, accused charged with the most serious crimes may not be provisionally released.²⁵⁷ This holding has the indirect effect of bringing the provisional release scheme on par with the ECtHR's case law. The Court found that national laws that remove judicial discretion for provisional release in the case of certain crimes and provide for an automatic

²⁵³ ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Savo Todović's Application for Provisional Release, *Prosecutor v. Rasević and Todović*, Case No. IT-97-25/1-AR65.1, A. Ch., 7 October 2005, p. 6.

²⁵⁴ *Ibid.*, p. 4.

²⁵⁵ See e.g. ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vinko Pandurević's Application for Provisional Release, *Prosecutor v. Pandurević and Trbić*, A. Ch., 3 October 2005, par. 5; ICTY, Decision on Defence Request for Provisional Release of Stanislav Galić, *Prosecutor v. Galić*, Case No. IT-98-29-A, A. Ch., 23 March 2005, par. 6; ICTY, Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, *Prosecutor v. Popović et al.*, A. Ch., 30 June 2006, par. 14.

²⁵⁶ Consider ICTY, Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release, *Prosecutor v. Haradinaj*, Case No. IT-04-84-PT, T. Ch. II, 12 October 2005, p. 4 (noting that "particularly in light of the presumption of innocence, [...] the seriousness of the crimes an accused is charged with is not a reason on its own for not granting provisional release, but merely one of the factors to be taken into account in evaluating whether the Accused will appear for trial"). See also ICTY, Order on Provisional Release of Valentin Ćorić, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, T. Ch. I, 30 July 2004, par. 29; ICTY, Decision on Provisional Release, *Prosecutor v. Stanišić*, Case No. IT-03-69, T. Ch., 28 July 2004, par. 22; ICTY, Decision on Fatmir Limaj's Request for Provisional Release, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-AR65, A Bench of the A. Ch., 31 October 2003, par. 30 (holding that such an approach is in accordance with the jurisprudence of the ECtHR); ICTY, Decision on Provisional Release, *Prosecutor v. Šainović and Odjanović.*, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, par. 6; ICTY, Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, *Prosecutor v. Popović et al.*, A. Ch., 30 June 2006, par. 14; ICTY, Decision on Interlocutory Appeal against Trial Chamber's Decisions Granting Provisional Release, *Prosecutor v. Tolimir et al.*, Case No. IT-04-80-AR65.1, A. Ch., 19 October 2005, par. 25.

²⁵⁷ See the Prosecution's argumentation in ICTY, Decision on Motions for Re-consideration, Clarification, Request for Release and Applications for Leave to Appeal, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.1; IT-04-74-AR65.2; IT-04-74-AR65.2, A Bench of the A. Ch., 8 September 2004, par. 29. (the Prosecution argued that there may be an inconsistent or double standard between the ICTY and national courts).

denial of provisional release, violate the right to a fair trial. Indeed, Article 5 (3) ECHR requires the judge that the accused appears before to have the authority to order release. It also requires that the judge consider the facts that militate for and against provisional detention.²⁵⁸ As previously argued, the severity of the crimes within the realm of international criminal tribunals was one of the primary justifications for the extraordinary nature of the pre-amendment provisional release scheme.²⁵⁹

Similarly, the expectation of a lengthy sentence cannot be held against the accused *in abstracto* where all accused face lengthy sentences upon conviction, because of the severity of the crimes.²⁶⁰ Such a factor should not be considered alone and must be assessed in light of other factors.²⁶¹ This holding is in accordance with the ECtHR's jurisprudence, which held on numerous occasions that the possibility of a severe sentence cannot, in principle, suffice to establish the danger that the accused will abscond without referring to other factors.²⁶² Nevertheless, the severity of the sentence in the event of a conviction may legitimately be regarded as a factor encouraging the accused to abscond.²⁶³

²⁵⁸ ECommHR, *Caballero v. The United Kingdom*, Application No. 32819/96, as referred to and confirmed by ECtHR, *S.B.C. v. The United Kingdom*, Application No. 39360/98, Judgment of 19 June 2002, par. 22 – 24.

²⁵⁹ See *supra*, Chapter 8, II.1.

²⁶⁰ ICTY, Decision on Defence Motion of Ljube Boskoski for Provisional Release, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-PT, T. Ch. II, 18 July 2005, par. 15; ICTY, Decision on Motions for Re-consideration, Clarification, Request for Release and Applications for Leave to Appeal, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.1; IT-04-74-AR65.2; IT-04-74-AR65.2, A Bench of the A. Ch., 8 September 2004, par. 29 – 31.

²⁶¹ ICTY, Decision on Interlocutory Appeal against Trial Chamber's Decision Denying Provisional Release, *Prosecutor v. Čermak and Markač*, Case No. IT-03-73-AR65.1, A. Ch., 2 December 2004, par. 27 ("the Appeals Chamber considers that the Trial Chamber regarded the possible severity of the sentence as determinative, thus giving it undue weight for justifying the Appellant's detention"); ICTY, Decision on Drago Nikolić's Request for Provisional Release, *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, T. Ch. II, 9 November 2005, par. 18; ICTY, Decision on Defence Request for Provisional Release of Stanislav Galić, *Prosecutor v. Galić*, Case No. IT-98-29-A, A. Ch., 23 March 2005, par. 6.

²⁶² ECtHR, *Letellier v. France*, Application No. 12369/86, Series A, No. 207, Judgment of 26 June 1991, par. 43 (noting that the danger of absconding "cannot be gauged *solely* on the basis of the severity of the sentence risked" (emphasis added)). Consider also ECtHR, *Hesse v. Austria*, Application No. 26186/02, Series A, No. 254-A, Judgment of 25 January 2007, par. 47; ECtHR, *Smirnova v. Russia*, Application Nos. 46133/99, 48183/99, Reports 2003-IX, Judgment of 24 July 2003, par. 60; ECtHR, *Mansur v. Turkey*, Application No. 16026/90, Series A, No. 319-B, Judgment of 15 April 1994, par. 55; ECtHR, *Tomasi v. France*, Application No. 12850/87, Series A, No. 241-A, Judgment of 27 August 1992, par. 98; ECommHR, *Jentzsch v. Germany*, Application No. 2604/65, 14 YB (1971), 876, Report of 30 November 1970, par. 154.

²⁶³ *Ibid.*, par. 154. See in that regard: ICTY, Order on Miodrag Jokić Motion for Provisional Release, *Prosecutor v. Jokić*, Case No. IT-01-42-PT, T. Ch., 20 February 2002, par. 24 (the Trial Chamber notes that where the Tribunal's jurisdiction is limited to serious offences this implies that the accused may expect to receive, if convicted, a sentence that may be of considerable length. This fact could mean that an accused is more likely to abscond or to obstruct the course of justice in other ways).

Remarkably in the *Jentzsch* case, which concerned the prosecution of war crimes and crimes against humanity, the ECommHR's conclusion seemed to imply that the danger of the accused's flight due to the severity of the crimes alleged and the severity of the sentence that could be expected in case of a conviction (life sentence) sufficed to justify continued detention. The Commission stressed the special responsibility of the authorities in preventing the escape of persons accused of committing such crimes.²⁶⁴ Consequently, one is left wondering in how far the seriousness of the crimes within the ambit of the international criminal tribunals and the sentences likely to be imposed in case of conviction would be a sufficient underpinning for a Trial Chamber to find that there is a risk of absconding.

FAIRLIE has noted that such a factor is of limited value given that the subject matter jurisdiction of the *ad hoc* tribunals is limited to the most serious crimes. Consequently, this factor will "likely admit of an answer before the question is even posed."²⁶⁵

§ *Cooperation with the Prosecutor*

An accused person's willingness to cooperate weighs in their favour "insofar as it shows their general attitude of cooperation towards the International Tribunal."²⁶⁶ Such a cooperative attitude may be expressed, for example, by the fact that an accused provisionally accepted to be interviewed by the Prosecutor.²⁶⁷ This does not imply, however, that an accused person should be penalised for refusing to cooperate. The non-cooperation of the accused should not play a role when considering his or her request for provisional release.²⁶⁸ Therefore, the non-cooperation should be considered as a neutral factor.

²⁶⁴ *Ibid.*, par. 160 – 161.

²⁶⁵ M.A. FAIRLIE, *The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled*, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, p. 1164.

²⁶⁶ See e.g. ICTY, Decision on Interlocutory Appeal against Trial Chamber's Decision Denying Provisional Release, *Prosecutor v. Čermak and Markač*, Case No. IT-03-73-AR65.1, A. Ch., 2 December 2004, par. 32; ICTY, Decision Refusing Milutinović Leave to Appeal, *Prosecutor v. Milutinović*, Case No. IT-99-37-AR65.3, A Bench of the A. Ch., 3 July 2003, par. 12; ICTY, Decision on Prosecution's Appeal against Decision on Provisional Release, *Prosecutor v. Simatović*, Case No. IT-03-69-AR65.2, A. Ch., 3 December 2004, par. 9; ICTY, Decision on Momočilo Krajišnik's Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik and Plavšić*, Case No. IT-00-39 & 40-PT, T. Ch., 8 October 2001, par. 21; ICTY, Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, *Prosecutor v. Popović et al.*, A. Ch., 30 June 2006, par. 28.

²⁶⁷ ICTY, Decision on Provisional Release, *Prosecutor v. Šainović and Ojdanić*, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, par. 6.

²⁶⁸ ICTY, Decision on Second Motion for Provisional Release, *Prosecutor v. Martić*, T. Ch. I, 12 September 2005, par. 31.

The consideration of such a factor sits uneasily with the right of the accused to remain silent and not incriminate him or herself. Nevertheless, where the Appeals Chamber held that cooperation with the Prosecutor may be taken into consideration as a relevant factor for assessing if the accused will appear for trial, it equally emphasised that the accused is not required to assist the Prosecution in proving its case against him,²⁶⁹ and that the accused “is not at the disposal of the Prosecution.”²⁷⁰ Similarly, provisional release should not be refused *as a matter of discretion* until an accused could be interrogated by the Prosecution.²⁷¹ Provisional release is not dependent on the accused’s agreement to be interviewed.²⁷² It follows from the above mentioned right to remain silent and the privilege against self-incrimination that the usefulness of the information provided to the Prosecutor is irrelevant.²⁷³

In this context, reference should be made to the aforementioned *Halilović* case, in which the Appeals Chamber held that a statement made by the Prosecution in the course of the investigation that cooperation could have a positive effect on the accused’s application for provisional release was distinct from a promise of provisional release. Therefore, while the Appeals Chamber considered this to be an inducement, in the sense of an incentive, it did not render the accused’s participation in an interrogation involuntary.²⁷⁴

²⁶⁹ ICTY, Decision on Prosecution’s Appeal against Decision on Provisional Release, *Prosecutor v. Simatović*, Case No. IT-03-69-AR65.2, A. Ch., 3 December 2004, par. 9.

²⁷⁰ ICTY, Decision Refusing Milutinović Leave to Appeal, *Prosecutor v. Milutinović*, Case No. IT-99-37-AR65.3, A. Ch., 3 July 2003, par. 12; ICTY, *Prosecutor v. Šainović and Odžanić*, Decision on provisional Release, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, par. 8.

²⁷¹ *Ibid.*, par. 8. In light of the right to remain silent, Judge Hunt argued that such argument made by the Prosecutor is offensive of the right to remain silent and “should be publically repudiated by the OTP.” See ICTY, Decision on Provisional Release, *Prosecutor v. Šainović et al.*, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, Dissenting Opinion of Judge David Hunt on Provisional Release, par. 85.

²⁷² ICTY, Decision on Lahi Brahimić’s Interlocutory Appeal against the Trial Chamber’s Decision Denying his Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.2, 9 March 2006, par. 16.

²⁷³ ICTY, Decision Refusing Milutinović Leave to Appeal, *Prosecutor v. Milutinović*, Case No. IT-99-37-AR65.3, A. Ch., 3 July 2003, par. 12 (noting that “there is no indication that the Trial Chamber considered that the account given by an accused must be regarded as “full and honest” by the Prosecution to be relevant to the Chamber’s decision to release him provisionally”); ICTY, Decision on Prosecution’s Appeal against Decision on Provisional Release, *Prosecutor v. Simatović*, Case No. IT-03-69-AR65.2, A. Ch., 3 December 2004, par. 9; ICTY, Decision on Lahi Brahimić’s Interlocutory Appeal against the Trial Chamber’s Decision Denying his Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.2, 9 March 2006, par. 16.

²⁷⁴ This decision was previously discussed, see *supra*, Chapter 4, IV.2.1; ICTY, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 19 August 2005, par. 38.

It follows that by waiving his or her rights, the accused may increase his or her chances of being granted provisional release. It has been argued that this presents the accused with a choice that “seems incompatible with the right to remain silent.”²⁷⁵

§ Other factors

Again, the list of factors is by no means exhaustive. Other factors considered in the jurisprudence include the fact that the accused or suspect did not try to abscond or go into hiding,²⁷⁶ previous compliance with all conditions and guarantees imposed during a previous period of provisional release,²⁷⁷ the age of the accused²⁷⁸ or character references.²⁷⁹ Notably, in *Šainović and Ojdanić*, the Appeals Chamber provided a list of relevant factors that a reasonable Trial Chamber should consider in the case at hand.²⁸⁰ Later case law confirmed that while such a list was not exhaustive, it offered ‘guidance’ as to the relevant factors that should be considered by the Trial Chamber.²⁸¹

II.2.6.2. Interference with victims, witnesses or other persons

The accused person seeking provisional release should equally satisfy the Trial Chamber that he or she will not interfere with victims, witnesses or other persons. The link between the risk

²⁷⁵ Z. DEEN-RACSMÁNY and E. KOK, Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2004*, Vol. XX, Antwerp, Intersentia, 2009, p. 73 (the authors argue that while the cooperation with the tribunal is a relevant factor to be considered in the assessment whether the accused will appear for trial, the Prosecution should be excluded from the definition of ‘tribunal’).

²⁷⁶ Consider *e.g.* ICTY, Order on Provisional Release of Valentin Ćorić, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, T. Ch. I, 30 July 2004, par. 30; ICTY, Order on Provisional Release of Jadranko Prlić, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, T. Ch. I, 30 July 2004, par. 30 (the Trial Chamber noted that the accused did not try to abscond prior to his arrest and did not go into hiding despite receiving indications that he was considered a suspect).

²⁷⁷ See, *e.g.* ICTY, Decision on the Accused Stojić’s Motion for Provisional Release, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, T. Ch. III, 17 July 2008, par. 16; ICTY, Decision on Prosecution’s Consolidated Appeal against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Ćorić, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.5, A. Ch., 11 March 2008, par. 19.

²⁷⁸ ICTY, Decision on Momočilo Krajišnik’s Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik and Plavšić*, Case No. IT-00-39 & 40-PT, T. Ch., 8 October 2001, par. 21.

²⁷⁹ See *e.g.* ICTY, Decision on Ramush Haradinaj’s Motion for Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, T. Ch. II, 6 June 2005, par. 34 (including reference letters from late President Rugova, and the Special Representative of the Secretary-General in Kosovo).

²⁸⁰ ICTY, Decision on Provisional Release, *Prosecutor v. Šainović and Ojdanić*, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, par. 6.

²⁸¹ ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Savo Todović’s Application for Provisional Release, *Prosecutor v. Rasević and Todović*, Case No. IT-97-25/1-AR65.1, A. Ch., 7 October 2005, p. 2.

underlying such a requirement and the existence of witness protection programmes should be mentioned at the outset. Logically, these protection programmes aim at reducing the exact same concerns that underlie the present requirement. Consequently, the existence thereof is a relevant factor that the Trial Chamber should consider in its assessment of this requirement.²⁸²

In general, the assessment of whether or not the accused will pose a danger to victims, witnesses or other persons cannot be made in the abstract but, rather, requires the identification of a concrete danger.²⁸³ The mere expression of general concerns or witness fears does not suffice.²⁸⁴

§ Possibility to contact prosecution witnesses

As the jurisprudence of the *ad hoc* tribunals has consistently reiterated, the heightened *ability* to interfere with victims and witnesses, by itself, does not suggest that the accused *will* pose a danger to them.²⁸⁵ The mere ability for the accused to contact witnesses directly or indirectly, does not constitute ‘danger’ within the meaning of Rule 65 (B) and therefore does not constitute a sufficient basis for refusing provisional release, so long as the Chamber is otherwise satisfied that the accused will not pose a risk.²⁸⁶ If the accused knowing the names of victims suffices to determine that the accused *will* pose a risk to them, then the Prosecutor’s simple compliance with his or her disclosure obligations pursuant to Rule 66 ICTY RPE would effectively prevent the provisional release of the accused person.²⁸⁷ The Appeals

²⁸² In this regard, REARICK notes that the blanket witness protection offered at the ICTR to prosecution witnesses to some extent alleviates the concerns of interference and substantially reduces the threats to witnesses or victims. See D.J. REARICK, *Innocent Until Alleged Guilty, Provisional Release at the ICTR*, in «Harvard International Law Journal», Vol. 44, 2003, p. 582.

²⁸³ See, e.g., ICTY, Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, T. Ch. I, 20 July 2007, par. 17; ICTY, Decision on Lahi Brahimaj’s Motion for Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. 04-84bis-PT, T. Ch. II, 10 September 2010, par. 30.

²⁸⁴ ICTY, Further Decision on Brahimaj’s Motion, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, T. Ch. II, 3 May 2006, par. 39.

²⁸⁵ See e.g. ICTY, Decision on Motion by Radoslav Brđanin for Provisional Release, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36-PT, T. Ch. II, 25 July 2000, par. 19; ICTY, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, A. Ch., 17 October 2005, par. 28.

²⁸⁶ *Ibid.*, par. 20.

²⁸⁷ *Ibid.*, par. 19; ICTY, Decision on Motion by Momir Talić for Provisional Release, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36, T. Ch. II, 28 March 2001, par. 33-39. Compare with ICTY, Decision Rejecting a Request for Provisional Release, *Prosecutor v. Blaškić*, Case No. IT-95-14, T. Ch., 25 April 1996, p. 5 (holding that “the knowledge which, as an accused person, he has of the evidence produced by the Prosecutor would place him in a

Chamber confirmed such a view and dismissed the argument that knowledge of the names of potential prosecution witnesses obtained by the accused was any indication that he would pose a threat to them. The mere fact that the accused has been informed of potential witnesses does not provide support for the argument that the accused has the intent to threaten these witnesses.²⁸⁸

§ *Public perception of witness safety*

Arguments based on the assumption that the perpetrators of previous incidents will also have an interest in interfering in this particular case and that provisional release *would* negatively impact on the public perception of the witnesses' safety are not sufficient to deny provisional release, in the absence of a *concrete* danger posed by the accused to anyone.²⁸⁹ Subjective witness fears are not sufficient and are not a reason to refuse provisional release per se.²⁹⁰ In the past, however, the tribunal took into consideration the negative impact that provisional release could have on a person's willingness to testify, particularly where the accused requested provisional release shortly before the intended commencement of the trial proceedings.²⁹¹

§ *Former position and threat posed to victims, witnesses or other persons*

Similarly, the fact that an accused *may* still hold considerable powers to influence victims or witnesses or the ability to destroy and suppress evidence is no indication that the accused *will* exercise such influence unlawfully.²⁹² Danger cannot be considered *in abstracto* and,

situation permitting him to exert pressure on victims and witnesses and that the investigation of the case might be seriously flawed").

²⁸⁸ ICTY, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, A. Ch., 17 October 2005, par. 28.

²⁸⁹ ICTY, Decision on Ramush Haradinaj's Motion for Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, T. Ch. II, 6 June 2005, par. 47.

²⁹⁰ ICTY, Decision on Ramush Haradinaj's Modified Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006, par. 41.

²⁹¹ ICTY, Decision on Request for Provisional Release of Dragoljub Kunarać, *Prosecutor v. Kunarać and Kovać*, Case No. IT-96-PT, T. Ch. II, 11 November 1999, par. 7 (The Trial Chamber found that "were the accused to be released this close to the intended commencement of the trial, such action could have a negative impact on the willingness of [the Prosecution's] witnesses to participate. In the circumstances of the case, a reasonable danger might arise that potential witnesses feel reluctant to participate in the trial").

²⁹² ICTY, Order on Provisional Release of Valentin Ćorić, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, T. Ch. I, 30 July 2004, par. 28; ICTY, Decision on Defence Motion of Ljube Boskoski for Provisional Release, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-PT, T. Ch. II, 18 July 2005, par. 43.

therefore, a concrete danger must be identified. Similarly, in cases where the accused previously held a senior position (e.g. as Republika Srpska's Minister of the Interior), the Prosecution should provide evidence showing that the accused would present a concrete risk of harm to victims and witnesses if released.²⁹³ The Appeals Chamber dismissed the argument that "because the Accused was once the Minister of Interior of the Republika Srpska, specific information as to his contacts and connections is not required as his position manifestly resulted in extensive and highly-placed contacts."²⁹⁴ Information should be provided as to connections or contacts retained by the accused or evidence that he or she has, in fact, ever sought to contact or intimidate victims or witnesses or intends to do so.²⁹⁵ The Appeals Chamber clarified in *Prlić et al.* that this does not amount to putting the burden on the Prosecution. It only suggests that if the accused has satisfied the Trial Chamber that he or she will not interfere with witnesses, victims or other persons upon release, the Prosecution should produce evidence to rebut that fact.²⁹⁶

§ Concrete indications of intimidation

In contrast, where the Prosecutor is able to formulate concrete allegations that the accused has been involved in witness intimidations, the Trial Chamber should address the validity of such allegations. If not, the Trial Chamber puts the burden to prove that the accused will not pose a danger to any person on the Prosecutor.²⁹⁷ In the *Milutinović* case, where the Trial Chamber did not respond to the Prosecutor's allegations, the Appeals Chamber stated that "the Trial Chamber appears, in effect, to have switched the burden to the Prosecution to show that the Accused would pose a danger if released. In the putative absence of such information, the Trial Chamber appears to have assumed the lack of a danger posed by the Accused's release."²⁹⁸

²⁹³ ICTY, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, A. Ch., 17 October 2005, par. 27.

²⁹⁴ *Ibid.*, par. 25 (the Prosecution argued that specific information is only required for low-level accused).

²⁹⁵ *Ibid.*, par. 27; ICTY, Decision on Mićo Stanišić Motion for Provisional Release, *Prosecutor v. Stanišić*, Case No. IT-04-79-PT, T. Ch. II, 19 July 2005, par. 18.

²⁹⁶ ICTY, Decision on Motions for Re-consideration, Clarification, Request for Release and Applications for Leave to Appeal, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.1; IT-04-74-AR65.2; IT-04-74-AR65.2, A. Ch., 8 September 2004, par. 26.

²⁹⁷ ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković's Provisional Release, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.1, A. Ch., 1 November 2005, par. 10-11.

²⁹⁸ *Ibid.*, par. 10-11; ICTY, Second Decision on Nebojša Pavković Provisional Release, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, T. Ch. III, 18 November 2005, par. 9. *In casu*, the Prosecution had

In this regard, the Appeals Chamber has underlined that a reasonable Trial Chamber should also have regard for governmental guarantees to monitor the accused and protect victims, witnesses and other persons,²⁹⁹ or to the accused's prior behaviour.³⁰⁰ Regard may also be given to protective measures issued in the course of the pre-trial stage.³⁰¹ Other factors that should be considered include the length that the accused was aware of the investigation without having posed any such threat or the geographical area that the accused seeks to be released to.³⁰²

II.2.6.3. Hearing of the host state and the state to which the accused seeks to be released

This condition for provisional release has not caused a great deal of controversy. In the *Todović* case, the Appeals Chamber found no error where the host state had not been heard. The host state should only be consulted when the Trial Chamber *grants* provisional release.³⁰³ Similarly, the requirement that the host state should be given the opportunity to be heard has not proven to be problematic. The Netherlands, for example, never tried to prevent provisional release.³⁰⁴ That being said, it is important to understand that the consideration of the host state's interests is a factor that sets the provisional release/detention regime of international criminal tribunals apart from their domestic counterparts.³⁰⁵

alleged that the accused had been involved in the attempted killing of the minister of foreign affairs of Serbia and Montenegro and had publicly threatened every person who would surrender him to the Tribunal.

²⁹⁹ ICTY, Decision on Defence Motion for Provisional Release, *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, T. Ch. II, 23 July 2004, par. 8.

³⁰⁰ Consider *e.g.* ICTY, Decision on the Motion for Provisional Release of the Accused Ćorić, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, T. Ch. III, 11 June 2007, p. 4.

³⁰¹ ICTY, Decision on Ramush Haradinaj's Motion for Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, T. Ch. II, 6 June 2005, par. 49.

³⁰² ICTY, Decision on Motions for Re-consideration, Clarification, Request for Release and Applications for Leave to Appeal, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.1; IT-04-74-AR65.2; IT-04-74-AR65.2, A. Ch., 8 September 2004, par. 26.

³⁰³ ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Savo Todović's Application for Provisional Release, *Prosecutor v. Rasević and Todović*, Case No. IT-97-25/1-AR65.1, A. Ch., 7 October 2005.

³⁰⁴ Consider *e.g.* ICTY, Correspondence from Host Country Re: Request for Provisional Release, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, 16 December 2008 ("I have the honour to inform you that the Netherlands, as host country and limiting itself to the practical consequences relating to such a provisional release, does not have any objections. It is the understanding of the Netherlands that, upon his provisional release, Mr. Milan Milutinović will leave Dutch territory").

³⁰⁵ F. MÉGRET, Beyond "Fairness": Understanding the Determinants of International Criminal Procedure, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, p. 65.

II.2.7. Provisional release on humanitarian/compassionate grounds or on medical grounds

While Rule 65 (B) ICTY, ICTR and SCSL RPE does not refer to compassionate or humanitarian grounds for provisional release, some case law states that motions based on these grounds “are governed by a distinct set of rules.”³⁰⁶ The ICTY’s jurisprudence confirmed that where the requirements of Rule 65 (B) have not been met, provisional release can be granted on compassionate or humanitarian grounds.³⁰⁷ However, other decisions declined to release a person on compassionate grounds, where the conditions of Rule 65 (B) had not been fulfilled. For example, in the *Meakić et al.* case, the Trial Chamber considered humanitarian considerations to be “substantially favouring the grant of provisional release for a limited period”. However, it consequently required that the conditions that the accused will appear for trial and not pose a danger to victims, witnesses or other persons were met.³⁰⁸ In *Talić*, the Trial Chamber found that, since the accused was suffering from terminal cancer, his medical condition had become incompatible with any detention on remand for a long period.³⁰⁹ Temporary release may also be ordered in cases where a relative has a grave illness or to attend a relative’s funeral.³¹⁰ In contrast, the ICTR never allowed temporary provisional release on compassionate grounds, nor did it allow for a *transfer in custody* as an alternative to provisional release.³¹¹

³⁰⁶ ICTY, Decision on Šainović Motion for Temporary Provisional Release, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, T. Ch., 7 June 2007, par. 7.

³⁰⁷ *Ibid.*, par. 7, par. 11; ICTY, Decision on Ojdanić Motion for Temporary Provisional Release, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, T. Ch., 4 July 2007, par. 8.

³⁰⁸ ICTY, Decision on Defendant Dušan Fuštar’s Emergency Motion Seeking a Temporary Provisional Release to Attend the 40-day Memorial of his Father’s Death, *Prosecutor v. Meakić et al.*, Case No. IT-02-65-PT, T. Ch., 11 July 2003, p. 3; consider also ICTR, Decision on Augustin Ndingiliyimana’s Emergency Motion for Temporary Provisional Release, *Prosecutor v. Ndingiliyimana et al.*, Case No. ICTR-2000-56-I, T. Ch. II, 11 November 2003, par. 18 (“After having reviewed the Motion, the Chamber finds that it does not fulfill the conditions set under Rule 65 for it to grant provisional release of the Accused, for example the hearing of the host country”).

³⁰⁹ ICTY, Decision on the Motion for Provisional Release of the Accused Momir Talić, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36-T, T. Ch. II, 20 September 2002, pp. 6-7.

³¹⁰ See e.g. ICTY, Decision Pursuant to Rule 65 Granting Amir Kabura Authorization to Attend his Mother’s Funeral, *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-T, Duty Judge, 12 March 2004; ICTY, Decision on Defendant Dušan Fuštar’s Emergency Motion Seeking a Temporary Provisional Release to Attend the 40-day Memorial of his Father’s Death, *Prosecutor v. Meakić et al.*, Case No. IT-02-65-PT, T. Ch. III, 11 July 2003.

³¹¹ Notably, in the *Ndingiliyimana et al.* case, Ndingiliyimana requested for provisional release to visit his son, who was gravely ill, in a Belgian hospital or to be allowed, in the event of his son’s death, to attend the funeral. In the alternative, he requested his ‘transfer in custody’. The request was denied because, among others, the ‘host state’ had not been heard. The Trial Chamber did not respond to the alternative request for a transfer in custody. See ICTR, Decision on Augustin Ndingiliyimana’s Emergency Motion for Temporary Provisional Release, *Prosecutor v. Ndingiliyimana et al.*, Case No. ICTR-2000-56-I, T. Ch. II, 11 November 2003, par. 1, 17-18.

In that regard, the ICTY noted that, in the absence of its own police force, transfer in custody (in the sense of an escorted release whereby an accused can be taken to an external event while remaining in custody under escort) is not possible. Therefore, although the ICTY allowed the defendant to be released pre-trial for short periods of time, “a condition of such release has been that the national authorities of the State to which the accused is to be released provide round the clock surveillance and supervision of the accused.”³¹²

As previously noted with regard to pre-amendment Rule 65 (B), medical grounds may also justify release in order for the accused to receive medical treatment. The conditions of Rule 65 have to be fulfilled and it should be demonstrated that the accused cannot receive the treatment in the host state.³¹³

II.2.8. Conditions imposed pursuant to Rule 65 (C)

An obligation is incumbent on the Trial Chamber to ensure that the accused will comply with the requirements to appear for trial and not to interfere with victims, witnesses or other persons. The power that the Trial Chamber holds, pursuant to Rule 65 (C) ICTY, ICTR and SCSL RPE, to impose such conditions upon the accused as it deems appropriate, should be seen in that perspective.³¹⁴ In practice, granting provisional release is made dependent on the imposition of certain conditions. The Trial Chamber will only be satisfied that the conditions under Rule 65 (B) are fulfilled if it appears that the accused person will comply with the conditions imposed. Conditions imposed typically include geographic limitations to where the accused should reside, or the requirement to not contact witnesses, victims or co-accused persons.

³¹² ICTY Manual on Developed Practices, Turin, UNICRI Publisher, 2009, p. 65.

³¹³ ICTY, Decision on “Defence Motion: Defence Request for Provisional Release for Providing Medical Aid in the Republic of Montenegro”, *Prosecutor v. Strugar*, Case No. IT-01-42-A, A. Ch., 16 December 2005, p. 2; ICTY, Decision on Provisional Release, *Prosecutor v. Kovačević*, Case No. IT-01-42/2-I, T. Ch. II, 2 June 2004, p. 2. On the requirement that it should not be possible to meet the medical grounds in the host state, consider: ICTY, Decision on Assigned Counsel Request for Provisional Release, *Prosecutor v. Milošević*, Case No. IT-02-54-T, T. Ch. III, 23 February 2006, par. 17.

³¹⁴ ICTY, Decision on Ramush Haradinaj’s Modified Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006, Joint Dissenting Opinion of Judge Shahabuddeen and Judge Schomburg, par. 3-4.

§ *Modification of conditions imposed*

The Trial Chamber holds the power to vary the conditions for provisional release.³¹⁵ Where the conditions imposed on the provisional release of a suspect or accused should be tied back to the requirements of Rule 65 (B),³¹⁶ the same holds true where the Trial Chamber exercises its discretion to *vary* the conditions.³¹⁷ The major ruling in this regard is the *Haradinaj* ‘Re-assessment Decision’. It was the first decision where the Trial Chamber expressly contemplated a possible modification of its own decision.³¹⁸ On 6 June 2005, ICTY Trial Chamber II had granted Haradinaj provisional release.³¹⁹ While the disposition of this decision prohibited Haradinaj from holding any governmental position at any level in Kosovo or from getting involved in any way in any public political activity,³²⁰ the Trial Chamber left the door open for a reconsideration of this condition after a period of ninety days.³²¹

On 15 August 2005, the Defence requested that the decision be reconsidered in order to lift the constraints on Haradinaj’s ability to appear publicly and on his involvement in public activities as well as for him to be permitted to travel throughout Kosovo.³²² The Trial Chamber subsequently decided, by majority, to allow Haradinaj to appear in public and to

³¹⁵ Reconsiderations of the conditions of provisional release have occurred in several cases, often on humanitarian grounds, see *e.g.* ICTY, Decision on Bajrush Morina’s Request to Vary Conditions of Provisional Release, *Prosecutor v. Haraqija and Morina*, Case No. IT-08-84-R77.4, T. Ch. I, 14 October 2008; ICTY, Decision on Šainović Motion for Variation of Conditions of Temporary Provisional Release, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, T. Ch., 1 October 2008.

³¹⁶ See *supra*, Chapter 8, II.1.

³¹⁷ ICTY, Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release, *Prosecutor v. Haradinaj*, Case No. IT-04-84-PT, T. Ch. II, 12 October 2005, p. 2. However, consider the dissenting opinion of Judge Shahabuddeen and Judge Schomburg to the decision on appeal, noting that despite this holding, “the Trial Chamber engaged in no apparent consideration of the Rule 65 (B) criteria in making its Re-Assessment Decision.” See ICTY, Decision on Ramush Haradinaj’s Modified Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006, Joint Dissenting Opinion of Judge Shahabuddeen and Judge Schomburg, par. 3-4. Consider also the argumentation elsewhere: K. DE MEESTER, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 29 February 2005 – 16 November 2005, Vol. XXVII, Antwerp, Intersentia, 2011, pp. 143 – 149.

³¹⁸ ICTY, Decision on Ramush Haradinaj’s Modified Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006, par. 24. Noteworthy, while the Appeals Chamber observed that this is the first case where a Trial Chamber expressly contemplated modifying its decision, the Appeals Chamber added in a footnote that this is an observation, and not a criticism of the Trial Chamber: “[t]he Trial Chamber is supposed to remain apprised of the behaviour of the accused when on provisional release, and to be prepared to modify conditions if necessary.”

³¹⁹ ICTY, Decision on Ramush Haradinaj’s Motion for Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, T. Ch. II, 6 June 2005.

³²⁰ With the exception of exercising his position of President of the Alliance for the Future of Kosovo.

³²¹ *Ibid.*, par. 53.6.

³²² ICTY, Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release, *Prosecutor v. Haradinaj*, Case No. IT-04-84-PT, T. Ch. II, 12 October 2005, p. 2.

engage in public political activities upon approval by UNMIK.³²³ In arriving at its decision, the Trial Chamber took into consideration “the very special circumstances of this case, especially UNMIK’s assessment of the anticipated positive effects of the Accused’s involvement in public political activities and in the upcoming negotiations on the final status of Kosovo.”³²⁴ Such considerations are at least remarkable insofar that they seem alien to the requirements of Rule 65 (B) ICTY RPE.

§ *Delegation of monitoring to a non-judicial body*

The Re-assessment Decision involved the United Nations Interim Administration in Kosovo (‘UNMIK’) in an unprecedented way in the accused’s provisional release regime. This raises the question as to which delegations of the Trial Chamber’s functions are acceptable under Rule 65 of the ICTY RPE. The Trial Chamber granted UNMIK the ability to approve or deny any request made by Haradinaj to appear in public or to engage in political activity. Only one yard-stick was provided for, to know that UNMIK considers that, in the concrete situation, “it would contribute to a positive development of the political and security situation in Kosovo.”³²⁵ Again, such a criterion is alien to the requirements of Rule 65 (B) ICTY RPE.³²⁶ No guarantee was provided that UNMIK would consider the requirements of Rule 65 (B) in its assessment of Haradinaj’s requests. The Trial Chamber retained some control through UNMIK’s bi-weekly reports to the Trial Chamber.³²⁷

The underlying question is this: to what extent can a Trial Chamber ‘delegate’ its power according to Rule 65 (C) to impose conditions on the provisional release of an accused as it deems appropriate in light of the objectives of Rule 65 (C) ICTY RPE?³²⁸ Put another way, what forms of delegation to UNMIK of these powers and responsibilities are acceptable? The

³²³ *Ibid.*, p. 5.

³²⁴ *Ibid.*, p. 4.

³²⁵ *Ibid.*, p. 4.

³²⁶ Indeed, what may be good for the political and security situation in Kosovo may not always be without danger to victims or witnesses. Consider in that regard the argumentation made by Judge Shahabuddeen and Judge Schomburg in their Dissenting Opinion to the Appeals Chamber Decision, see ICTY, Decision on Ramush Haradinaj’s Modified Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006, Joint Dissenting Opinion of Judge Shahabuddeen and Judge Schomburg, par. 7.

³²⁷ ICTY, Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release, *Prosecutor v. Haradinaj*, Case No. IT-04-84-PT, T. Ch. II, 12 October 2005, p. 4.

³²⁸ ICTY, Decision on Ramush Haradinaj’s Modified Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006, Joint Dissenting Opinion of Judge Shahabuddeen and Judge Schomburg, par. 19.

Prosecutor appealed this decision on the ground that it constituted an impermissible abdication of the Trial Chamber's role.³²⁹ The Appeals Chamber found that some form of delegation is indispensable for the proper functioning of the tribunal.³³⁰ Specifically, the tribunal has to rely on national authorities or other actors to control the conditions and terms of provisional release. While the Appeals Chamber emphasised that not every form of delegation would be permissible, it concluded that several factors rendered the delegation permissible *in concreto*.³³¹ Firstly, the decision-making entrusted to UNMIK was not central to the judicial process, insofar that the decisions at stake did not have a bearing on the accused's innocence or guilt.³³² Secondly, UNMIK was not granted absolute discretion.³³³ Thirdly, the Trial Chamber retained "quite real and effective" supervisory authority by means UNMIK's bi-weekly reports and the fact that the Prosecution would also be watching. UNMIK's power was constrained given that the Trial Chamber could change the conditions at any time. Lastly, there are significant advantages in allowing UNMIK to take responsibility for day-to-day decisions; a function which, if left to the the Trial Chamber, would be impractical.³³⁴

Thus, the Appeals Chamber amended the Trial Chamber's decision only insofar that it did not allow the Prosecution to make submissions to UNMIK when the accused formulated a request to UNMIK. In the scenario of delegating certain functions to UNMIK, the equality of arms and the *audi alteram partem* principles have some applicability outside the tribunal.³³⁵

³²⁹ ICTY, Decision on Ramush Haradinaj's Modified Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006, par. 57.

³³⁰ On appeal, the Chamber identified the following principles and law allowing the delegation of some of its functions: (i) Security Council Resolutions commanding states to cooperate fully with the Tribunal and Resolution 1244, demanding the same from UNMIK, (ii) the inherent powers of the Tribunal, which should be broad enough to allow for some delegation as far as such is crucial to carry out the Tribunal's mission and (iii) the Statute of the tribunal which allows for certain forms of delegation, without putting an explicit break on what can be delegated, *ibid.*, par. 64-76.

³³¹ *Ibid.*, par. 81.

³³² Judge Schomburg and Judge Shahabuddeen disagree, see ICTY, Decision on Ramush Haradinaj's Modified Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006, Joint Dissenting Opinion of Judge Shahabuddeen and Judge Schomburg, par. 16 (arguing that the guilt or innocence on the charges put forward in the indictment is not the only judicial decision the Trial Chamber is entrusted with).

³³³ While the Appeals Chamber underscored that the criterion is not empty, it noted that it is not very precise.

³³⁴ ICTY, Decision on Ramush Haradinaj's Modified Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006, par. 91. The proposal made by Judge Agius to have submissions from three parties was not taken up by the Appeals Chamber as such would put "an extreme burden on the Chamber and, given the certainty of delays in answering requests, would defeat the purpose of the holding and reduce the Accused's participation in politics to a mere quiddity" (see *ibid.*, par. 91, fn. 156).

³³⁵ *Ibid.*, par. 98. The conclusion that the delegation was lawful was opposed by Judge Shahabuddeen and Judge Schomburg. They concluded that the amount of discretion given to UNMIK, which they refer to as the "elastic

§ *Limitations to the conditions that can be imposed*

The vague criterion that UNMIK had to use to decide on Haradinaj's requests raises other legitimate concerns. Such delegation may be in violation of the right to freedom of expression, as human rights law requires that restrictions to such a right *be provided for by law*.³³⁶ Curtailing the right to engage in political speech should equally fulfill this requirement. Consequently, limitations put on this freedom based on other considerations than the ones mentioned in Rule 65 (B) ICTY RPE should be treated with distrust. It was argued above that the criterion on which basis UNMIK decided on Haradinaj's applications, and which it could use to curtail Haradinaj's right to political speech, was linked to neither of these criteria.

Nevertheless, the Appeals Chamber reasoned that human rights law departs from the position that all expression is allowed unless other circumstances are present. The starting point in the *Haradinaj* Re-assessment Decision was that all expression (at least, all political) is prohibited.³³⁷ The Chamber continued that *the human rights norms have nothing to say about the correct criteria to apply in this case*.³³⁸ Such an argument, however, should be rejected. While it is true that the Trial Chamber's first decision denied the right to political speech, a condition that can be imposed by the Trial Chamber pursuant to Rule 65 (C), the starting point when an accused is provisionally released is that this person continues to be entitled to that right. When the Trial Chamber decides to impose conditions that restrict such right, these restrictions, under human rights law, should be provided for by law.³³⁹ Under the tribunal's

security criterion", does not longer guarantee the Trial Chamber's ability to supervise and control the provisional release regime. See ICTY, Decision on Ramush Haradinaj's Modified Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006, Joint Dissenting Opinion of Judge Shahabuddeen and Judge Schomburg, par. 15 and the discussion thereof in K. DE MEESTER, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 29 February 2005 – 16 November 2005, Vol. XXVII, (forthcoming).

³³⁶ ICTY, Decision on Ramush Haradinaj's Modified Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006, par. 58; for a similar argument, consider Z. DEEN-RACSMÁNY and E. KOK, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2004, Vol. XX, Antwerp, Intersentia, 2009, p. 75.

³³⁷ In its first decision, the Trial Chamber had prohibited all political speech by Haradinaj. Consequently, in the wording of the Appeals Chamber, the question at stake is "how much expression will UNMIK *allow* the Accused?"

³³⁸ ICTY, Decision on Ramush Haradinaj's Modified Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006, par. 84 (emphasis added).

³³⁹ Article 19 ICCPR; Article 10 ECHR; Article 13 ACHR; Article 9 ACHPR.

procedural framework, this implies that they should be necessary to ensure the accused's appearance at trial or for the protection of victims, witnesses or other persons.

In a similar vein, the standard condition imposed by the ICTY, that the accused cannot discuss the case with anyone but counsel and that he or she should refrain from holding public office, may be problematic from a human rights perspective and may be disproportionate, even where such a condition is justified by the need to prevent absconding and to promote the administration of justice.³⁴⁰ Moreover, it has been argued that such a restriction lacks a proper legal basis because Rule 65 (C) is vague and broad.³⁴¹ However, as argued before, Rule 65 (C) and (B) should be read together in that conditions imposed pursuant to Rule 65 (C) should be necessary to safeguard the presence of the accused for trial or to prevent any danger to victims, witnesses or other persons. In that way, Rule 65 (B) ICTY, ICTR and SCSL RPE should be understood as limiting Rule 65 (C) where it explains the nature of the threat that would arise from the individual's exercise of his or her freedom of expression.

II.2.9. Requests for modification of the conditions of detention

A rather unexplored alternative route to the stringent conditions of Rule 65, which prevented any provisional release from being granted at the ICTR and the SCSL, is Rule 64 ICTY, ICTR and SCSL RPE. This rule allows the accused to apply to the President to request a modification of the conditions of detention. On this basis, in *Blaškić*, the then-President Cassese placed the accused under *house arrest* in a residence designated by the authorities of The Netherlands outside the tribunal's Detention Unit.³⁴² While the President noted that the possibility of house arrest is neither provided for under the Statute nor under the RPE of the ICTY, he argued that there is also nothing preventing or prohibiting house arrest as an alternative to pre-trial detention, calling it the "middle-of-the-road measure" between the

³⁴⁰ Z. DEEN-RACSMÁNY and E. KOK, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2004, Vol. XX, Antwerp, Intersentia, 2009, pp. 74- 75 (arguing that it is difficult to see why a blanket ban on discussing the case with anyone but counsel is necessary to attain these aims, also in light of other conditions imposed).

³⁴¹ *Ibid.*, p. 75.

³⁴² ICTY, Decision on the Motion of the Defence filed Pursuant to Rule 64 of the Rules of Procedure and Evidence, *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, President, 3 April 1996, par. 24 (*in casu*, defence counsel sought "some sort of restricted liberty" under Rule 64 (reference is made to the measure of compulsory residence (assignation à la résidence), which is a precautionary measure taken against persons who (i) have allegedly committed offences which do not automatically entail remand in custody and (ii) are not likely to engage in behavior (such as interference with investigations, repetition of crime, danger to the public order) requiring that a custodial measure be taken (par. 12)).

norm (detention on remand) and the exception (provisional release). In his assessment, the President considered such factors as the risk of absconding, danger posed to witnesses, tampering with evidence or danger to the public order and peace.³⁴³ Also, the ICTR considered that in some situations, including situations where security concerns or medical reasons are present, detention at a location other than the tribunal's detention facility may be preferable.³⁴⁴ On this basis, Ngirumpatse was detained at a safe house in Arusha in order to receive medical treatment.³⁴⁵

II.2.10. Length of the pre-trial detention

The average period of time that accused persons spend in pre-trial detention is a matter of grave concern. The accused are usually detained several years before the start of their trial. In some cases, the period of time spent in pre-trial detention is simply appalling.³⁴⁶ For example, Karemera spent over seven years in pre-trial detention at the behest of the ICTR prior to the commencement of his trial. This is not an exception. Ngirumpatse and Nzirorera each spent approximately six-and-a-half years in pre-trial detention, while Bagosora and Hategekimana were both detained six years prior to the commencement of their trial.³⁴⁷ In contrast to the ICC and other internationalised criminal tribunals, the procedural framework of the ICTY/ICTR and the SCSL does not envisage a formal review mechanism to control the necessity and reasonableness of continued pre-trial detention.³⁴⁸

³⁴³ *Ibid.*, par. 21.

³⁴⁴ ICTR, Decision on Matthieu Ngirumpatse's Motion to Vary his Conditions of Detention, *Prosecutor v. Ngirumpatse*, Case No. ICTR-98-44-T, President, 24 June 2010, par. 2.

³⁴⁵ Consider ICTR, Decision on Matthieu Ngirumpatse's Motion to Vary his Conditions of Detention, *Prosecutor v. Ngirumpatse*, Case No. ICTR-98-44-T, President, 24 June 2010.

³⁴⁶ Consider F. GAYNOR, Provisional Release in the Law of the International Criminal Tribunal for the Former Yugoslavia, in J. DORIA, H-P GASSER, and M.C. BASSIOUNI (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Leiden – Boston, Martinus Nijhoff Publishers, 2009, p. 198 (referring to the length of pre-trial detention as “one of the most worrying features of international criminal proceedings”).

³⁴⁷ ICTR, Status of Detainees on 5 September 2013 (available at: <http://www.unict.org/cases/tabid/202/Default.aspx>, last visited 18 January 2014).

³⁴⁸ ICTY, Order on Motion for Provisional Release, *Prosecutor v. Ademi*, Case No. IT-01-46-PT, T. Ch., 20 February 2002, par. 26 (the Trial Chamber emphasises that in the absence of a formal, periodic review mechanism, the issue of the length of the pre-trial detention may need to be given particular attention. It was noted by WALD and MARTINEZ that suggestions to change the original Rule 65 (B) to adopt a presumption of release and an automatic review of detention every 90 days have been made but were rejected. See P. WALD and J. MARTINEZ, Provisional Release at the ICTY: A Work in Progress, in R. MAY et al., *Essays on ICTY Procedure and Evidence*, Kluwer Law International, The Hague, 2001, p. 233. Compare with the periodic review mechanism provided for under Article 60 (3) ICC Statute, which will be discussed, *infra*, Chapter 8, II.3.3.

As previously discussed, under pre-amendment Rule 65 (B), the length of the pre-trial detention was assessed in provisional release applications as part of the ‘exceptional circumstances’ requirement.³⁴⁹ Nevertheless, the ICTR Appeals Chamber held in *Kanyabashi* that “although the long pre-trial detention the Applicant has served may, if attributable to the Tribunal, entail the need for a reparation for a violation of fundamental human rights, it does not *per se* constitute good cause for release.”³⁵⁰ Consequently, the length of pre-trial detention alone would not necessarily be sufficient for release but only a factor to be taken into consideration when assessing the existence of ‘exceptional circumstances’. This ‘exceptional circumstances’ requirement was, in turn, the threshold for considering the other requirements for provisional release under pre-amendment Rule 65 (B).³⁵¹ Therefore, even where the Trial Chamber would find the pre-trial detention to be unreasonable, this would not necessarily entail that the person should be released. It was noted with concern that a period of pre-trial detention of over six-and-a-half years was not considered to constitute ‘exceptional circumstances’ in the sense of pre-amendment Rule 65 (B) ICTR RPE.³⁵²

Likewise, following the amendment of Rule 65 (B), the length of detention is only a factor considered in the Trial Chamber’s exercise of its discretion to *deny* provisional release if the substantial conditions of Rule 65 (B) are fulfilled (the period of detention being is a factor favouring release). It was stressed in *Krajišnik* that the length of the pre-trial detention is “an important factor in the exercise of discretion in determining an application for provisional release.”³⁵³ Similarly, the Appeals Chamber held in *Haradinaj* that the excessive length of pre-trial detention has no bearing on the assessment of the substantial requirements of Rule 65 (B) ICTY RPE but is “an additional discretionary consideration.”³⁵⁴ This factor includes both the actual or likely period of detention.³⁵⁵

³⁴⁹ As discussed, *supra*, Chapter 8, II.1.

³⁵⁰ ICTR, Decision (on Application for Leave to Appeal under Rule 65 (D) of the Rules of Procedure and Evidence), *Kanyabashi v. Prosecutor*, Case No. ICTR-96-15-A, A Bench of the A. Ch., 13 June 2001, p. 3; ICTR, Decision on Motion to Appeal against the Provisional Release Decision of Trial Chamber II of 21 October 2002, *Prosecutor v. Ndayambaje*, Case No. ICTR-98-42-T, A Bench of the A. Ch., 10 January 2003, p. 4.

³⁵¹ *Cf.* ICTR, Decision on Defence Motion for Release, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. III, 12 July 2002, par. 22.

³⁵² See *supra*, Chapter 8, II.1.

³⁵³ ICTY, Decision on Momočilo Krajišnik’s Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik and Plavšić*, Case No. IT-00-39 & 40-PT, T. Ch., 8 October 2001, par. 22.

³⁵⁴ ICTY, Decision on Lahi Brahimaj’s Interlocutory Appeal against the Trial Chamber’s Decision Denying his Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.2, A. Ch., 9 March 2006, par. 23. Consider also, *e.g.* ICTY, Decision on Appeal against Decision Denying Motion for Provisional Release, *Prosecutor v. Milošević*, Case No. IT-98-29/1-AR65.1, A. Ch., 17 October 2006, par. 8; ICTY, Decision on the

It follows from international human rights norms that pre-trial detention should be limited in time and that the person has a right to be tried within a reasonable time or to be (conditionally) released (*délai raisonnable*).³⁵⁶ Both the HRC and the ECtHR considered that what constitutes ‘reasonable time’ must be assessed on a case-by-case basis.³⁵⁷ The ECtHR explained that the ‘reasonableness of time’ criterion cannot be translated into a fixed number of days, weeks, months or years, or into various periods depending on the seriousness of the alleged crime. Article 5 (3) ECHR does not include a maximum length of pre-trial detention.³⁵⁸

While Article 5 (3) ECHR is formulated as a disjunction (“trial within a reasonable time *or* release”), it requires the ordering of the release as soon as the detention ceases to be reasonable.³⁵⁹ Release may be conditioned by guarantees to appear for trial.³⁶⁰ TRECHSEL noted that the assessment of the reasonableness of the length of detention, entailing the weighing of the interests of the person against the interests of the prosecution of crime, is particularly difficult where offences such as crimes against humanity are concerned.³⁶¹ The aforementioned *Jentzsch v. Germany* case is illustrative in that regard. It concerned proceedings in Germany involving allegations of war crimes and crimes against humanity for Jentzsch’s alleged involvement as a member of the SS in ‘death bath’ operations at the Gusen concentration camp. The ECommHR found a pre-trial detention of over six years (while ‘regrettably long’) not to be unreasonable.³⁶² In its assessment, the ECommHR referred to the fact that (1) the crimes happened a long time ago, (2) that numerous victims were involved and that there was a need “to clarify the whole historical complex” in order to make a proper

Accused Praljak’s Motion for Provisional Release, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, T. Ch. III, 17 July 2008, par. 27.

³⁵⁵ ICTY, Decision on Appeal against Decision Denying Motion for Provisional Release, *Prosecutor v. Milošević*, Case No. IT-98-29/1-AR65.1, A. Ch., 17 October 2006, par. 8.

³⁵⁶ Article 9 (3) ICCPR; Article 5 (3) ECHR; Article 7 (5) ACHR.

³⁵⁷ HRC, *Koné v. Senegal*, Communication No. 386/1989, U.N. Doc. CCPR/C/52/D/386/1989, 27 October 1994, par. 8.6 and 8.7 (*in casu*, the HRC found four years and four months pre-trial detention to be excessive in the absence of special circumstances justifying such delay); HRC, *Bolaños v. Ecuador*, Communication No. 238/1997, U.N. Doc. Supp. No. 40 (A/44/40), 26 July 1989, par. 2.1, 8.3 and 9.

³⁵⁸ ECtHR, *Stögmüller v. Austria*, Application No. 1602/62, Series A, No. 9, Judgment of 10 November 1969, par. 4.

³⁵⁹ Consider *e.g.* ECtHR, *McKay v. The United Kingdom*, Application No. 543/03, Reports 2006-X, Judgement (Grand Chamber) of 3 October 2006, par. 41; ECtHR, *Wemhoff v. Austria*, Application No. 2212/64, Series A, No. 7, Judgment of 27 June 1968, par. 4-5.

³⁶⁰ Article 5 (3) ECHR.

³⁶¹ S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, p. 518.

³⁶² ECommHR, *Jentzsch v. Germany*, Application No. 2604/65, 14 YB (1971) 876, Report of 30 November 1970, par. 174.

assessment of the individuals involved and their degree of participation and guilt, (3) the number of witnesses and suspects and (4) the fact that the crime scene was outside Germany.³⁶³ Similar difficulties are encountered by international criminal tribunals when conducting their investigations.³⁶⁴ It follows that the specific nature of the crimes within the ambit of the jurisdiction of the international criminal tribunals influences the interpretation of human rights provisions and allows for extended pre-trial detention.

An additional factor in explaining the length of pre-trial detention in the *Jentzsch v. Germany* case was the fact that proceedings had been transferred several times, which was not the case in *W.R. v. The Federal Republic of Germany*.³⁶⁵ In this case, the applicant had been convicted to penal servitude for life for the murder of some 148 persons while he served as a subordinate police commander and member of the SS in German occupied Poland. The ECommHR did not find the length of detention on remand of six years and eleven months to be unreasonable.³⁶⁶ The Commission held that “the prosecuting authorities, in investigating the case against the applicant, were faced with such exceptional difficulties as do not arise in normal criminal cases.”³⁶⁷ These include the fact that the crimes were committed a long time ago, the fact that the crimes were committed against numerous victims as part of “a large scale scheme calculated to exterminate the Jews as an entire”, the fact that witnesses had been scattered, the fact that it was necessary to establish the exact role of the accused in the alleged crimes, the necessity to first obtain a general picture of the situation and the fact that some 500 witnesses were examined in Germany and abroad.³⁶⁸ To be clear, it is not the nature (gravity) of the crime but the complexity of the crime that justifies longer periods of pre-trial detention. It should be noted that there is no automatic correlation between the gravity of the crime and the complexity of the case. Thus, a case by case consideration is warranted.³⁶⁹

³⁶³ *Ibid.*, par. 171.

³⁶⁴ See *supra*, Chapter 2, VII.3.

³⁶⁵ ECommHR, *W. R. v. The Federal Republic of Germany*, Application No. 3376/67, Collection 29, pp. 31-49, Decision of 4 February 1969.

³⁶⁶ *Ibid.*

³⁶⁷ *Ibid.*

³⁶⁸ *Ibid.*

³⁶⁹ Consider, e.g., RYNGAERT, speaking on the more general right to a fair trial: “[i]n fact, serious concerns may be raised over the use of the gravity of the crime as a free-standing criterion – that is, as unconnected from the genuine complexity of the proceedings – in terms of the presumption of innocence.” See C. RYNGAERT, *The Doctrine of Abuse of Process: A Comment on the Cambodia Tribunal’s decisions in the Case against Duch* (2007), in «Leiden Journal of International Law», Vol. 21, 2008, p. 731.

Whether the time spent in detention before judgment has, at some stage, exceeded the acceptable limit---and has, therefore, imposed a greater sacrifice than could be expected from a person presumed to be innocent---must be taken into consideration.³⁷⁰ The ‘reasonable time’ requirement under Article 5 (3) ECHR implies a two-pronged test. As previously noted, the persistence of a reasonable suspicion is a condition *sine qua non* for the lawfulness of the continued detention. However, as the ECtHR’s jurisprudence confirms, after a certain amount of time, the persistence of a reasonable suspicion is no longer sufficient. Other grounds should justify continued detention. These grounds should be ‘relevant’ and ‘sufficient’. Where such grounds are lacking, even short periods of pre-trial detention may be found to be in violation of Article 5 (3) ECHR. It was noted that these justifying grounds are lacking in the procedural framework of the *ad hoc* tribunals and the SCSL. Besides, the Court must ascertain whether the national authorities displayed ‘special diligence’ in conducting the proceedings.³⁷¹ The aim of such a test is to detect any unjustified delays or periods of inactivity.³⁷² When a defendant is provisionally detained, there is a special duty of diligence on the authorities to bring detention to an end without further delay.³⁷³

On several occasions, the ICTY held that the length of pre-trial detention should be considered “in light of all the circumstances of a case, such as the complexity of the case, the speed of handling, the conduct of the accused, the conduct of authorities, the absence of unjustified inertia and the presence of budgetary appropriations for the administration of criminal justice.”³⁷⁴ In considering the length of pre-trial detention, the *ad hoc* tribunals highlighted the fact that they are working in a different context than national criminal justice systems.³⁷⁵ Circumstances that have been considered in the jurisprudence to explain the length

³⁷⁰ ECtHR, *Wenhoff v. Austria*, Application No. 2212/64, Series A, No. 7, Judgment of 27 June 1968, par. 5.

³⁷¹ Consider *e.g.* ECtHR, *Stögmüller v. Austria*, Application No. 1602/62, Series A, No. 9, Judgment of 10 November 1969, par. 5; ECtHR, *W. v. Switzerland*, Application No. 14379/88, Series A, No. 254-A, Judgment of 26 January 1993, par. 30; ECtHR, *Tomasi v. France*, Application No. 12850/87, Series A, no. 241-A, Judgment of 27 August 1992, par. 84.

³⁷² Consider *e.g.* ECtHR, *Toth v. Austria*, Application No. 11894/85, Series A, No. 224, Judgment of 12 December 1991, par. 76; ECtHR, *Vaccaro v. Italy*, Application No. 41852/98, Judgment of 16 November 2000, par. 42 (the Court found a violation where no explanation had been given for an investigation lasting one year, five months and twenty-four days, where after it took the district court ten months and a half to declare that the case was outside its jurisdiction).

³⁷³ ECtHR, *Scott v. Spain*, Application No. 21335/93, Reports 1996-VI, Judgment of 18 December 1996, par. 72.

³⁷⁴ ICTY, Decision on Darko Mrda’s Request for Provisional Release, *Prosecutor v. Mrda*, Case No. IT-02-59-PT, T. Ch. II, 15 April 2003, par. 42; ICTY, Decision on Vidoje Blagojević’s Application of Provisional Release, *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-PT, T. Ch. II, 22 July 2002, par. 29.

³⁷⁵ Consider in this regard the argumentation by MCINTYRE that “[t]he Tribunal must [...] take account of unique circumstances in which it operates.” See G. MCINTYRE, *Defining Human Rights*, in G. BOAS and

of the pre-trial detention include (1) the general complexity of the proceedings,³⁷⁶ (2) the number of motions filed by the parties³⁷⁷ and (3) the further complexity caused by the joinder of trials,³⁷⁸ (4) the gravity of the crimes charged and/or the severity of the corresponding penalty,³⁷⁹ (5) the factual and legal complexity of the charges and³⁸⁰ (6) the necessity to deliberate and render decisions on pre-trial motions filed by the parties.³⁸¹

More worrisome are references to institutional constraints and limited resources in the case law of the *ad hoc* tribunals. For example, in *Bagosora*, the Trial Chamber referred to the overbooked trial docket and the ‘limited human and physical resources’ at the tribunal’s disposal.³⁸² However, the HRC confirmed that institutional shortcomings are not a relevant circumstance in the assessment of the ‘reasonable time’ requirement.³⁸³

W.A. SCHABAS (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Brill Academic Publishers, Leiden, 2003, p. 233.

³⁷⁶ ICTY, Decision on Darko Mrda’s Request for Provisional Release, *Prosecutor v. Mrda*, Case No. IT-02-59-PT, T. Ch. II, 15 April 2003, par. 42; ICTR, Decision on the Defence Motion for the Provisional Release of the Accused, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, T. Ch. II, 21 February 2001, par. 9; ICTR, Defence Motion for Provisional Release of the Accused, *Prosecutor v. Muhimana*, Case No. ICTR-95-1-B-I, T. Ch. I, 1 October 2002, par. 8; ICTR, Decision on Sagahutu’s Preliminary Provisional Release and Severance Motions, *Prosecutor v. Sagahutu et al.*, Case No. ICTR-00-56-T, T. Ch. II, 25 September 2002, par. 51; ICTR, Decision on Bizimungu’s Motion for Provisional Release Pursuant to Rule 65 of the Rules, *Prosecutor v. Bizimungu*, Case No. ICTR-99-50-T, T. Ch. II, 4 November 2002, par. 32.

³⁷⁷ ICTR, Decision on the Defence Motion for the Provisional Release of the Accused, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, T. Ch. II, 21 February 2001, par. 9.

³⁷⁸ *Ibid.*, par. 9; ICTR, Decision on the Defence’s Motion for Provisional Release Pursuant to Rule 65 of the Rules, *Prosecutor v. Bicomumpaka*, Case No. ICTR-99-50-T, T. Ch. II, 25 July 2001, par. 19.

³⁷⁹ ICTR, Decision on Application by Hormisdas Nsengimana for Leave to Appeal the Trial Chamber’s Decision on Provisional Release, *Prosecutor v. Nsengimana*, A. Ch., 23 August 2005, p. 5 (as confirmed in ICTR, Judgement, *Prosecutor v. Nsengimana*, Case No. 01-69-T, T. Ch. I, 17 November 2009, par. 49); ICTR, Defence Motion for Provisional Release of the Accused, *Prosecutor v. Muhimana*, Case No. ICTR-95-1-B-I, T. Ch. I, 1 October 2002, par. 8; ICTR, Decision on the Defence’s Motion for Provisional Release Pursuant to Rule 65 of the Rules, *Prosecutor v. Bicomumpaka*, Case No. ICTR-99-50-T, T. Ch. II, 25 July 2001, par. 19; ICTR, Decision on Bizimungu’s Motion for Provisional Release Pursuant to Rule 65 of the Rules, *Prosecutor v. Bizimungu*, Case No. ICTR-99-50-T, T. Ch. II, 4 November 2002, par. 32; ICTR, Decision on Defence Motion for Release, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. III, 12 July 2002, par. 22.

³⁸⁰ ICTR, Decision on the Defence’s Motion for Provisional Release Pursuant to Rule 65 of the Rules, *Prosecutor v. Bicomumpaka*, Case No. ICTR-99-50-T, T. Ch. II, 25 July 2001, par. 19.

³⁸¹ *Ibid.*, par. 19.

³⁸² ICTR, Decision on Defence Motion for Release, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. III, 12 July 2002, par. 25. Consider also: ICTY, Decision on Motion by Radoslav Brđanin for Provisional Release, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36-PT, T. Ch. II, 25 July 2000, par. 28 (stating that “[i]t is unfortunate that the limited resources possessed by the Tribunal do not permit an earlier trial for those in detention, and that a delay of even this length is necessary, but the likely period of pre-trial detention for Brđanin has not been demonstrated to be unreasonable”).

³⁸³ HRC, *Bizouarn v. Bolivia*, Application No. 336/1988, U.N. Doc. CCPR/C/43/D/336/1988, 5 November 1991, par. 6.5 (“The lack of adequate budgetary appropriations for the administration of criminal justice alluded to by the State party does not justify unreasonable delays in the adjudication of criminal cases”).

Overall, considerations relating to the length of the pre-trial detention only play a marginal role in the assessment of provisional release applications.³⁸⁴ Even in cases where the accused has been detained for a considerable amount of time in pre-trial detention, the fact that the ECtHR's case law has accepted delays of four years or more has been used to justify refusals of provisional release.³⁸⁵

Since the length of detention is assessed by the Trial Chamber as part of its discretionary power, it is evident that Rule 65 (B) does not leave room for the length of pre-trial detention to itself lead to release. This is not in conformity with international human rights law, where the proper remedy in case pre-trial detention is found to be unreasonably lengthy is release. Therefore, it may be asked whether a *habeas corpus*-like request for release may be made on the sole ground of the unreasonable length of detention.³⁸⁶ However, in *Barayagwiza*, where the Defence submitted that the length of pre-trial detention was unreasonable and the accused should be released, the Trial Chamber urged the Defence to address the requirements of Rule 65 in its application.³⁸⁷

Another alternative route to address the length of pre-trial detention is through a claim that the right to be tried without undue delay has been violated.³⁸⁸ Nevertheless, the right to be tried within a reasonable time or release and the right to be tried without undue delay, while related, are distinct rights. Where delays in the trial are found to be justified, the right to be tried within a reasonable time or to release may still imply that the person should be released.

³⁸⁴ C. A. MÜLLER, *The Law of Interim Release in the Jurisprudence of the International Criminal Tribunals*, in «International Criminal Law Review», Vol. 8, 2008, p. 611 (concluding that the length of detention has not been a determinant factor).

³⁸⁵ G. MCINTYRE, *Defining Human Rights*, in G. BOAS and W.A. SCHABAS (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Brill Academic Publishers, Leiden, 2003, p. 233. See e.g. ICTY, *Decision on Momočilo Krajišnik's Notice of Motion for Provisional Release, Prosecutor v. Krajišnik and Plavšić*, Case No. IT-00-39 & 40-PT, 8 October 2001, par. 15 ("the relevant international treaties express the proposition that provisional release should be granted where the accused cannot be brought to trial within a reasonable period of time"). Nevertheless, the Trial chamber consequently refers to the ECtHR which held that extensive periods of pre-trial detention may be reasonable, for example in ECtHR, *W. v. Switzerland*, Application No. 14379/88, Series A, No. 254-A, Judgment of 26 January 1993.

³⁸⁶ As suggested by H. FRIMAN, *Commentary*, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for Rwanda 2001 – 2002*, Vol. X, Antwerp, Intersentia, 2007, p. 122. As discussed earlier, the *ad hoc* tribunals and the SCSL determined that they have the power to hear *habeas corpus* motions. See *supra*, Chapter 7, V.4.1.

³⁸⁷ ICTR, *Decision on the Defence's Motion for Provisional Release of Jean-bosco Barayagwiza, Prosecutor v. Barayagwiza*, Case No. ICTR-99-52-T, T. Ch. I, 3 September 2002, par. 3 (the Trial Chamber refers to an earlier (similar) motion that was orally decided and where the Presiding Judge stated: "If you are relying on Rule 65, you [should] make an appropriate motion and satisfy the criteria set out in Rule 65 for a decision to be taken by the Chamber in respect of provisional release. Such a course is still open to you").

³⁸⁸ Article 21 (4) (c) ICTY Statute; Article 20 (4) (C) ICTR Statute and 17 (4) (c) SCSL Statute.

II.2.11. Agreements on the acceptance of provisionally released persons

It may be asked how far a *duty is incumbent on the tribunal to identify a country willing to accept an accused who meets the criteria for provisional release*.³⁸⁹ One could argue that the Registry should undertake efforts to conclude agreements with states willing to accept persons who meet the standards for release on their territory.³⁹⁰ To some extent, guidance may be found in the enforcement of sentences agreements that have been concluded between the *ad hoc* tribunals and states that have expressed a willingness to enforce sentences. However, regarding the enforcement of sentences, provision is made for states to express this willingness under the *ad hoc* tribunals' respective Statutes.³⁹¹ In turn, the *ad hoc* tribunals' Statutes do not provide any procedure for states to express their willingness to accept persons whose provisional release has been ordered by the tribunal. Coupled with the aforementioned absence of any statutory provision on provisional release, such a gap creates the impression that the possibility of provisional release was only an afterthought.

Nevertheless, such an oversight may not lead to a refusal to order provisional release if there is no longer a justification for pre-trial detention. Where the ECtHR considered the length of pre-trial detention pursuant to Article 9 (3) ICCPR, it held that the state cannot rely on institutional constraints to justify continued pre-trial detention.³⁹² Consequently, the tribunal cannot rely on deficits in its own procedural regime to justify continued detention. International human rights norms dictate that the authority reviewing the lawfulness of

³⁸⁹ In such argument, it is presumed, as the *ad hoc* tribunals have emphasised themselves, that obtaining state guarantees is not a prerequisite for provisional release. See *supra*, Chapter 8, II.2.6.1.

³⁹⁰ Consider e.g. C.L. DAVIDSON, No shortcuts on Human Rights: Bail and the International Criminal Trial, in «American University Law Review», Vol. 60, 2010, pp. 69 – 70 (advocating that the tribunals actively seek to make arrangement with states and holding that “the ICC and other emerging tribunals, like the Special Panel for Lebanon, would be well advised to consider in advance the arrangements to be made for the release of a defendant for whom no valid grounds for detention exist”).

³⁹¹ Article 27 ICTY Statute and Article 26 ICTR Statute, Rule 103 ICTY and ICTR RPE. Consider also ICTY, Practice Direction on the Procedure for the International Tribunal's Designation of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment (Rev.1), 1 September 2009 and ICTR, Practice Direction on the Procedure for the International Tribunal's Designation of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment, 23 September 2008. In that regard, it was noted by some authors that “[i]t is an open question as to what should happen if no such designation can be made, meaning that no state would be prepared to enforce sentences of the Tribunals.” See C. KRESS and G. SLUITER, Imprisonment, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court, Oxford, Oxford University Press, 2002, p. 1772.

³⁹² As discussed, *supra*, Chapter 8, II, 2.10.

detention should always have the authority to order release.³⁹³ The ECtHR held that such authority to order release should be ‘effective’.³⁹⁴ It follows that once there is no longer a justification for continued pre-trial detention, a duty is incumbent on the tribunal to identify a country willing to accept provisionally released accused persons. Whether it would actually be possible for the tribunal to identify states willing to conclude an agreement to accept provisionally released persons on their territory remains an open question. According to one legal officer of the ICTR, imposing such a burden on the tribunal “is like asking the impossible”.³⁹⁵

In connection to the question above, it is important to ask how far an *obligation is incumbent on states* to accept persons who have been provisionally released by the tribunal. It could be argued that a broad interpretation of the unconditional requirement to ‘cooperate with the tribunal in the investigation and/or prosecution of persons accused of committing serious violations of international humanitarian law’ encompasses a duty to receive persons who have been provisionally released by the tribunal on their territory.³⁹⁶ As one author puts it, the duty of states to cooperate with the *ad hoc* tribunals is “all-embracing.”³⁹⁷ It includes “any situation in which the ICTY or ICTR need assistance.”³⁹⁸ Such an obligation is only limited where statutory provisions would limit such obligations (as the Statutes of the *ad hoc* tribunals arguably do with regard to the enforcement of sentences).³⁹⁹ *In casu*, where provisional release is ordered, the tribunal needs assistance by states to effectively implement its decision

³⁹³ See *supra*, Chapter 7, V.3.1 (right to be promptly brought before a judge or ‘officer’) and Chapter 7, V.4.1 (right to challenge the legality of detention).

³⁹⁴ ECtHR, *Feldman v. Ukraine*, Application Nos. 76556/01 and 38779/04, Judgment of 8 April 2010, par. 90 (where the national court ordered release of the person, the person was immediately re-arrested. The ECtHR held that the review of the lawfulness of detention was thus ineffective in that there was no adequate judicial response to the applicant's complaints). See S. GOLUBOK, *Pre-Conviction Detention before the International Criminal Court: Compliance or Fragmentation*, in «The Law and Practice of International Courts and Tribunals», Vol. 8, 2010, p. 308.

³⁹⁵ One legal officer, when asked about the existence of a duty incumbent on the tribunal to identify a state willing to accept the accused person provisionally released, replied the following: “I think it would be difficult for one to argue that the Tribunal should also take responsibility to find a home, even a temporary home, for persons provisionally. [...] [F]rom an administrative point of view, I would say that it is probably undesirable to impose that additional responsibility on the Tribunal, because it is like asking the impossible.” See Interview with a Legal Officer of the ICTR, ICTR-29, Arusha 5 June 2008, p. 5.

³⁹⁶ Article 29 ICTY Statute and Article 28 ICTR Statute.

³⁹⁷ B. SWART, *General Problems*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1592. This is not to say that the tribunal should not be unmindful to legitimate state concerns. See ICTY, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v. Blaškić*, Case No. IT-95-AR108 bis, A. Ch., 29 October 1997, par. 67.

³⁹⁸ B. SWART, *General Problems*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1592.

³⁹⁹ *Ibid.*, p. 1592.

to release a person provisionally. Therefore, the state requested should comply with such request.

Nevertheless, when interviewees were asked about the existence of such an obligation, some revealed themselves to be rather sceptical. First of all, such decisions involve important financial consequences.⁴⁰⁰ Secondly, and more importantly, it may be asked whether there could be an obligation on states to accept persons who are accused of grave crimes on their territory.⁴⁰¹ One interviewee called it “a step too far”.⁴⁰² In that regard, it was noted that there is no obligation to grant them refugee status.⁴⁰³ Indeed, Article 1 (F) (a) of the 1951 Refugee Convention excludes persons from the protection of refugee status in case there are ‘serious reasons for considering’ that the person has committed a crime against peace, a war crime or a crime against humanity. Besides, states may argue that their immigration laws may prevent them from accepting the person onto their territory.⁴⁰⁴

II.3. The ICC: Provisional release as the rule, detention as the exception

The ICC provides for a regime of pre-trial detention and release that is substantially different from the provisional release scheme provided for by the *ad hoc* tribunals and the SCSL. Several (guiding) principles underlying the Court’s pre-trial detention and provisional release scheme distinguish it from the other international criminal tribunals and deserve our close consideration. The next subsection will address issues such as the allocation of the burden of proof, the absence of discretion to order pre-trial release and, most notably, the existence of a periodic review mechanism. The sum of these elements will lead us to conclude that the procedural scheme of the ICC provides for provisional release as a rule and detention as an exception. The ICC’s record on provisional release provides us with two examples where

⁴⁰⁰ Interview with a Judge of the ICTR, ICTR-05, Arusha, 2 June 2008, p. 7.

⁴⁰¹ Consider *e.g.* Interview with a Legal Officer of the ICTR, ICTR-34, Arusha, 3 June 2008, p. 8 (“I am just not so certain how easy it would be for the Tribunal to make arrangements with states and sort of coerce them into accepting a detained person if they are unwilling to do so”).

⁴⁰² Interview with a Legal Officer of the ICTR, ICTR-17, 3 June 2008, p. 7 (“I think that is a step too far. I think it is too far to order a state to accept someone who is accused of mass murder on their territory. I do not think any state would really want to do that. I think it should remain voluntary”).

⁴⁰³ Interview with a Legal Officer of the ICTR, ICTR-30, Arusha, 30 May 2008, p. 8.

⁴⁰⁴ Nevertheless, some accused persons already had official refugee status in the countries where they were arrested. Therefore they should not have any problems in moving back to these countries. See: Interview with Mr. Taku, Defence counsel, ICTR-21, Arusha, 23 May 2008, p. 14.

temporary interim release was granted on humanitarian grounds. Both concerned the temporary release of Bemba during a period not exceeding 24 hours to attend a funeral.⁴⁰⁵

§ *Exceptional character of detention*

ICC case law has continuously emphasised the exceptional character of pre-trial detention, thereby deviating from the mainstream opinion upheld in the case law of the *ad hoc* tribunals and the SCSL that detention is neither the rule nor the exception.⁴⁰⁶ Indeed, in stark contrast to the system of automatic pre-trial detention at the *ad hoc* tribunals and the SCSL, the ICC Statute makes the issuance of a warrant of arrest by the Pre-Trial Chamber dependent not only upon the existence of reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court but also on the existence of a legitimate purpose for the detention. More precisely, detention should appear to be necessary (i) to ensure the person's appearance at trial; (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings or (iii) to prevent the person from continuing with the

⁴⁰⁵ See ICC, Decision on the Defence's Urgent Request Concerning Mr. Jean-Pierre Bemba's Attendance of his Father's Funeral, *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-437-Conf, PTC II, 8 July 2009 as referred to in ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-403, PTC II, 14 April 2009, par. 36; ICC, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08, PTC II, 14 August 2009, par. 65; ICC, Decision on the Defence Request for Mr. Jean-Pierre Bemba to Attend his Stepmother's Funeral, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1099, T. Ch. III, 12 January 2011. A further request by Bemba to be released on humanitarian grounds in order to be able to register for the elections in the DRC was summarily dismissed. See, among others: ICC, Public Redacted Version of the "Decision on Applications for Provisional Release" of 27 June 2011, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1565-Red, T. Ch. III, 16 August 2011, par. 69 – 72 ("travelling to the DRC to complete one's electoral registration is not the type of circumstance that warrants such extraordinary relief"). See also ICC, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 27 June 2011 entitled "Decision on Applications for Provisional Release", *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1626-Red (OA 7), A. Ch., 19 August 2011, par. 82 – 86 (concluding that the Trial Chamber did not err in dismissing the request); ICC, Decision on the "Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo", *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1691, T. Ch. III, 2 September 2011; ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 2 September 2011 Entitled "Decision on the 'Demande de mise en liberté de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo'", *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-1722 (OA 8), A. Ch., 9 September 2011.

⁴⁰⁶ See e.g. ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-403, PTC II, 14 April 2009, par. 36; ICC, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08, PTC II, 14 August 2009, par. 36 (indicating it as one of "the guiding principles upon which the present review is based").

commission of the crime or a related crime which is within the jurisdiction of the court and arises out of the same circumstances.⁴⁰⁷ The importance of this different starting point lies in its accordance with international human rights norms and practices. It was previously emphasised how international human rights norms require that detention be the exception and not the rule.⁴⁰⁸ Besides, the existence of a statutory provision dealing with pre-trial detention and release (Article 60 ICC Statute) should be noted, in contrast to the absence of such a provision in the Statutes of the *ad hoc* tribunals and the SCSL.

However, it has been argued that, with the exception of instances where a person appears before the Court following a summons to appear, pre-trial detention is the rule. This conclusion is derived from the structure of the relevant provisions and the requirement that the suspect request or apply for interim release.⁴⁰⁹

§ Applications for provisional release pursuant to Article 60 (2) ICC Statute

Pursuant to Article 60 (2) ICC Statute, the suspect or accused may apply for provisional release during the period of pre-trial detention. The suspect should be informed about this right to apply for interim release at his or her first court appearance.⁴¹⁰ Such a request can be made at the first appearance or afterwards.⁴¹¹ The Pre-Trial Chamber should be satisfied that the conditions for detention under Article 58 (1) ICC Statute are met.⁴¹² In that regard, written observations should be sought from the Prosecutor and the detained person.⁴¹³ Besides, the Pre-Trial Chamber should seek the observations of the host state and of the state to which the person seeks to be released.⁴¹⁴ Consequently, in line with the case-law of the *ad hoc* tribunals,

⁴⁰⁷ See *supra*, Chapter 7, II.1.

⁴⁰⁸ See *supra*, Chapter 8, I.

⁴⁰⁹ W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 724.

⁴¹⁰ Article 60 (1) ICC Statute.

⁴¹¹ Rule 118 (1) ICC Statute.

⁴¹² As noted by Judge Pikis, the principal distinction between Article 60 (2) ICC Statute and Article 58 (1) is the different time perspective. See ICC, Judgment on the Appeal of Mr. Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. 01/04-01/06-824, A. Ch., 13 February 2007, Separate Opinion of Judge Georghios M. Pikis, par. 10.

⁴¹³ Rule 118 (3) ICC RPE; ICC, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 26 September 2011 Entitled “Decision on the Accused’s Application for Provisional Release in Light of the Appeals Chamber’s judgment of 19 August 2011”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1937-Red2 (OA 9), A. Ch., 15 December 2011, par. 64.

⁴¹⁴ Regulation 51 of the ICC Regulations of the Court.

the suspect or accused applying for interim release should indicate the state to which he or she seeks to be released.⁴¹⁵

As jurisprudence clarifies, a decision pursuant to Article 60 (2) ICC Statute requires that the justification for detention be examined anew (*de novo*) and that such a review be based on evidence placed before the Chamber and not on evidence placed before another Chamber.⁴¹⁶ The requirement to assess anew the facts justifying detention implies that the power of the Pre-Trial Chamber is not conditioned by a previous ruling on the application for an arrest warrant.⁴¹⁷ However, this does not prevent the Chamber from referring, in its decision on interim release, to the decision on the warrant of arrest, where the factors that were relied upon in the latter decision may be the same.⁴¹⁸ There is no requirement for presenting ‘changed circumstances’.⁴¹⁹ This requirement should be understood in light of the *ex parte* nature of the application for a warrant of arrest. The Court hears the submissions from the

⁴¹⁵ ICC, Order on Application for Release, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-128, PTC I, 29 May 2006, p. 2.

⁴¹⁶ ICC, In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, *Prosecutor v. Katanga and Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-572 (OA 4), A. Ch., 9 June 2008, par. 12. Consider also the dissent of Judge Pikis, who is critical of the reasoning of the Single Judge, who relied on the decision on the issuance of an arrest warrant as the basis for the determination of an application for interim release pursuant to Article 60 (2) ICC Statute without satisfying himself that the conditions of Article 58 (1) ICC Statute were met and leaving it to the suspect to rebut the findings of the Pre-Trial Chamber in the decision on the confirmation of the arrest warrant. See ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled “Decision on Application for Interim Release”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-323 (OA), A. Ch., 16 December 2008, Dissenting Opinion Judge Georghios M. Pikis, par. 26-27. See further ICC, Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-180-Red, PTC I, 13 July 2012, par. 47.

⁴¹⁷ ICC, In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, *Prosecutor v. Katanga and Chui, Situation in the DRC*, A. Ch., Case No. ICC-01/04-01/07-572 OA 4, 9 June 2008, par. 10; ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-278 (OA), A. Ch., 26 October 2012, par. 23.

⁴¹⁸ *Ibid.*, par. 27.

⁴¹⁹ *Ibid.*, par. 25. The Appeals Chamber determines that the Pre-Trial Chamber misstated the applicable standard where the requirement of ‘changed circumstances’ only applies to decisions under article 60 (3) on the periodic review of decisions on provisional detention. Nevertheless, the majority concluded that the Pre-Trial Chamber applied the correct legal standard in the factual analysis (*ibid.*, par. 25). Judge Ušacka disagrees on this point and convincingly shows how the many references in the decision to the arrest warrant decision create the opposite impression. See *ibid.*, Dissenting Opinion of Judge Anita Ušacka, par. 20 *et seq.*

Defence for the first time.⁴²⁰ The assessment pursuant to Article 58 (1) ICC Statute includes both limbs (the presence of reasonable grounds and necessity of the detention).⁴²¹

§ *Provisional release applications pending surrender (Article 59 (3) ICC Statute)*

As hinted before, the ICC Statute equally provides for a second regime which applies to provisional release applications in the custodial state ('interim release pending surrender').⁴²² While being detained in the custodial state and pending surrender to the ICC, the suspect has a right to apply for interim release before the competent authority.⁴²³ Such a right is an improvement in comparison with the *ad hoc* tribunals' procedural system, where no provision was made for interim release in the custodial state and where the issue of provisional release was left in its entirety with the Trial Chamber. Such right betrays the more horizontal nature of the ICC.⁴²⁴ In the absence of further specifications regarding the applicable procedure, the relevant municipal laws will apply to these applications for provisional release.⁴²⁵ Worrisome at first is the requirement that the competent authority of the custodial state considers, 'given

⁴²⁰ ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", *Prosecutor v. Gbagbo, Situation in the Republic of Côte d'Ivoire*, Case No. ICC-02/11-01/11-278 (OA), A. Ch., 26 October 2012, par. 23 (in contrast, a decision pursuant to Article 60 (3) is a review of an earlier decision on detention/release).

⁴²¹ While the jurisprudence of the ICC has uniformly held that the assessment pursuant to Article 60 (2) ICC Statute should include both limbs, it has been argued that a challenge to the 'reasonable grounds' requirement is not really an application for interim release and that the result of a successful challenge should not be interim release but dismissal of the charges. See W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, pp. 724 -725. Nevertheless, the re-assessment of the existence of reasonable grounds provides a safeguard to the suspect or accused where it ensures that reasonable grounds, which are a necessary requirement for the issuance of the warrant of arrest, *persist*. The successful challenge of the 'reasonable grounds' criterion does not invalidate the original warrant of arrest where it encompasses a consideration *anew* whether the reasonable grounds criterion *continues* to be fulfilled. Therefore, the time element may explain different outcomes where the Pre-Trial Chamber assesses the existence of 'reasonable grounds'.

⁴²² Article 59 (3) – (7) ICC Statute and Rule 117 ICC RPE.

⁴²³ Article 59 (3) ICC Statute. The jurisprudence of the ICC reveals that at least two suspects have relied on this right: Bemba Gombo and Mbarushima, and applied for interim before the competent authority in Belgium and France respectively.

⁴²⁴ Where a vertical relationship exists between states and the *ad hoc* tribunals, the unqualified nature of the cooperation requirements incumbent on states in principle prevents the national authorities from provisionally releasing the suspect. See C. PAULUSSEN, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, p. 729; B. SWART, *Arrest and Surrender*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1254; G. SLUITER, *Surrender of War Criminals to the ICC*, in «The Loyola of Los Angeles International and Comparative Law Review», Vol. 25, 2003, p. 623.

⁴²⁵ Such design should be considered in light of concerns that were raised during the drafting process of the Rome statute (*ad hoc* committee of the GA) that municipal law might be at tension with the obligations of the State towards the Court. This led to the position of the PrepCom that proceedings for arrest were to lay essentially within the framework of the domestic authorities: see W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 717.

the gravity of the alleged crimes’, whether there are ‘urgent and exceptional circumstances’ to justify interim release and whether the necessary safeguards exist to ensure that the custodial state can fulfil its duty to surrender a suspect to the ICC.⁴²⁶ This provision reinstalls the original, pre-amendment Rule 65 (B) ICTY RPE requirement.⁴²⁷ Notably, where the pre-amendment criterion of ‘exceptional circumstances’ was justified by (1) the extreme gravity of the offences concerned and (2) the unique circumstances under which the tribunal operates, including the absence of a police force and the absence of any control over the areas in which the accused would reside, only the first one is relevant here where applications for interim release in the custodial state are concerned. Nevertheless, it should be noted that the criteria for interim release in the custodial state “reflect current practice in the field of extradition.”⁴²⁸ At that stage a warrant of arrest has already been issued pursuant to Article 58 ICC Statute, which presupposes the fulfilment of the relevant standard of proof and a determination that detention is necessary. Therefore, the comparison with the pre-amendment provisional release regime at the *ad hoc* tribunals and the SCSL is flawed.⁴²⁹ More worrisome than is the prohibition for the custodial state to consider whether the warrant of arrest was lawfully issued.⁴³⁰ This contrasts with the jurisprudence of the *ad hoc* tribunals⁴³¹ and is in tension with international human rights norms.⁴³² However, Rule 117 (3) ICC RPE inserts a possibility to challenge the legality of the warrant of arrest by direct application to the ICC Pre-Trial Chamber.⁴³³ Furthermore, as noted by SLUITER, nothing seems to prevent the executive branch to raise issues relating to the legality of the warrant of arrest as an obstacle

⁴²⁶ Consider e.g. C.A. MÜLLER, *The Law of Interim Release in the Jurisprudence of the International Criminal Tribunals*, in «International Criminal Law Review», Vol. 8, 2008, p. 620 (arguing, among others, that such requirement is inconsistent with the ICCPR and the jurisprudence of the ECtHR and is contrary to the principle of complementarity as well as Article 21 (3) ICC Statute).

⁴²⁷ See the discussion of this requirement, *supra*, Chapter 8, II.1.

⁴²⁸ B. SWART, *Arrest Proceedings in the Custodial State*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1254 (the author adds that “[t]he critical consideration in deciding whether or not to grant interim release must surely be whether or not the risk that a person will abscond after having been released can be minimized”).

⁴²⁹ For a similar view, see G. SLUITER, *Human Rights Protection in the ICC Pre-Trial Phase*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 469 (arguing that the inclusion of such criterion is “fully justified”).

⁴³⁰ Article 59 (4) ICC Statute, see *supra*, Chapter 7, V.3.2.

⁴³¹ See *supra*, Chapter 7, V.4.1.

⁴³² Notably, such limitation may be at tension with the right to challenge the lawfulness of the arrest and detention, as discussed in detail, *supra*, Chapter 7, V.3.2.

⁴³³ See *supra*, Chapter 7, II.4.2 and Chapter 7, V.3.2. and V.4.2. Besides, whereas Article 59 (4) ICC Statute prevents the competent authority in the custodial state from assessing the legality of the arrest warrant, nothing prevents the competent authority from reviewing the legality of the request for the arrest and surrender of the person. As noted by one author, this may even allow the competent authority to review the legality of the sufficiency of the evidence supporting the request, pursuant to Article 91 (2) (C) ICC Statute. See G. SLUITER, *Surrender of War Criminals to the ICC*, in «The Loyola of Los Angeles International and Comparative Law Review», Vol. 25, 2003, pp. 469 – 470.

to cooperation.⁴³⁴ Further requirements incumbent on the custodial state include the obligation of notification, the obligation to ‘give full consideration’ to recommendations by the Pre-Trial Chamber before rendering a decision, to provide periodic reports upon request by the Pre-Trial Chamber and to deliver the suspect to the ICC as soon as possible when ordered to do so.⁴³⁵ While the practice is limited, Article 59 (3) ICC Statute was put to the test in the *Bemba* case when Bemba requested to be provisionally released by the custodial state (Belgium). The request was denied.⁴³⁶

§ Disclosure

There is no provision in the statutory documents of the ICC for disclosure in relation to applications for interim release, leaving an important *lacuna*.⁴³⁷ Nevertheless, the Appeals Chamber clarified that the suspect or the accused must be granted access to the largest extent possible to documents that are essential for him or her to challenge the legality of detention. Such requirement follows from the right of every individual to be informed of the grounds and reasons for which the deprivation of liberty is sought.⁴³⁸ The Prosecutor should have this in mind when applying for a warrant of arrest pursuant to Article 58 ICC Statute and alert the Pre-Trial Chamber as soon as possible, preferably at that time, of any necessary redactions.⁴³⁹ Such redactions may be necessary to protect victims and witnesses or to safeguard the on-

⁴³⁴ G. SLUITER, Human Rights Protection in the ICC Pre-Trial Phase, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, p. 467.

⁴³⁵ Article 59 (5) – (7) ICC Statute. Consider e.g. ICC, Recommendations adressées à la Chambre d’instruction de la Cour d’Appel de Paris en vertu de l’article 59 du Statut de Rome, *Le Procureur c. Mbarushimana, Situation en RDC*, Affaire No. ICC-01/04-01/10-15, Ch. P. I, 18 octobre 2010 (in which the Pre-Trial Chamber limited itself to confirming that the justifications for the detention set out in its decision on the Prosecutor’s application for an arrest warrant remain valid).

⁴³⁶ Cass, P.08.0896.F, 18 June 2008, which can be found in the Oxford Reports on International Law in Domestic Courts, http://ildc.oxfordlawreports.com/subscriber_article?script=yes&id=/oril/Cases/law-ildc-1115be08&recno=3&module=ildc&category=Belgium, last checked 21 December 2010). According to Article 16 (1) of the Law of 29 March 2004 on Cooperation with the International Criminal Court and the International Criminal Tribunals, the suspect can file a request for release awaiting surrender with the *Chambre des mises en accusation* (*Kamer van Inbeschuldigingstelling*). The *Cour de Cassation* (*Hof van Cassatie*) held that a suspect can request provisional release pursuant to Article 59 (3) ICC Statute and Article 16 (1) of the Law on cooperation with the ICC while the *Chambre des mises en accusation* had not yet taken a decision on his appeal against his provisional detention, because these are two separate procedures).

⁴³⁷ ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled “Decision on Application for Interim Release”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-323 (OA), A. Ch., 16 December 2008, par. 26.

⁴³⁸ Article 9 (2) and (4) ICCPR; Article 5 (2) and (4) ECHR; Art. 7 (4) and (5) ACHR; see the discussion of this right, *supra*, Chapter 7, V.2.2.

⁴³⁹ *Ibid.*, par. 32-33.

going investigation.⁴⁴⁰ Where the suspect or accused applies for interim release in the absence of full disclosure, he or she can again apply for interim release when full disclosure has been obtained.⁴⁴¹

II.3.1. Absence of discretion to refuse provisional release

An important difference in the ICC's provisional detention and release scheme is the absence of any discretion of the Pre-Trial Chamber. It follows from the language of Article 60 (2) ICC Statute that where the conditions for detention under Article 58 (1) ICC Statute cease to be met, the person *shall* be released.⁴⁴²

Importantly, since decisions on an application for provisional release pursuant to Article 60 (2) *juncto* Article 58 (1) ICC Statute are *not discretionary* in nature, the principle of proportionality and necessity should not be an independent consideration in a decision regarding continued detention.⁴⁴³ Indeed, it is the discretion of the Trial Chamber of the *ad hoc* tribunals and the SCSL to either refuse or grant applications for provisional release which necessitates the reading of a distinct requirement of proportionality (including a notion of necessity) into Rule 65 (B) ICTY, ICTR and SCSL RPE.

⁴⁴⁰ *Ibid.*, par. 33. Consider in this regard the critical remarks of SCHABAS regarding the scope of application for interim release as being limited to the requirements of Article 58 (1) (b) and not including Article 58 (1) (a) ICC Statute, *supra*, Chapter 8, II.3, fn. 421.

⁴⁴¹ ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled "Decision on Application for Interim Release", *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-323 (OA), A. Ch., 16 December 2008, par. 39-40.

⁴⁴² See the wording of Article 60 (2) ICC Statute: 'shall' (not 'may') as confirmed in ICC, Judgment on the Appeal of Mr. Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled "D cision sur la demande de mise en libert  provisoire de Thomas Lubanga Dyilo", *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. 01/04-01/06-824, A. Ch., 13 February 2007, par. 134; ICC, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08, PTC II, 14 August 2009, par. 41; ICC, Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-631 (OA2), A. Ch., 2 December 2009, par. 59.

⁴⁴³ ICC, Judgment on the Appeal of Mr. Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled "D cision sur la demande de mise en libert  provisoire de Thomas Lubanga Dyilo", *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. 01/04-01/06-824, A. Ch., 13 February 2007, par. 140.

II.3.2. Burden of proof rests with the Prosecutor

According to the relevant case law, the burden of proof pursuant to Article 60 (2) ICC Statute rests on the Prosecution. It was argued by Single Judge Kuenyehia in the *Katanga and Ngudjolo Chui* case that this follows not only from the ordinary meaning of the words of Article 60 (2) ICC Statute, but is also in accordance with the object and purpose of Article 60 (2) ICC Statute. The provision aims at ensuring that pre-trial detention is limited to the period of time when the conditions of Article 58 (1) continue to be met.⁴⁴⁴

However, the close scrutiny of the reasoning by the Single Judge or the Pre-Trial Chamber in the assessment of applications for provisional release unveils inconsistencies in the Court's case law. For example, in the *Bemba* case, the Single Judge effectively put the burden on the suspect. When assessing the risk of obstruction or endangerment of the investigation or prosecution, the Single Judge referred to the findings and conclusions of the Pre-Trial Chamber in its decision on the application for an arrest warrant, "in the absence of any relevant argument on the part of the defence to the contrary."⁴⁴⁵ Similarly, in its assessment of the 'reasonable grounds' requirement of Article 58 (1) (a) ICC Statute, the Single Judge argued that these grounds are exhaustively explained in the decision on the application for a warrant of arrest and that "the defence has not put forward any material fact or argument to rebut these grounds and considers that they still stand."⁴⁴⁶ The Appeals Chamber determined

⁴⁴⁴ ICC, Decision on the Powers of the Pre-Trial Chamber to Review *proprio motu* the Pre-Trial Detention of Germain Katanga, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, PTC I, Case No. ICC-01/04-01/07-330, 18 March 2008, pp. 6-7. Consider also: ICC, Decision Concerning Observations on the Review of the Pre-Trial Detention of Mathieu Ngudjolo Chui, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-602, PTC I, 17 June 2008, p. 4; ICC, Decision Concerning Observations in the Review of the Pre-Trial Detention of Germain Katanga, *Prosecutor v. Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07-668, PTC I, 9 July 2008, p. 4; ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", *Prosecutor v. Gbagbo, Situation in the Republic of Côte d'Ivoire*, Case No. ICC-02/11-01/11-278 (OA), A. Ch., 26 October 2012, Dissenting Opinion of Judge Anita Ušacka, par. 22.

⁴⁴⁵ ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the African Republic*, Case No. ICC-01/05-01/08-80-Anx, PTC III, 20 August 2008 (annexed to ICC, Decision Concerning the Public Version of the "Decision on Application for Interim Release" of 20 August 2008, *Prosecutor v. Bemba, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-80, PTC II, 26 August 2008), par. 59.

⁴⁴⁶ *Ibid.*, par. 52.

that while it would have been preferable for the Pre-Trial Chamber to explain in more detail how it reached its conclusion, the Single Judge did not err.⁴⁴⁷

Such conclusion is regrettable. By confirming that the yardstick for determining an application for interim release pursuant to Article 60 (2) ICC Statute is the warrant of arrest and the decision on the Prosecutor's application for a warrant of arrest (a decision taken in the absence of the suspect or accused) the burden of proof is effectively put on the suspect or accused.⁴⁴⁸ It is up to the suspect or accused to rebut the findings in this decision.⁴⁴⁹ As argued by Judge Pikis in his dissent to the Appeals Chamber's judgment, the burden of proof pursuant to Article 60 (2) ICC Statute should be on the Prosecutor, who seeks to limit the liberty of the individual. The Prosecution should satisfy the Pre-Trial Chamber that the requirements of Article 58 (1) ICC Statute are met. Where, as previously explained, an Article 60 (2) ICC Statute application requires the Pre-Trial Chamber to revisit the conditions under Article 58 (1) anew; the assessment should not be limited to a determination whether the suspect or accused person has rebutted these conditions.⁴⁵⁰

It was previously held that putting such burden on the detained person is in violation of international human rights norms.⁴⁵¹ Additionally, placing the burden of proof on the suspect or accused is contrary to Article 67 (1) (i) ICC Statute, which prohibits any reversal of the burden of proof or placing of the onus of rebuttal on the accused person.

This minority view notwithstanding, the majority of the case law seems to put the burden, under Rule 60 (2) ICC Statute, on the Prosecutor. However, it was noted by SCHABAS that it is not clear what the implications of placing such burden on the Prosecutor are where the Prosecutor "may simply rely upon earlier submissions, coupled with the claim that

⁴⁴⁷ ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled "Decision on Application for Interim Release", *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-323 (OA), A. Ch., 16 December 2008, par. 64 – 68.

⁴⁴⁸ ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled "Decision on Application for Interim Release", *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-323 (OA), A. Ch., 16 December 2008, Dissenting Opinion Judge Georgios M. Pikis, par. 3.

⁴⁴⁹ Consequently, the Prosecutor should not adduce any evidence or material other than the decision on the application for an arrest warrant.

⁴⁵⁰ *Ibid.*, par. 26, referring to ICC, In the Appeal by Mathieu Ngujolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, *Prosecutor v. Katanga and Chui, Situation in the DRC*, A. Ch., Case No. ICC-01/04-01/07-572 (OA 4), 9 June 2008, par. 12.

⁴⁵¹ See *supra*, Chapter 8, II.2.2.

[circumstances] are unchanged.”⁴⁵² This implies that the burden to produce new evidence that challenges the earlier decision by the Pre-Trial Chamber rests with the accused.⁴⁵³ Where it holds true that the burden on the Prosecutor may not be too high where the Pre-Trial Chamber has previously been satisfied that ‘reasonable grounds’ exist and that detention is necessary, the previous finding does not predict the outcome of the re-consideration anew of the justification of detention. More puzzling is the argumentation that “[i]f the Prosecutor produces no evidence of changed circumstances, there must be a presumption in favour of a *status quo*. In other words, the burden falls to the detained person to produce new evidence challenging the earlier ruling.”⁴⁵⁴ The existence of any presumption (for a *status quo*) is at tension with the requirement pursuant to Article 60 (2) ICC Statute to consider the justification for detention *anew* and, therefore, should be rejected.⁴⁵⁵

II.3.3. Periodic review of ruling on release or detention

Doubtless, the most important dissimilarity between the ICC’s and the *ad hoc* tribunals’ provisional release scheme is the periodic review mechanism which is provided for under Article 60 (3) ICC Statute and Rule 118 (2) ICC RPE. It provides the detained person with a procedural safeguard against the undue prolongation of detention.⁴⁵⁶ The purpose of this procedural safeguard is “to ensure that detention that was ordered in accordance with the Statute does not become unwarranted because of a change of circumstances.”⁴⁵⁷ Therefore, the *passing of time* is of central importance to the understanding of this review mechanism.

⁴⁵² See W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 724.

⁴⁵³ *Ibid.*, p. 724.

⁴⁵⁴ *Ibid.*, p. 724.

⁴⁵⁵ See the discussion *supra*, Chapter 8, II.3.

⁴⁵⁶ ICC, In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, *Prosecutor v. Katanga and Chui, Situation in the DRC*, A. Ch., Case No. ICC-01/04-01/07-572 (OA 4), 9 June 2008, par. 14; ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 28 July 2010 Entitled “Decision on the Review of the Detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rules of Procedure and Evidence”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1019 (OA 4), 19 November 2010, par. 49.

⁴⁵⁷ *Ibid.*, par. 49. It has been argued that the ‘changed circumstances’ requirement seeks to prevent one Chamber (single Judge) to revise the decision by a differently composed Chamber (single Judge) and from acting, in effect, as an appellate court. See K.A.A. KHAN, Article 60, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1165 (who considers such condition to be “a proper and appropriate safeguard to avoid frivolous or repeated applications on this issue by either side”).

Pursuant to Article 60 (3) ICC Statute, a ‘ruling on detention’ should regularly be reviewed by the Pre-Trial Chamber or by the Single Judge.⁴⁵⁸ Whereas Article 60 only speaks of the review of detention by the Pre-Trial Chamber, the Trial Chamber can exercise its functions in relation to interim release on the basis of Article 61 (11) ICC Statute.⁴⁵⁹ Such review should take place at least every 120 days or at any time at the request of the person or the Prosecutor.⁴⁶⁰ No time restriction applies if one of the parties requests a review of a ruling on provisional release. They should not wait 120 days.⁴⁶¹ Nevertheless, the jurisprudence clarified that the statutory provisions also provide the Single Judge with a margin of discretion to decide whether such new application should be admitted for the sake of conducting a review on interim release.⁴⁶² There seems to be no basis for reading such discretion into Article 60 (3) ICC Statute. The ‘changed circumstances’ criterion already limits the right of the parties to request a review of the pre-trial detention and safeguards against repetitious or frivolous requests.

The Pre-Trial Chamber may decide, at the request of one of the parties or *proprio motu*, to convene a hearing. It is under the obligation to have at least an annual hearing on the issue pre-trial detention.⁴⁶³ It was held by PTC I that observations by the parties are not a precondition for the periodic review.⁴⁶⁴ Importantly, the obligation of a periodic review pursuant to Article 60 (3) ICC Statute only applies where there has been *a ruling on a*

⁴⁵⁸ Article 39 (2) (b) (iii) ICC Statute and Rule 7 ICC RPE allow for a single Judge to exercise the functions of the Pre-Trial Chamber.

⁴⁵⁹ ICC, Transcript of Hearing, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-T, T. Ch. III, 8 December 2009, p. 24; ICC, Decision on Review of the Detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rules of Procedure and Evidence, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-743, T. Ch. III, 1 April 2010, par. 25; ICC, Decision Reviewing the “Decision on the Application for the Interim Release of Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-976, T. Ch. I, 9 October 2007, par. 8.

⁴⁶⁰ Rule 118 (2) ICC RPE.

⁴⁶¹ ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-403, PTC II, 14 April 2009, par. 31.

⁴⁶² *Ibid.*, par. 32-33 (*in casu*, the Pre-Trial Chamber considered that the suspect had received full disclosure between the time of his previous and present interim release application, which warranted a reconsideration of the matter. Besides, the Pre-Trial Chamber noted that the deadline for the periodic review was approaching. Therefore, expediency considerations further favoured the review).

⁴⁶³ Rule 118 (3) ICC RPE. For an example, see ICC, Transcript of Hearing, *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-T, PTC II, 29 June 2009.

⁴⁶⁴ ICC, Review of the “Decision on the Application for the Interim Release of Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-826, PTC I, 14 February 2007, p. 7 (referring to Rule 118 (2) ICC RPE).

previous application for provisional release.⁴⁶⁵ Where Article 60 (3) ICC Statute speaks of a ‘ruling on the release or detention of a person’, the Appeals Chamber rejected the assertion in *Lubanga* that the periodic review is not only triggered by a decision on interim release but also as a consequence of “any different action of the Pre-Trial Chamber which had the result of keeping Thomas Lubanga in detention.”⁴⁶⁶ Consequently, it is not the warrant of arrest that triggers the periodic review mechanism of Article 60 (3) ICC Statute. In *Bemba*, the Appeals Chamber clarified that the ‘ruling’ referred to in Article 60 (3) ICC Statute is either the initial decision made under Article 60 (2) ICC Statute or ‘any potential subsequent modifications made to that decision under Article 60 (3) of the Statute’.⁴⁶⁷

It has been held by Single Judge Steiner that in the absence of a previous request for interim release, the Single Judge or Pre-Trial Chamber is not precluded from conducting a *proprio motu* review of the pre-trial detention, where such would be warranted.⁴⁶⁸ Such *proprio motu* power ultimately derives from the function of the Pre-trial Chamber as the ‘ultimate guarantor of the rights of the Defence’,⁴⁶⁹ and equally follows from a contextual reading of Article 60

⁴⁶⁵ ICC, Judgment on the Appeal of Mr. Lubanga Dyilo Against the Decision of Pre-Trial Chamber I Entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. 01/04-01/06-824, A. Ch., 13 February 2007, par. 94. Nevertheless, Pre-Trial Chamber I apparently disregarded the holding by the Appeals Chamber, where the Single Judge (Judge Steiner) reasoned that pre-trial detention should be reviewed at least every 120 days pursuant to Rule 118 ICC RPE, and where *in casu* no previous application for interim release had been filed by the defendant. See ICC, Decision Concerning Observations on the Review of the Pre-Trial Detention of Germain Katanga, *Prosecutor v. Katanga, Situation in the DRC*, Case No. ICC-01/04-01/07, PTC I, 24 January 2008, p. 3. A later decision by Single Judge Steiner followed the reasoning of the Appeals Chamber. See ICC, Decision Concerning Pre-Trial Detention of Germain Katanga, *Prosecutor v. Katanga, Situation in the DRC*, Case No. ICC-01/04-01/07, PTC I, 21 February 2008, p. 6.

⁴⁶⁶ ICC, Judgment on the Appeal of Mr. Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. 01/04-01/06-824, A. Ch., 13 February 2007, par. 96 – 99. Judge Pikis, in his separate opinion, clarified that ‘review’ refers to a ‘revisitation’ of a subject previously visited. That subject revisited concerns the interim release of the suspect which can only arise where the suspect is being detained. Besides, a ‘ruling’ refers to “the outcome of a court’s decision either on some point of law or on the case as a whole.” See *ibid.*, Separate Opinion of Judge Georgios M. Pikis, par. 15.

⁴⁶⁷ ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 28 July 2010 Entitled “Decision on the Review of the Detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rules of Procedure and Evidence”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1019 (OA 4), A. Ch., 19 November 2010, par. 46.

⁴⁶⁸ ICC, Decision Concerning Pre-Trial Detention of German Katanga, *Prosecutor v. Katanga, Situation in the DRC*, Case No. ICC-01/04-01/07, PTC I, 21 February 2008, p. 6; ICC, Decision on the Powers of the Pre-Trial Chamber to Review *proprio motu* the Pre-trial Detention of Germain Katanga, *Prosecutor v. Katanga and Njudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-330, PTC I, 18 March 2008, pp. 8-10, 12.

⁴⁶⁹ *Ibid.*, p. 8.

(3) ICC Statute⁴⁷⁰ from its object and purpose⁴⁷¹ and is in compliance with international human rights norms. Nevertheless, such a reading is obviously at tension with the ordinary meaning of the wording of Article 60 (3) which speaks of a ‘review of its ruling on release or detention of the person’. While the Appeals Chamber has not yet considered the issue of a *proprio motu* review pursuant to Rule 60 (3) ICC Statute, it was indicated above that according to the Appeals Chamber, such a ruling refers to the initial decision taken on a request for interim release or any modifications thereto.⁴⁷² It remains unclear what the starting point is in a case of a *proprio motu* review in the absence of previous ruling on provisional release and detention.

When the Pre-Trial Chamber periodically reviews the detention on remand, it should address the justification for the detention anew and satisfy itself whether the conditions under Article 58 (1) ICC Statute continue to be met.⁴⁷³ The Pre-Trial Chamber should ascertain whether the circumstances bearing on the subject have changed, and if so, whether they warrant the termination of detention. According to Article 60 (3) ICC Statute, the Pre-Trial Chamber may only modify its ruling ‘if it is satisfied that changed circumstances so require’.⁴⁷⁴ Such

⁴⁷⁰ More precisely, from the reading of Article 60 (3) ICC Statute and Rule 118 ICC RPE in light of Articles 55, 57 and 67 ICC Statute, including the right for the suspect or accused “not to be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Statute.”

⁴⁷¹ Article 60 (3) ICC Statute and Rule 118 ICC RPE aim, according to the Pre-Trial Chamber, (i) at ensuring that a person is only detained on remand where the conditions for detention of Article 58 (1) are met, and (ii) only for the period of time these conditions continue to be met and that, if no such *proprio motu* power were read in Article 60 (3), “a person could remain in pre-trial detention indefinitely without any review whether the conditions continue to be met.”

⁴⁷² See *supra*, Chapter 8, II, 3.3, fn. 465- 467 and accompanying text.

⁴⁷³ ICC, Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-631 (OA2), A. Ch., 2 December 2009, par 58 – 60.

⁴⁷⁴ *Ibid.*, par. 60. In another decision, Single Judge Steiner followed the reasoning of the Appeals Chamber. See also ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08, PTC III, 16 December 2008, par. 32 (holding that the ‘changed circumstances’ criterion necessitates revisiting the conditions on the basis of which it was decided in the previous decision on provisional release that the suspect should continue to be detained); ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-403, PTC II, 14 April 2009, par. 37; ICC, Decision Concerning Pre-Trial Detention of Germain Katanga, *Prosecutor v. Katanga, Situation in the DRC*, Case No. ICC-01/04-01/07, PTC I, 21 February 2008, p. 6.

Where no material change in circumstances since the last review of the detention has been identified by the Trial Chamber, the Chamber will not consider the preparedness of states to accept a person that is provisionally released. Consider ICC, Transcript of Hearing, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-T, T. Ch. III, 8 December 2009, p. 28; ICC, Decision on Review of the Detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rules of Procedure and Evidence, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-743, T. Ch. III, 1 April 2010, par. 32.

changed circumstances, according to the Appeals Chamber, either encompass a change in some or all of the facts that are underlying a previous decision on detention or the presence of a new fact which satisfies the Pre-Trial Chamber that a modification of the previous decision is necessary.⁴⁷⁵ Trial Chamber III held, in line with the holding of the Appeals Chamber, that what is required is a ‘material (or substantive) change’ of circumstances. However, the Trial Chamber further narrowed the concept of changed circumstances by holding that ‘incremental changes’ (which for example follow from the passage of time) *do not necessarily reach the threshold to constitute a ‘material change’*.⁴⁷⁶ Such limited interpretation of the concept of ‘material changes’ sits uneasy with the emphasis put on the passage of time by the jurisprudence of the ECtHR. The jurisprudence of the ECtHR uniformly underscored the importance that the court reviewing the detention takes the passage of time into consideration and demonstrates that the reasons for detention which existed at the beginning of the detention *continue to exist* until the point at which the applicant was released or convicted.⁴⁷⁷ By introducing the concept of ‘incremental changes’, the Court denies the importance of the element of time with regard to the justification for continued detention.⁴⁷⁸

Regarding methodology, where the Pre-Trial Chamber carries out a periodic review, it must revert to the ‘ruling on the release or detention of a person’ and determine whether or not

⁴⁷⁵ Consider e.g. ICC, Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-631 (OA 2), A. Ch., 2 December 2009, par. 60; ICC, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 27 June 2011 entitled “Decision on Applications for Provisional Release”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1626-Red (OA 7), A. Ch., 19 August 2011, par. 71; ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 2 September 2011 Entitled “Decision on the ‘Demande de mise en liberté de M. Jean-Pierre Bemba Gombo afin d’accomplir ses devoirs civiques en République Démocratique du Congo””, *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-1722 (OA 8), A. Ch., 9 September 2011, par. 30; ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 6 January 2012 Entitled ‘Decision on the Defence’s 28 December 2011 “Requête de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo”’, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-2151-Red (OA 10), A. Ch., 5 March 2012, par. 31.

⁴⁷⁶ ICC, Decision on Review of the Detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rules of Procedure and Evidence, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-743, T. Ch. III, 1 April 2010, par. 29.

⁴⁷⁷ Consider e.g. ECtHR, *Labita v. Italy*, Application No. 26772/95, Reports 2000-IV, Judgment of 6 April 2000, par. 153; ECtHR, *Kudła v. Poland*, Application No. 30210/96, Reports 2000-XI, Judgement (Grand Chamber) of 26 October 2000, par. 114.

⁴⁷⁸ Consider also S. GOLUBOK, Pre-Conviction Detention before the International Criminal Court: Compliance or Fragmentation, in «The Law and Practice of International Courts and Tribunals», Vol. 8, 2010, p. 306 (arguing that “time is a very relevant circumstance, and it is always changing, by definition”).

there has been a change in circumstances bearing on the requirements of Article 58 (1) ICC Statute.⁴⁷⁹ It should look at the circumstances already decided on in the ‘ruling’ and determine whether these circumstances continue to exist. There is no need to enter findings on the circumstances already decided upon in the original ruling.⁴⁸⁰ Importantly, this implies that the Chamber cannot limit itself to the consideration of the arguments raised by the Defence.⁴⁸¹ Evenly important, the Chamber is required to set out its reasoning.⁴⁸² This is in line with the jurisprudence of the ECtHR which repeatedly emphasised that where identical or stereotyped language is used in the orders confirming detention, this raises doubts about the justification for continued detention.⁴⁸³ Nevertheless, at the same time the ECtHR has stressed that the lack of detailed reasoning will not in itself lead to a violation of Article 5 (3) ECHR.

In this respect, the Appeals Chamber proffered necessary guidance to the Pre-Trial Chambers in how to conduct periodic reviews. Earlier practice revealed rather divergent views on the scope of the review decisions. For example, in *Lubanga*, Trial Chamber I discussed the relevant conditions for detention under Rule 58 (1) ICC Statute in the context of a periodic review, without having due regard the presence of ‘changed circumstances’.⁴⁸⁴ In the *Katanga and Ngudjolo* case, Pre-Trial Chamber I adopted yet another approach to the matter where it, upon the conclusion that the circumstances had not changed since the previous ruling,

⁴⁷⁹ ICC, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 27 June 2011 entitled “Decision on Applications for Provisional Release”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1626-Red (OA 7), A. Ch., 19 August 2011, par. 71; ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 2 September 2011 Entitled “Decision on the ‘Demande de mise en liberté de M. Jean-Pierre Bemba Gombo afin d’accomplir ses devoirs civiques en République Démocratique du Congo’”, *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-1722 (OA 8), A. Ch., 9 September 2011, par. 30.

⁴⁸⁰ See e.g. ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 28 July 2010 Entitled “Decision on the Review of the Detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rules of Procedure and Evidence”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1019 (OA 4), 19 November 2010, par. 53.

⁴⁸¹ *Ibid.*, par. 52.

⁴⁸² *Ibid.*, par. 52.

⁴⁸³ ECtHR, *Mansur v. Turkey*, Application No. 16026/90, Series A, No. 319-B, Judgment of 15 April 1994, par. 55; ECtHR, *Kalashnikov v. Russia*, Application No. 47095/99, Reports 2002-VI, Judgment of 15 July 2002, par. 116; ECtHR, *Panchenko v. Russia*, Application No. 45100/98, Judgment of 8 February 2005, par. 107; ECtHR, *Vayıç v. Turkey*, Application No. 18078/02, Judgment of 20 June 2006, par. 35.

⁴⁸⁴ Consider e.g. ICC, Decision Reviewing the “Decision on the Application for the Interim Release of Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-976, T. Ch. I, 9 October 2007, par. 6 – 10.

appraised the submissions made by the parties in the context of that original request for interim release.⁴⁸⁵

§ *Burden of proof*

Similar to what was said earlier regarding applications for provisional release; divergent views existed concerning the burden of proof. A review of the relevant jurisprudence reveals that in some instances, the burden was put on the suspect or accused to show that events which occurred since the previous reconsideration implied a substantial change in the circumstances.⁴⁸⁶ The suspect or the accused was effectively required to refute the grounds on the basis of which the Pre-Trial Chamber or Single Judge made the previous determination as to the validity of the requirements of Article 58 (1) ICC Statute.

In its decision in the *Bemba* case, the Appeals Chamber clarified this issue. According to the Appeals Chamber, when the Pre-Trial Chamber decides to issue a warrant of arrest pursuant to Article 58 ICC Statute on the basis of evidence and other information submitted by the Prosecutor, this indicates that the Prosecutor must also submit information satisfying the Pre-Trial Chamber that continued detention is necessary.⁴⁸⁷ Consequently, the burden clearly rests on the Prosecutor. However, this burden is limited to ‘changed circumstances’. The Prosecutor is required to make submissions on the question of whether or not there has been any change in the conditions that previously justified detention. Connected to this is the obligation incumbent on the Prosecutor to bring any other relevant information of which he or

⁴⁸⁵ ICC, Review of the “Decision on the Application for Interim Release of Mathieu Ngudjolo Chui”, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07, PTC I, 23 July 2008, p. 7.

⁴⁸⁶ ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-403, PTC II, 14 April 2009, par. 40 (“The Defence thus failed to refute the grounds on the basis of which the Single Judge made her previous determination that the requirements of Article 58 (1) remained valid”); ICC, Decision on Review of the Detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rules of Procedure and Evidence, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-743, T. Ch. III, 1 April 2010, par. 33 (“the Chamber is unpersuaded that any of these matters demonstrate a change of circumstances since the last review of the accused’s detention, either viewed separately or together. Further, they do not undermine the critical conclusion that detention remains necessary to ensure the accused’s appearance at this trial”); ICC, Decision on the Review of the Detention of Mr. Jean-Pierre Bemba pursuant to Rule 118 (2) of the Rules of Procedure and Evidence, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-843, T. Ch. III, 28 July 2010, par. 38 (“In the view of the Chamber, the defence has failed to allege any new facts justifying a change in the detention regime”).

⁴⁸⁷ ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 28 July 2010 Entitled “Decision on the Review of the Detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rules of Procedure and Evidence”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1019 (OA 4), 19 November 2010, par. 50.

she is aware that relates to the question of detention or release to the attention of the Chamber.⁴⁸⁸

§ *Prosecutorial review of detention*

Whereas Article 60 (3) ICC encompasses the duty incumbent on the Pre-Trial Chamber to periodically review the pre-trial detention, it should be noted that the Regulations of the OTP include a parallel obligation on the OTP to keep the necessity of the provisional detention of a person under review.⁴⁸⁹

II.3.4. Interlocutory appeal against decisions on detention or release

In line with the *ad hoc* tribunals and the SCSL, decisions granting or denying interim release may be appealed by either party.⁴⁹⁰ Obviously, such right to appeal equally applies to instances of conditional release. The scope of the appeal is limited. The appraisal of the evidence which is relevant to the continued detention lies, in the first place, with the Pre-Trial Chamber. The Appeals Chamber may justifiably interfere if the findings of the Pre-Trial Chamber are flawed on the basis of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or the taking into account of facts extraneous to the *sub judice* issues.⁴⁹¹ As far as factual errors are concerned, the Pre-Trial Chamber enjoys a margin of appreciation with regard to the inferences drawn from the available evidence and to the weight accorded to different factors.⁴⁹² Parties may request to

⁴⁸⁸ *Ibid.*, par. 2, 51.

⁴⁸⁹ Regulation 57 (2) of the OTP Regulations.

⁴⁹⁰ Article 82 (1) (b) ICC Statute.

⁴⁹¹ ICC, In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, *Prosecutor v. Katanga and Chui, Situation in the DRC*, A. Ch., Case No. ICC-01/04-01/07-572 (OA 4), 9 June 2008, par. 25; ICC, Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-631 (OA2), A. Ch., 2 December 2009, par. 61.

⁴⁹² See e.g. ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 6 January 2012 Entitled "Decision on the Defence's 28 December 2011 "Requête de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo", *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-2151-Red (OA 10), A. Ch., 5 March 2012, par. 16; ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled "Decision on the "Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo", *Prosecutor v. Gbagbo, Situation in the Republic of Côte d'Ivoire*, Case No. ICC-02/11-01/11-278 (OA), A. Ch., 26 October 2012, par. 51.

grant suspensive effect of the appeal. The time limitation for appeals of decisions on interim release is five days.⁴⁹³ Victims may participate on appeal under specific circumstances.⁴⁹⁴ Where they participated in the proceedings before the Pre-Trial Chamber (or Trial Chamber), they are not automatically allowed to participate in the interlocutory appeal. They should file an application to that extent, where an interlocutory appeal is a “separate and distinct stage of the proceedings”, and the Appeals Chamber will assess whether the victim’s personal rights have been affected as well as the appropriateness of the victims’ participation.⁴⁹⁵

Concerns have been raised about the slow pace of the appellate review of detention-related decisions. For example, where the Defence in *Bemba* appealed the review decision of Trial Chamber III of 28 July 2010, the Appeals Chamber rendered its decision on appeal on 19 November 2010, more than three-and-a-half months later. Similarly, in *Gbagbo*, the Appeals Chamber rendered its decision on the decision of Pre-Trial Chamber I of 13 July 2012 on provisional release only on 26 October 2012, almost three-and-a-half months later. GOLUBOK noted that while no strict time limitations are provided for the consideration of these decisions on appeal, “[i]t is hardly possible for the delays of this magnitude to be compatible with the requirement of speedy review of the lawfulness of detention.”⁴⁹⁶ Indeed, where international human rights law requires that arrested persons and detained persons have the right to judicial supervision of the lawfulness of the detention, such lawfulness should be determined *speedily*.⁴⁹⁷ Pending trial, there is a special need for a swift decision “because the defendant should benefit fully from the principle of the presumption of innocence.”⁴⁹⁸ Such time element includes the appellate proceedings, if provided for.⁴⁹⁹ As previously noted, a period of 23 days between the lodging of the request and the decision was not found to satisfy the speediness requirement by the ECtHR.⁵⁰⁰ A delay of three months between the filing of a

⁴⁹³ Rule 154 (1) ICC RPE.

⁴⁹⁴ ICC, Judgment on the Appeal of Mr. Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. 01/04-01/06-824, A. Ch., 13 February 2007, par. 35 – 45.

⁴⁹⁵ *Ibid.*, par. 35 –45.

⁴⁹⁶ S. GOLUBOK, Pre-Conviction Detention before the International Criminal Court: Compliance or Fragmentation, in «The Law and Practice of International Courts and Tribunals», Vol. 8, 2010, p. 309.

⁴⁹⁷ As discussed at length, *supra*, Chapter 7, V.4.1.

⁴⁹⁸ Consider *e.g.* ECtHR, *Shannon v. Latvia*, Application No. 32214/03, Judgment of 24 November 2009, par. 67.

⁴⁹⁹ Consider *e.g. ibid.*, par. 67; ECtHR, *Toth v. Austria*, Application No. 11894/85, Series A, No. 224, Judgment of 12 December 1991, par. 84; ECtHR, *Navarra v. France*, Application No. 13190/87, Judgment of 23 November 1993, par. 28.

⁵⁰⁰ ECtHR, *Rehbock v. Slovenia*, Application No. 29462/95, Judgment of 28 November 2000, par. 85-86. See *supra*, Chapter 7, V.4.1.

challenge and the decision was found to be too leniently ‘in principle’ by the HRC.⁵⁰¹ Consequently, the delays of the Appeals Chamber in ordering their review decisions may not be compatible with international human rights norms.

II.3.5. Grounds justifying pre-trial detention

II.3.5.1. General

In contrast with the statutory documents of the *ad hoc* tribunals and the SCSL, Article 58 ICC Statute imposes certain material conditions for pre-trial detention. Firstly, Article 58 (1) (b) ICC Statute sets a threshold for the issuance of a warrant of arrest and makes pre-trial detention dependent on the existence of ‘reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court’. This requirement was already addressed elsewhere.⁵⁰² Secondly, detention should be necessary on the basis of one of the alternative grounds justifying detention in Rule 58 (1) (b) ICC Statute. These grounds will be discussed here.

The requirement of a legitimate ground upon which pre-trial detention is based, brings the pre-trial detention regime in line with human rights norms. As previously noted, the ECtHR requires the existence of a “genuine requirement of public interest”, which, notwithstanding the presumption of innocence, outweighs the person’s right to personal liberty.⁵⁰³ The ECtHR discerned four permissible grounds for the refusal of interim release, to know (1) the risk that the accused will not appear for trial; (2) the risk that the accused would prejudice the administration of justice; (3) the risk that the accused would commit further offences and (4) the risk that the accused would cause public disorder.⁵⁰⁴ It is easily understood how some of these legitimate grounds, such as the risk of flight or prejudice to the administration of justice

⁵⁰¹ HRC, *Torres v. Finland*, Communication No. 291/19 88, U.N. Doc. CCPR/C/38/D/191/1988, 5 April 1990, par. 7.3. The HRC declined to find a violation of Article 9 (4) ICCPR as it did not know the reasons for the judgement only being issued that late.

⁵⁰² See *supra*, Chapter 7, II.2.

⁵⁰³ See e.g. ECtHR, *Smirnova v. Russia*, Application Nos. 46133/99, 48183/99, Reports 2003-IX, Judgment of 24 July 2003, par. 60; ECtHR, *W. v. Switzerland*, Application No. 14379/88, Series A, No. 254-A, Judgment of 26 January 1993, par. 30; ECtHR, *Tomasi v. France*, Application No. 12850/87, Series A, No. 241-A, Judgment of 27 August 1992, par. 84.

⁵⁰⁴ Consider, e.g. ECtHR, *Smirnova v. Russia*, Application Nos. 46133/99, 48183/99, Reports 2003-IX, Judgment of 24 July 2003, par. 59.

(or even the risk of public disorder), are particularly valid with regard to these international jurisdictions.⁵⁰⁵

The close scrutiny of the decisions on interim release issued by the Pre-Trial Chambers, in general, only reveals a cursory discussion of the conditions set forth in Article 58 (1) ICC Statute. In several cases, the Appeals Chamber criticised the *scarce reasoning* of the respective Pre-Trial Chambers. In *Lubanga*, the Appeals Chamber noted that it would have been preferable for the Pre-Trial Chamber to explain in more detail why it reached its conclusion that the Appellant may abscond.⁵⁰⁶ Nevertheless, the Appeals Chamber immediately added “that it could not discern any error on the part of the Pre-Trial Chamber.”⁵⁰⁷ Similarly, it considered the reasoning as to the potential endangerment of witnesses (the other factor which, according to the Pre-Trial Chamber, necessitated continued detention) to be scarce, but added that the reasons for detention are in the alternative and therefore the question whether the detention is necessary to prevent the obstruction or endangerment of the investigations or court proceedings is not decisive.⁵⁰⁸ As a result, subsequent review decisions issued by Judge Steiner of Pre-Trial Chamber I underlined that the Appeals Chamber did not discern any error on the part of the Chamber and reiterated the wording of the Appeals Chamber that any determination by a Pre-Trial Chamber whether or not a suspect is likely to abscond necessarily involves an element of prediction.⁵⁰⁹ No further explanation is given why the PTC reached the conclusion that the accused may abscond or may interfere with the administration of justice.⁵¹⁰ In a similar vein, periodic reviews

⁵⁰⁵ F. MÉGRET, Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, p. 65.

⁵⁰⁶ ICC, Judgment on the Appeal of Mr. Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. 01/04-0106 (OA 7), A. Ch., 13 February 2007, par. 136-137.

⁵⁰⁷ *Ibid.*, par. 136.

⁵⁰⁸ *Ibid.*, par. 139.

⁵⁰⁹ ICC, Review of the “Decision on the Application for the Interim Release of Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-826, PTC I, 14 February 2007, p. 5, fn. 13; ICC, Second Review of the “Decision on the Application for Interim Release of Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-926, PTC I, 11 June 2007, p. 5, fn. 14.

⁵¹⁰ Notwithstanding the additional argumentation by the Single Judge that the danger of absconding had increased after the confirmation of charges, that the identities of many witnesses were disclosed during the confirmation hearing and that, considering the ever volatile situation in the DRC, the risk of endangerment of victims and witnesses remained, the reasoning does not further clarify why these two factors were found to be present in the first place. See ICC, Review of the “Decision on the Application for the Interim Release of Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-826, PTC I, 14 February 2007, p. 6; ICC, Second Review of the “Decision on the Application for Interim Release of

undertaken by Trial Chamber I, only included a scarce consideration of the conditions of Article 58 (1) (b) (i) ICC Statute.⁵¹¹ Likewise, in the *Bemba* case, the Appeals Chamber on the one hand criticised the Pre-Trial Chamber and emphasised that it would have been preferable to discuss in more detail why the conditions of Article 58 (1) (b) (i) continue to be fulfilled, but on the other hand emphasised that:

“[it] is nevertheless satisfied that the Pre-Trial Chamber’s omission to provide more detailed reasoning did not detract from the correctness and adequacy of its finding on this point.”⁵¹²

Subsequent decisions on interim release suffer from similar poor reasoning. Finally, similar criticisms were vented towards Pre-Trial Chamber I in the *Gbagbo* case, and the Appeals Chamber emphasised “the importance of the reasoning in decisions on interim release.”⁵¹³ “The reasoning should indicate with sufficient clarity the basis of the decision.”⁵¹⁴ While the Appeals Chamber noted that the reasoning of the Pre-Trial Chamber “was relatively sparse”, and emphasised “to provide fuller reasoning in future decisions on the review of detention”, it did not find the decision to be so lacking in reasoning for it to conclude to an error of law.⁵¹⁵

Therefore, while the Appeals Chamber repeatedly emphasised the importance of a detailed reasoning explaining why continued detention remains necessary, such consideration seems to have fallen on deaf ears. Such scarcely reasoned decisions are problematic from a human

Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-926, PTC I, 11 June 2007, p. 5.

⁵¹¹ ICC, Decision Reviewing the “Decision on the Application for the Interim Release of Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-976, T. Ch. I, 9 October 2007, par. 10.

⁵¹² ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled “Decision on Application for Interim Release”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-323 (OA), A. Ch., 16 December 2008, par. 53. Similarly, the Appeals Chamber exposed itself critical of the scarce reasoning on Article 58 (1) (b) (ii) ICC Statute, again without finding an identifiable error of law (*ibid.*, par. 66-67).

⁵¹³ ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled “Decision on the “Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo””, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-278 (OA), A. Ch., 26 October 2012, par. 47.

⁵¹⁴ *Ibid.*, par. 47.

⁵¹⁵ *Ibid.*, par. 47, 49, 64. Consider the Dissenting Opinion of Judge Ušacka, who disagrees with the majority and holds in this regard that “the majority has to correct errors, clarify findings, and interpret the findings in the Impugned Decision regarding the application of article 60 (2) of the Statute. With all due respect for the majority, I find that the reasoning provided by the Pre-Trial Chamber does not conform to the standards required of a reasoned decision pursuant to article 60 (2) of the Statute.” See *ibid.*, Dissenting Opinion of Judge Anita Ušacka, par. 14.

rights perspective where, as previously emphasised, the ECtHR repeatedly held that while the lack of a detailed reasoning will not in itself lead to a violation of Article 5 (3) ECHR, the use of identical or stereotyped language in orders confirming detention may give rise to doubts about the justification for the continued detention.⁵¹⁶ Reasons which are given to justify continued detention should be ‘relevant and sufficient’.⁵¹⁷

Further, the decision on interim release should be based on the facts pertinent to the case. In the *Ngudjolo* case, the Appeals Chamber reasoned that the Single Judge had erred in her assessment of the possibility of obstructing or endangering the investigations or court proceedings, where she referred to the analysis of the security situation by Judge Steiner in the *Katanga* case. The Chamber underlined that the Single Judge is duty-bound to appraise facts bearing on *sub judice* matters, to determine their cogency and weight and come to certain findings. It is for the Single Judge to assess the facts pertinent to the decision.⁵¹⁸

II.3.5.1. To ensure the presence of the suspect or accused at trial

The need to ensure the presence of the suspect or accused at trial seems to be the most important ground necessitating provisional detention. In the case law of the ICC (including decisions on applications for warrants of arrest, decisions on interim release, as well as decisions on the review of continued detention) several factors can be identified which are considered in the assessment of the necessity of a person’s arrest and detention to ensure his or her presence during the trial proceedings. Firstly, it may be expected that voluntary surrender is an important factor in the assessment of any risk of flight, in line with the case law of the *ad hoc* tribunals and the SCSL. In that regard, the ICC Pre-Trial Chamber rejected claims made by the suspect on his willingness to present himself before the Court because of

⁵¹⁶ ECtHR, *Mansur v. Turkey*, Application No. 16026/90, Series A, No. 319-B, Judgment of 15 April 1994, par. 55; ECtHR, *Kalashnikov v. Russia*, Application No. 47095/99, Reports 2002-VI, Judgment of 15 July 2002, par. 116; ECtHR, *Panchenko v. Russia*, Application No. 45100/98, Judgment of 8 February 2005, par. 107; ECtHR, *Vayıç v. Turkey*, Application No. 18078/02, Judgment of 20 June 2006, par. 35.

⁵¹⁷ Consider e.g. ECtHR, *Wemhoff v. Austria*, Application No. 2212/64, Series A, No. 7, Judgment of 27 June 1968, par. 12; ECtHR, *Yagci and Sargin v. Turkey*, Series A, No. 319-A, Judgment of 8 June 1995, par. 52; ECtHR, *Khodorkovskiy v. Russia*, Application No. 5829/04, Judgment of 31 May 2011, par. 182.

⁵¹⁸ ICC, In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, *Prosecutor v. Katanga and Chui, Situation in the DRC*, A. Ch., Case No. ICC-01/04-01/07-572 OA 4, 9 June 2008, par. 26-27; ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled “Decision on Application for Interim Release”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-323 OA, A. Ch., 16 December 2008, par. 52.

the *hypothetical nature of such statement* and the absence of any concrete evidence.⁵¹⁹ Problematic is the finding of Pre-Trial Chamber I where prior detention, which prevented voluntary appearance, was the only factor to conclude that arrest was necessary to ensure appearance at trial.⁵²⁰ In this way, the fact that a person is detained prior to his surrender to the ICC is used as justification for his subsequent detention. Such reasoning contrasts with the practice of the *ad hoc* tribunals. The *ad hoc* tribunals hold that where the accused is prevented from voluntarily surrendering him or herself, the absence of voluntary surrender is to be considered a neutral factor.⁵²¹

Secondly, the jurisprudence of the ICC uniformly holds that the fact that the charges have been confirmed increases the risk that a person may abscond.⁵²² In a similar vein, the dismissal of an admissibility challenge by the Defence and the approaching start of the trial may increase the risk of absconding.⁵²³ Thirdly, the gravity of the crimes and the possibility of facing a long prison sentence are often referred to as a relevant factor in the consideration of the risk of absconding in the sense of Article 58 (1) (b) (i) ICC Statute.⁵²⁴ However, the

⁵¹⁹ Consider e.g. ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-80-Anx, PTC III, 20 August 2008 (annexed to ICC, Decision Concerning the Public Version of the “Decision on Application for Interim Release” of 20 August 2008, *Prosecutor v. Bemba, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-80, PTC II, 26 August 2008), par. 58. In a later decision, the Single Judge held that while she cannot build her argument solely on hypothetical arguments, she was of the view that this factor, together with all other relevant factors constituted ‘changed circumstances’. “In the absence of any explanation for this change of its stance”, the Appeals Chamber found that the Pre-Trial Chamber erred in its appreciation of the weight to be attached to these hypothetical claims. See ICC, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08, PTC II, 14 August 2009, par. 61; ICC, Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”, *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-631 OA2, A. Ch., 2 December 2009, par. 75.

⁵²⁰ ICC, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga, *Prosecutor v. Katanga, Situation in the DRC*, Case No. ICC-01/04-01/07, PTC I, 6 July 2007, par. 62.

⁵²¹ See *supra*, Chapter 8, II, 2.6.1.

⁵²² ICC, Review of the “Decision on the Application for the Interim Release of Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-826, PTC I, 14 February 2007, p. 6; ICC, Second Review of the Decision on the Application for Interim Release of Mathieu Ngunjolo (Rule 118 (2) of the Rules of Procedure and Evidence), *Prosecutor v. Katanga and Ngunjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-750, T. Ch. II, 19 November 2008, par. 13.

⁵²³ ICC, Decision on Review of Detention of Mr. Jean-Pierre Bemba Gombo pursuant to the Appeals Judgment of 19 November 2010, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1088, T. Ch. III, 17 December 2010, par. 32, 39.

⁵²⁴ Consider e.g. ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté

Appeals Chamber has emphasised, in line with the practice of the *ad hoc* tribunals and with international human rights law, that such factors cannot be considered in isolation.⁵²⁵ Fourthly, where the suspect or accused has a network of international contacts, such factor may, according to the Appeals Chamber, be relevant in the assessment as to whether the person will appear for trial.⁵²⁶ For example, in *Bemba*, the Single Judge found the reference to the “past and present political position, international contacts, financial and professional background and availability of the necessary network and financial resources” by the Pre-Trial Chamber in its decision on the application for an arrest warrant to be relevant and determined that this consideration was still valid.⁵²⁷ The relevance of these circumstances in

provisoire du president Gbagbo”, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-278 (OA), A. Ch., 26 October 2012, par. 23; ICC, Judgment on the Appeal of Mr Callixte Mbarushimana against the Decision of Pre-Trial Chamber I of 19 May 2011 entitled “Decision on the ‘Defence Request for Interim Release’”, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-283, A. Ch., 14 July 2011, par. 21; ICC, Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”, *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-631 (OA2), A. Ch., 2 December 2009, par. 67; ICC, Review of the “Decision on the Application for Interim Release of Mathieu Ngujolo Chui”, *Prosecutor v. Katanga and Ngujolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07, PTC I, 23 July 2008, p. 5; ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-80-Anx, PTC III, 20 August 2008 (annexed to ICC, Decision Concerning the Public Version of the “Decision on Application for Interim Release” of 20 August 2008, *Prosecutor v. Bemba, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-80, PTC II, 26 August 2008), par. 56; ICC, Decision on Review of Detention of Mr. Jean-Pierre Bemba Gombo pursuant to the Appeals Judgment of 19 November 2010, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1088, T. Ch. III, 17 December 2010, par. 40; ICC, Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-180-Red, PTC I, 13 July 2012, par. 56.

⁵²⁵ ICC, Judgment on the Appeal of Mr. Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. 01/04-01/06-824, A. Ch., 13 February 2007, par. 136; ICC, Second Review of the Decision on the Application for Interim Release of Mathieu Ngujolo (Rule 118 (2) of the Rules of Procedure and Evidence), *Prosecutor v. Katanga and Ngujolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-750, T. Ch. II, 19 November 2008, par. 13; ICC, Third Review of the Decision on the Application for Interim Release of Mathieu Ngujolo (Rule 118 (2) of the Rules of Procedure and Evidence), *Prosecutor v. Katanga and Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-965, T. Ch. II, 17 March 2009, par. 8; See *supra*, Chapter 8, II.2.6.1.

⁵²⁶ ICC, Judgment on the Appeal of Mr. Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. 01/04-01/06-824, A. Ch., 13 February 2007, par. 137 (the Appeals Chamber adds that “any determination by a Pre-Trial Chamber of whether or not a suspect is likely to abscond necessarily involves an element of prediction”).

⁵²⁷ ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08, PTC III, 10 June 2008, par. 87; ICC, Decision on the Prosecutor’s Application for Warrants of Arrest, *Situation in the DRC*, Case No. ICC-01/04-01/07, PTC I, 10 February 2006, par. 114 (referring to the “variety of national and international contacts”); ICC, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of France, the Republic of Portugal, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08, PTC II, 14 August 2009, par. 58; ICC, Decision on

the assessment of the necessity of detention in view of the risk of flight has been confirmed by the jurisprudence of the ECtHR.⁵²⁸

Further in line with the jurisprudence of the *ad hoc* tribunals and the SCSL, the Courts seems to attach little weight to personal guarantees provided by the accused.⁵²⁹ In turn, much weight is attached to state guarantees offered. It will be illustrated how the Appeals Chamber has turned the provision of state guarantees into a quasi-requirement for every provisional release.⁵³⁰

Other factors assessed included the “risk that the suspect may abscond from the jurisdiction of the Court if granted provisional release”,⁵³¹ a previous record in absconding in relation to national criminal proceedings for war crimes⁵³² and the position of the suspect where connections attach to this position which may be at the person’s disposal.⁵³³

Review of Detention of Mr. Jean-Pierre Bemba Gombo pursuant to the Appeals Judgment of 19 November 2010, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1088, T. Ch. III, 17 December 2010, par. 38. Compare ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10, PTC I, 28 September 2010, par. 47 (referring to the international support network at the suspect’s disposal that could enable him to flee by providing financial support); ICC, Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-180-Red, PTC I, 13 July 2012, par. 57 - 63 (referring to Mr Gbagbo’s political contacts and funds and the fact that “certain assets [...] may not have been frozen to date”); ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-278 (OA), A. Ch., 26 October 2012, par. 59 – 60.

⁵²⁸ ECtHR, *Hesse v. Austria*, Application No. 26186/02, Series A, No. 254-A, Judgment of 25 January 2007, par. 47; ECtHR, *W. v. Switzerland*, Application No. 14379/88, Series A, No. 254-A, Judgment of 26 January 1993, par. 33; ECtHR, *Neumeister v. Austria*, Application No. 1936/63, Series A, No. 8, Judgment of 27 June 1968, par. 10 (noting that also the character of the person, his morals, family ties, his assets, home, occupation and all kinds of links with the country in which he or she is being prosecuted may either confirm or deny the risk of flight).

⁵²⁹ See e.g. ICC, Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-180-Red, PTC I, 13 July 2012, par. 55 (“the Single Judge is of the view that the assurances of Mr Gbagbo are not *per se* sufficient to grant interim release”); ICC, Public Redacted Version of the 26 September 2011 Decision on the Accused’s Application for Provisional Release in Light of the Appeals Chamber’s Judgment of 19 August 2011, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1789-Red, T. Ch. III, 27 September 2011, par. 24-26.

⁵³⁰ See *infra*, Chapter 8, II.3.7.

⁵³¹ ICC, Review of the “Decision on the Application for Interim Release of Mathieu Ngudjolo Chui”, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07, PTC I, 23 July 2008, pp. 5-6.

⁵³² ICC, Decision on the Application for Interim Release of Mathieu Ngudjolo Chui, *Prosecutor v. Katanga and Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-345, PTC I, 27 March 2008, p. 8.

⁵³³ ICC, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Mathieu Ngudjolo Chui, *Prosecutor v. Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-02/07, PTC I, 6 July 2007, par. 64.

II.3.5.2. Obstruction or endangerment of the investigation or of the court proceedings

It should be noted that the ICC has adopted a considerably more flexible approach than the jurisprudence of the *ad hoc* tribunals and the SCSL in relation to the requirement that the accused person would not interfere with victims, witnesses or other persons. The ICC does not require the presence of *concrete evidence* indicating the possible interference of the suspect or accused with victims or witnesses. Indeed, the nascent jurisprudence of the ICC, for example, accepted general references to the volatile situation in the DRC and/or the disclosure of the identity of victims and witnesses.⁵³⁴ In other instances, reference was made to concrete instances of prior interference or obstruction.⁵³⁵ However, the Appeals Chamber has reminded (*obiter*) that it follows from Article 58 (1) (b) (ii) ICC Statute that detention must be necessary ‘to ensure that *the person* does not obstruct or endanger the investigation or the court proceedings’. Hence, “there must be a link between the detained person and the risk of witness interference.”⁵³⁶

Remarkably, and in stark contrast with the jurisprudence of the *ad hoc* tribunals and the SCSL, the Trial Chambers take subjective feelings of insecurity voiced by victims into consideration.⁵³⁷ Such departure from the *ad hoc* tribunals’ jurisprudence may perhaps be

⁵³⁴ See e.g. ICC, Review of the “Decision on the Application for Interim Release of Mathieu Ngudjolo Chui”, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07, PTC I, 23 July 2008, p. 10.

⁵³⁵ ICC, Public Redacted Version of the 26 September 2011 Decision on the Accused's Application for Provisional Release in Light of the Appeals Chamber's Judgment of 19 August 2011, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1789-Red, T. Ch. III, 27 September 2011, par. 29 – 33 (“Several incidents have been reported since July 2011 in which threats have allegedly been made against prosecution witnesses and their families in connection with their testimony at the Court.” [...] “The Chamber is not in a position at this stage to reach conclusions on who is responsible for the alleged incidents of witness interference. It is a reasonable inference, however, that some may have originated from individuals who support the accused.”); ICC, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Mathieu Ngudjolo Chui, *Prosecutor v. Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-02/07, PTC I, 6 July 2007, par. 67 (referring to threats uttered by men under the suspect’s command); *ibid.*, par. 63 (referring to obstruction of the investigation conducted by MONUC on the crimes allegedly committed).

⁵³⁶ ICC, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 26 September 2011 Entitled “Decision on the Accused's Application for Provisional Release in Light of the Appeals Chamber's judgment of 19 August 2011”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1937-Red2 (OA 9), A. Ch., 15 December 2011, par. 67.

⁵³⁷ ICC, Second Review of the Decision on the Application for Interim Release of Mathieu Ngudjolo (Rule 118 (2) of the Rules of Procedure and Evidence), *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-750, T. Ch. II, 19 November 2008, par. 15 (“in view of the feeling of insecurity voiced by the victims, the use of general terms, equally striking in the Prosecutor’s submissions, does not reasonably eliminate the risk of real interference should Mathieu Ngudjolo Chui be released and return to the DRC”). Compare, *supra*, Chapter 8, II.2.6.2.

traced back to the important role victims play as participants in the trial proceedings. Additionally, in ICC investigations, the crimes are often ongoing with suspects still holding senior positions while victims and witnesses remain in the region. As a consequence, risks of interference are obviously higher.

Indeed, the ICC seems to attach much weight to the factor that in a given case, the identities of many witnesses have been disclosed to the suspect or accused and that he or she *may* thus exert pressure on victims and witnesses to obstruct or endanger the court's proceedings.⁵³⁸ The Trial Chamber noted in *Bemba* that the suspect could easily locate them, placing them at a particular risk. As president of the Movement for the Liberation of the Congo, Bemba continued to exercise *de facto* and *de jure* authority over this movement and could rely on the movements' network and on his former soldiers to influence witnesses, with past behaviour indicating that he would do so.⁵³⁹ In *Mbarushimana*, the Pre-Trial Chamber noted that the suspect maintained his position of leader of the FDLR and through his contacts with FDLR members in the field could have access to (potential) witnesses.⁵⁴⁰ Consequently, the position of a suspect or accused person is a factor that should be considered. In this regard the Court

⁵³⁸ ICC, Public Redacted Version of the "Decision on Applications for Provisional Release" of 27 June 2011, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1565-Red, T. Ch. III, 16 August 2011, par. 63–65 (noting that the fact that the accused has been informed of the identities of all prosecution witnesses, together with his position, his influence and the financial means he can muster create a 'possibility' of witness interference); ICC, Review of the "Decision on the Application for the Interim Release of Thomas Lubanga Dyilo", *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-826, PTC I, 14 February 2007, p. 6 (considering that this factor in combination with the volatile situation in the DRC may lead to the endangerment of victims and witnesses); ICC, Review of the "Decision on the Application for Interim Release of Matthieu Ngudjolo Chui", *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07, PTC I, 23 July 2008, p. 10 (noting that the disclosure of the identities of many witnesses for the purpose of the confirmation hearing together with the security situation in the DRC increases the risk of endangerment of victims and witnesses); See ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08, PTC III, 16 December 2008, par. 41; ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", *Prosecutor v. Gbagbo, Situation in the Republic of Côte d'Ivoire*, Case No. ICC-02/11-01/11-278 (OA), A. Ch., 26 October 2012, par. 65 ("Disclosure enhances the detainee's knowledge of the Prosecutor's investigations. Therefore under article 58 (1) (b) (ii) of the Statute, it may be a relevant factor").

⁵³⁹ ICC, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08, PTC III, 10 June 2008, par. 88-89; ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08, PTC III, 16 December 2008, par. 38 (the single Judge refers to an alleged incident of Defence interference with prosecution witnesses).

⁵⁴⁰ ICC, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10, PTC I, 28 September 2010, par. 48.

may also refer to the fact that a suspect or accused person has a “large and well-organised network of potential supporters.”⁵⁴¹

II.3.5.3. Continuous contribution to the commission of the alleged (or related) crime(s)

Pre-trial detention may be necessary to prevent a person from continuing with the commission of the alleged crime or a related crime within the jurisdiction of the Court and which arises out of the same circumstances. For example, this ground was relied upon by the Prosecutor in his application for a warrant of arrest for Mbarushimana. The Pre-Trial Chamber concluded that it was satisfied that the risk of continuing contribution to the commission of the alleged crimes was ‘sufficiently high’ to justify the issuance of a warrant of arrest.⁵⁴² In a similar vein in *Gbagbo*, the Single Judge concluded that the activities of his political party were aimed at restoring him in power. Since Mr. Gbagbo *could* use its network of supporters to commit crimes within the jurisdiction of the Court, continued detention was warranted.⁵⁴³ This legitimate ground for provisional detention concerns “*future crimes*”, “which by their nature cannot be specified in detail.”⁵⁴⁴

II.3.6. Length of pre-trial detention

It follows from Article 60 (4) ICC Statute that the Pre-Trial Chamber should ensure that individuals are not detained for an unreasonable period of time prior to trial due to ‘inexcusable delay’ by the Prosecutor.⁵⁴⁵ The provision adds that where the Pre-Trial Chamber finds a delay to be inexcusable, it “shall consider releasing the person, *if*

⁵⁴¹ ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-278 (OA), A. Ch., 26 October 2012, par. 31.

⁵⁴² ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10, PTC I, 28 September 2010, par. 49 (the Pre-Trial Chamber added that “Mbarushimana maintains to date his position [...] and continues to contribute to the commission of the crimes alleged in the Prosecutor’s application” (emphasis added)).

⁵⁴³ ICC, Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-180-Red, PTC I, 13 July 2012, par. 69.

⁵⁴⁴ ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-278 (OA), A. Ch., 26 October 2012, par. 70 (emphasis in original).

⁵⁴⁵ The term ‘inexcusable’ seems to defy attempts to define it.

circumstances so require.” Consequently, there is no obligation on the Pre-Trial Chamber to set a person free upon the finding of an ‘inexcusable delay’. The Appeals Chamber has emphasised that Article 60 (4) is independent from Article 60 (2) and 60 (3) ICC Statute, and constitutes a distinct protective mechanism.⁵⁴⁶ Nevertheless, it has been argued that, in practice, the distinction between Article 60 (3) and 60 (4) has become blurred, where the latter review is undertaken at the occasion of the Article 60 (3) review.⁵⁴⁷ In this sense, it was noted by Judge Pikis that Article 60 (3) ICC Statute “adds an additional safeguard to the armoury of the law for the protection of a right of a person not to be exposed to unjustified prolongation of his/her detention.”⁵⁴⁸

The unreasonableness of any period of detention prior to trial *cannot be considered in the abstract*, but has to be determined on the basis of the circumstances of each case and should take the specific features of that case into consideration.⁵⁴⁹ In its assessment, the Trial Chamber must determine whether the requirement of public interest outweighs the rule of respect for individual liberty.⁵⁵⁰

The assessment of Article 60 (4) ICC Statute consists, on its turn, of two prongs. First, the reasonableness of the overall period of detention should be assessed. Only when the period of detention is found to be unreasonable, is there a need to consider the second prong, to know whether the unreasonable delay was caused by an ‘inexcusable delay’ that can be attributed to

⁵⁴⁶ ICC, Judgment on the Appeal of Mr. Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled “*Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo*”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. 01/04-01/06-824, A. Ch., 13 February 2007, par. 120; ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08, PTC III, 16 December 2008, par. 29.

⁵⁴⁷ W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 729.

⁵⁴⁸ ICC, Judgment on the Appeal of Mr. Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled “*Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo*”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. 01/04-01/06-824, A. Ch., 13 February 2007, Separate Opinion of Judge Georgios M. Pikis, par. 17.

⁵⁴⁹ See *e.g.* ICC, Judgment on the Appeal of Mr. Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled “*Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo*”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. 01/04-01/06-824, A. Ch., 13 February 2007, par. 122-123; ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08, PTC III, 16 December 2008, par. 46.

⁵⁵⁰ See, *e.g.*, ICC, Second Review of the “Decision on the Application for Interim Release of Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-926, PTC I, 11 June 2007, p. 7; ICC, Third Review of the Decision on the Application for Interim Release of Mathieu Ngudjolo (Rule 118 (2) of the Rules of Procedure and Evidence), *Prosecutor v. Katanga and Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-965, T. Ch. II, 17 March 2009, par. 11.

the Prosecutor.⁵⁵¹ Delays that are not attributable to the Prosecutor, e.g. the financial constraints of the Court, are not included in Article 60 (4) ICC statute.⁵⁵²

‘Inexcusable delay’ has been interpreted by the Appeals Chamber as a “failure to take timely steps to move the judicial process forward, as the ends of justice may demand.”⁵⁵³ Issues regarding *prior detention* are relevant where they are part of the “process of bringing the Appellant to justice for the crimes that form the subject-matter of the proceedings before the Court.”⁵⁵⁴ Where prior detention is not part of that process, it should not be taken into consideration in the assessment under Article 60 (4) ICC Statute.⁵⁵⁵ Consequently, the period a person is detained for in the national jurisdiction before being transferred to the ICC is not relevant where the crimes, for which he or she was being detained in the custodial state, are separate and distinct from the crimes that led to the issuance of a warrant of arrest by the ICC.

In this sense, the jurisprudence of the ICC surpasses what is required under human rights law. According to the ECHR, where a person has already been deprived of liberty in another jurisdiction, pending extradition, that time period does not fall under Article 5 (3) ECHR,

⁵⁵¹ ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08, PTC III, 16 December 2008, par. 45.

⁵⁵² K.A.A. KHAN, Article 60, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, München, Verlag C.H. Beck, 2008, p. 1167 (criticising the exclusion of delays not attributable to the Prosecutor from the scope of Article 60 (4)). It was previously noted that institutional constraints are irrelevant to the assessment of the reasonableness of the period of pre-trial detention pursuant to Article 9 (3) ICCPR. See *supra*, Chapter 8, II.2.10.

⁵⁵³ ICC, In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, *Prosecutor v. Katanga and Chui, Situation in the DRC*, A. Ch., Case No. ICC-01/04-01/07-572 (OA 4), 9 June 2008, par. 14. The organs of the Court should act swiftly and should not have been dormant at any time in the course of the proceedings. See ICC, Decision on the Application for the Interim Release of Thomas Lubanga Dyilo, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-586, PTC I, 18 October 2006, p. 7.

⁵⁵⁴ ICC, Judgment on the Appeal of Mr. Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. 01/04-01/06-824, A. Ch., 13 February 2007, par. 121, referring to ICC, Judgment on the Appeal of Mr. Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. 01/04-01/06-772, A. Ch., 14 December 2006, par. 42; consider also ICC, Decision on the Powers of the Pre-Trial Chamber to Review *proprio motu* the Pre-Trial Detention of Germain Katanga, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, PTC I, Case No. ICC-01/04-01/07-330, 18 March 2008, p. 11.

⁵⁵⁵ ICC, Judgment on the Appeal of Mr. Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. 01/04-01/06-824, A. Ch., 13 February 2007, par. 121. The Appeals Chamber notes that Article 78 (2) ICC Statute only allows to deduct, in imposing the sentence, any time spent in detention in connection with *conduct underlying the crime* (emphasis added).

which provision does not apply to detention with a view to extradition pursuant to Article 5 (1) (f) and which detention is within the jurisdiction of another state.⁵⁵⁶

II.3.7. Conditional release

When the (Pre-) Trial Chamber or the Single Judge determines that a person should be released, conditional release may be ordered and conditions may (and in practice, will) be imposed.⁵⁵⁷ This implies a two-tiered approach whereby the Pre-Trial Chamber first determines whether a person should be released and secondly as to whether and what conditions should be imposed.⁵⁵⁸ Such conditions help mitigate or negate the risks described in Article 58 (1) (b) ICC Statute. However, the Appeals Chamber holds that it may also “in appropriate circumstances, impose conditions that do not, *per se*, mitigate [such] risks.”⁵⁵⁹ The result of this two-tiered examination should be a single unseverable decision that grants conditional release on the basis of specific and enforceable conditions.⁵⁶⁰ Whereas it follows from the case law that the Pre-Trial Chamber holds *discretion* to consider conditional release, such power should be exercised “judiciously and with full cognizance of the fact that the person’s personal liberty is at stake.”⁵⁶¹ Nevertheless, it is argued here that it is preferable that the consideration of conditional release is fully guided by the principle of subsidiarity. Hence, where conditions imposed upon release would satisfy the needs for provisional detention, no discretion should be left with the Chamber to order provisional detention.

⁵⁵⁶ ECtHR, *Quinn v. France*, Application No. 18580/91, Judgment of 22 March 1995, par. 53.

⁵⁵⁷ Rule 119 (1) ICC RPE states that “[t]he Pre-Trial Chamber may set one or more conditions restricting liberty.”

⁵⁵⁸ ICC, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08, PTC II, 14 August 2009, par. 43. The strict separation of these two steps is to a certain extent artificial. What if the Pre-Trial Chamber would only be satisfied that the conditions of Article 58 (1) ICC Statute are not met where certain conditions are applied? Through the consideration of governmental guarantees, a consideration of the conditions to be applied already occurs during the first step.

Where the defendant is ready to abide court orders and conditions: such is not sufficient *per se* to order provisional release. ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08, PTC III, 16 December 2008, par. 37.

⁵⁵⁹ ICC, Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”, *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-631 (OA2), A. Ch., 2 December 2009, par. 105.

⁵⁶⁰ *Ibid.*, par. 105.

⁵⁶¹ ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-278 (OA), A. Ch., 26 October 2012, par. 79.

Before the conditional release is granted, the views of the relevant state should be heard.⁵⁶² If the Chamber is considering conditional release and a state generally indicated its willingness and ability to receive a detained person without it being clear what specific conditions the state is willing or able to impose, the Chamber should indicate the conditions it considers and seek the observations of the state in that regard.⁵⁶³ In addition, the Pre-Trial Chamber should seek the views of the victims that have communicated in the case and may be at risk because of the release or the conditions imposed.⁵⁶⁴ Conditions restricting liberty that can be imposed include travel limitations, limitations regarding contacts, restrictions regarding professional activities, deposition of a bond, providing real or personal security or surety, prohibition to contact witnesses or victims directly or indirectly, or the handing over of identity papers.⁵⁶⁵ Where Rule 119 (1) ICC RPE provides a list of conditions that may be imposed, this list is by no means exhaustive. It follows from the presumption of innocence and the principle of subsidiarity that the conditions imposed should be the least stringent conditions which are required to safeguard the interests of Article 58 (1) ICC Statute.⁵⁶⁶

Cooperation of states is vital for the execution of all decisions granting conditional release.⁵⁶⁷ In that regard, Single Judge Trendafilova referred to the general cooperation obligation of States Parties embodied in Articles 86 and 88 ICC Statute, which also applies to Part 5 of the ICC Statute concerning interim release.⁵⁶⁸ The Single Judge held the view that governmental

⁵⁶² Rule 119 (3) ICC RPE; Regulation 51 ICC Regulations of the Court.

⁵⁶³ ICC, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 26 September 2011 Entitled "Decision on the Accused's Application for Provisional Release in Light of the Appeals Chamber's judgment of 19 August 2011", *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1937-Red2 (OA 9), A. Ch., 15 December 2011, par. 35 – 38; ICC, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 27 June 2011 entitled "Decision on Applications for Provisional Release", *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1626-Red (OA 7), A. Ch., 19 August 2011, par. 56; ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 2 September 2011 Entitled "Decision on the 'Demande de mise en liberté de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo'", *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-1722 (OA 8), A. Ch., 9 September 2011, par. 38.

⁵⁶⁴ Rule 119 (3) ICC RPE.

⁵⁶⁵ Rule 119 (1) ICC Statute.

⁵⁶⁶ K.A.A. KHAN, Article 60, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, München, Verlag C.H. Beck, 2008, p. 1164.

⁵⁶⁷ ICC, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08, PTC II, 14 August 2009, par. 84.

⁵⁶⁸ *Ibid.*, par. 85-86.

guarantees are no prerequisite for interim release and that the absence of such guarantees cannot weigh heavily against the suspect or accused.⁵⁶⁹

Nevertheless, the Appeals Chamber determined that the Single Judge had erred where she ordered conditional release without first identifying the conditions that would render the release feasible, without identifying the state to which Bemba would be released and without determining whether the state concerned would be able to impose the Court's conditions.⁵⁷⁰ Where, as stated above, Rule 119 (3) ICC RPE obliges the Court to seek the views of the relevant states before the imposition or the amendment of any conditions restricting liberty, it follows that prior to ordering the provisional release of a suspect or accused, "a State willing and able to accept the person concerned ought to be identified prior to a decision on conditional release."⁵⁷¹ The Appeals Chamber did not further clarify the meaning of "a State willing and able".⁵⁷²

This interpretation, which is in line with the practice of the *ad hoc* tribunals and the SCSL, confirms the existence of a quasi-requirement of providing governmental guarantees before a provisional release can be granted. As emphasised by the Appeals Chamber, any decision of the Court granting provisional release would be ineffective without the cooperation of the relevant state party. In the end, the ICC is dependent on state cooperation in relation to accepting a person who has been conditionally released as well as ensuring that the conditions imposed by the ICC are enforced. Regrettably, the question as to what obligations are incumbent on States Parties to accept suspects or accused persons who have been released conditionally and to offer the necessary guarantees, is left unaddressed. Rather, the Appeals Chamber limited itself to repeating the mantra of dependence on state cooperation. SLUITER observes that this quasi-requirement makes the compliance of the Court's provisional

⁵⁶⁹ *Ibid.*, par. 88.

⁵⁷⁰ ICC, Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-631 OA2, A. Ch., 2 December 2009, par. 109.

⁵⁷¹ *Ibid.*, par. 106.

⁵⁷² G. SLUITER, *Atrocity Crimes Litigation: Some Human Rights Concerns Occasioned by Selected 2009 Case Law*, in «Northwestern Journal of International Human Rights», Vol. 8, 2010, p. 265.

detention regime with international human rights norms dependent on the question of whether or not a state is 'willing and able' to receive a person who is eligible for provisional release.⁵⁷³

In a subsequent step to obtain conditional release, Bemba's Defence formulated a request to the Trial Chamber (pursuant to Article 57 (3) (b) ICC Statute) for assistance by the Registry to obtain the necessary state guarantees of appearance. The request was rightly dismissed in the context of the Article 60 (3) review where such a request did not constitute a 'changed circumstance' and was only relevant to future applications for provisional release.⁵⁷⁴ Nevertheless, such a request in itself may offer an interesting avenue. The request was based on Rule 20 ICC RPE which deals with the responsibilities of the Registry *vis-à-vis* the Defence and provides a list of responsibilities which, according to the Defence, is non-exhaustive in nature. The Defence drew a parallel with the enforcement agreements that have been signed with certain states and argued that "similar agreements could be signed with States Parties, whereby they could offer a guarantee that [he] would appear at trial if he were to be released to their territories."⁵⁷⁵

A parallel could also be drawn with Rule 185 ICC RPE which deals with release of the detained person, other than on a provisional basis. It obliges the Court to make, as soon as possible, such arrangements as it considers appropriate for the transfer of the person. Persons should be transferred 'to a state which is *obliged* to receive him or her, to another state which agrees to receive him or her, or to a State which has requested his or her extradition with the consent of the original surrendering State'.

⁵⁷³ *Ibid.*, p. 265 (the author adds that "[t]he respect of fundamental human rights norms cannot be made conditional upon such highly uncertain factors").

⁵⁷⁴ ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 28 July 2010 Entitled "Decision on the Review of the Detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rules of Procedure and Evidence", *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1019 (OA 4), A. Ch., 19 November 2010, par. 69. Consider in this regard also ICC, Decision on the 'Defence Request for an Order for State Cooperation Pursuant to Article 57(3)(b) of the Rome Statute', *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-85, PTC I, 24 March 2011 (where the accused requested an order for state cooperation on the basis of Article 57 (3) (b) ICC Statute and Rule 119 (3) ICC RPE and Regulation 51 ICC Regulations of the Court (obligation for the Pre-Trial Chamber, in the context of a decision on interim release, to seek the observations of the State to which the person seeks to be released) such request was rejected where "it is for the Chamber to request observations from the State concerned, only if and when an application for interim release is made, and that it is not required that such observations should be obtained by the person applying for interim release and included in that person's application").

⁵⁷⁵ ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 28 July 2010 Entitled "Decision on the Review of the Detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rules of Procedure and Evidence", *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1019 (OA 4), A. Ch., 19 November 2010, par. 46

Consequently, it may be argued that a corresponding obligation exists for States Parties to receive persons provisionally released. In line with the argumentation provided by Single Judge Steiner, one may reason that an obligation to accept detainees that are provisionally released and to offer necessary guarantees for their appearance at trial follows from the general obligations incumbent on States Parties to fully cooperate with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.⁵⁷⁶ This presupposes an understanding of the obligations of States Parties to ‘cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court’ as to also cover detention on remand. There seems to be no reason why the States Parties’ cooperation obligations would not extend to the provisional detention/release regime.⁵⁷⁷ Moreover, it may be argued that Article 88 ICC Statute obliges States Parties to have the necessary procedures in place to receive persons provisionally released by the Court and to ensure the appearance of the person at trial and/or to avoid any interference with victims, witnesses or other persons. This view is in line with international human rights law. It was argued by Judge ROBINSON in his dissent to the *Krajišnik* case, that “[a] judicial body cannot rely on peculiarities in its system to justify derogations from the rule of respect for individual liberty.”⁵⁷⁸ He opined that any authority reviewing detention should be able to effectively order release if there are no reasons for the continuation of detention and this order should be able to be effectively implemented. GOLUBOK has proposed; in line with the suggestion that was made earlier with regard to the *ad hoc* tribunals, that “the Assembly of States Parties [is] to ascertain that standing arrangements are in place to ensure the State cooperation in the matters related to the conditional release at the investigation/trial stage of the proceedings before the ICC, having in mind the States Parties’ general obligation to cooperate fully with the Court in its investigation and prosecution of crimes within its jurisdiction.”⁵⁷⁹

⁵⁷⁶ Article 86 ICC Statute.

⁵⁷⁷ G. SLUITER, Atrocity Crimes Litigation: Some Human Rights Concerns Occasioned by Selected 2009 Case Law, in «Northwestern Journal of International Human Rights», Vol. 8, 2010, p. 266 (the author holds that the assistance of states in respect of interim release should be governed by Article 93 (1) (1) of the ICC Statute (residual clause)).

⁵⁷⁸ ICTY, Decision on Momočilo Krajišnik’s Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik and Plavšić*, Case No. IT-00-39 & 40-PT, 8 October 2001, Dissenting Opinion of Judge Patrick Robinson, par. 12.

⁵⁷⁹ S. GOLUBOK, Pre-Conviction Detention before the International Criminal Court: Compliance or Fragmentation, in «The Law and Practice of International Courts and Tribunals», Vol. 8, 2010, p. 308.

Unfortunately, this view is not currently held by the States Parties. They reason that the cooperation obligations under Article 86 do not necessarily include cooperation with the Defence.⁵⁸⁰ In this regard, reference is made to Article 57 (3) (b) ICC Statute, which limits the Pre-Trial Chamber's power to assist with defence requests for cooperation to 'such cooperation [...] as may be necessary to assist the person *in the preparation of his or her defence*'.⁵⁸¹ It follows that States Parties consider the assistance with regard to provisional or conditional release to be a voluntary form of cooperation.⁵⁸² Therefore, an *ad hoc* framework agreement would be necessary between the Court and States Parties willing to receive persons eligible for conditional or provisional release. In this regard, the ICC Registry drafted and circulated an 'Interim Release Framework Agreement'.⁵⁸³

Finally, with regard to the *Bemba* case, it is noted that although the Defence was eventually able to provide the Court with state guarantees, provisional release was refused by Trial Chamber III when it concluded that these guarantees "do little to allay the Chamber's concerns regarding the possibility of the accused absconding."⁵⁸⁴ On appeal, the Appeals Chamber concluded that the Trial Chamber erred where it did not assess these state guarantees in light of the letter of Bemba addressed to that state. From the combined reading of these documents, it emerged that the state concerned could impose the conditions indicated in the letter of Bemba or other conditions under Rule 119 (1) ICC RPE.⁵⁸⁵ Once a state indicated its general willingness and ability to accept a detained person and enforce conditions, it is for the Court to specify the necessary conditions for release and to seek observations from the state in that regard.⁵⁸⁶ After the matter was remanded for reconsideration, the Trial Chamber concluded, based on additional information submitted, that the conditions proposed by the state "do not mitigate the risk of flight to an acceptable

⁵⁸⁰ International Bar Association, Fairness at the International Criminal Court, August 2011, p. 37.

⁵⁸¹ Emphasis added.

⁵⁸² *Ibid.*, p. 37.

⁵⁸³ *Ibid.*, pp. 37 – 38. The report discusses several key points of the framework agreement, which has not been made public at the time of writing.

⁵⁸⁴ ICC, Public Redacted Version of the "Decision on Applications for Provisional Release" of 27 June 2011, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1565-Red (OA 7), T. Ch. III, 16 August 2011, par. 59 – 61.

⁵⁸⁵ ICC, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 27 June 2011 entitled "Decision on Applications for Provisional Release", *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1626-Red (OA 7), A. Ch., 19 August 2011, par. 51 – 52.

⁵⁸⁶ *Ibid.*, par. 54 – 56.

degree” and “would meaningfully increase the accused's ability to interfere with witnesses or to cause others to do so.”⁵⁸⁷

II.3.8. Impact of medical reasons on provisional detention

According to the Appeals Chamber, medical reasons may impact provisional detention in at least two ways. Firstly, health reasons may have an effect on the legitimate grounds upon which provisional detention is based. Secondly, the poor health may be considered by the Pre-Trial Chamber where it exercises its discretion to order conditional release.⁵⁸⁸ Recall that the *ad hoc* tribunals may order provisional release on medical grounds even when the conditions for provisional release have not been met.⁵⁸⁹

II.4. Internationalised criminal tribunals: confirming pre-trial detention as the exception

II.4.1. The Extraordinary Chambers in the Courts of Cambodia

II.4.1.1. General

The pre-trial detention regime is similar to that of the ICC since it also proclaims, at least in theory, that liberty is the rule and deprivation of liberty is the exception.⁵⁹⁰ In line with the ICC, the Co-Investigating Judges emphasised the *exceptional nature* of provisional detention;

⁵⁸⁷ ICC, Public Redacted Version of the 26 September 2011 Decision on the Accused's Application for Provisional Release in Light of the Appeals Chamber's Judgment of 19 August 2011, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1789-Red, T. Ch. III, 27 September 2011, par. 38, 41.

⁵⁸⁸ ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d'Ivoire*, Case No. ICC-02/11-01/11-278 (OA), A. Ch., 26 October 2012, par. 87; ICC, Decision on the Request for the Conditional Release of Laurent Gbagbo and on his Medical Treatment, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d'Ivoire*, Case No. ICC-02/11-01/11-362-Red, PTC I, 18 January 2013, par. 24. In the *Gbagbo* case, the Single Judge decided that the medical condition of Gbagbo did not have a bearing on the legitimate grounds for detention under Article 58 (1) (b) and did not consider it necessary to exercise her discretion to grant conditional release on medical grounds. See *ibid.*, par. 38; ICC, Decision on the Review of Laurent Gbagbo's Detention pursuant to article 60(3) of the Rome Statute, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d'Ivoire*, Case No. ICC-02/11-01/11-291, PTC I, 12 November 2012.

⁵⁸⁹ See *supra*, Chapter 8, 2.8.

⁵⁹⁰ Consider e.g. Rule 82 (1) ECCC IR (“The Accused shall remain at liberty whilst appearing before the Chamber unless Provisional Detention has been ordered in accordance with these IRs’); Rule 72 (4) (d) ECCC IR (“where the disagreement concerns provisional detention, there shall be a presumption of freedom”); ECCC, Decision on Immediate Appeal by KHIEU Samphan on Application for Release, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC/TCSC(04), SCC, 6 June 2011, par. 46 – 47 (referring to the presumption of liberty).

liberty during the pre-trial phase is therefore the general rule.⁵⁹¹ In a similar vein, the ECCC Trial Chamber confirmed that liberty is the norm.⁵⁹² The exceptional nature of any deprivation of liberty is reflected in the strict time limitation of any order on provisional detention. Pursuant to Rule 63 (6) of the Internal Rules ('IR'), provisional detention may be ordered for crimes against humanity, war crimes and genocide for a period not exceeding one year, which can be extended per one additional year. For other crimes within the jurisdiction of the Extraordinary Chambers, detention may be ordered for periods not exceeding six months, renewable by further six-month periods. The period of pre-trial detention may only be extended twice by the Co-Investigating Judges. Consequently, the maximum period of provisional detention (between the opening and closing of the judicial investigation)⁵⁹³ is three years and one and a half years respectively.⁵⁹⁴ It was previously discussed that provisional detention of a charged person may be ordered at any time during the judicial investigation, after an adversarial hearing.⁵⁹⁵

Further proof of the exceptional character of provisional detention may be found in Rule 64 (1) ECCC IR, according to which, at any time during the detention of the charged person, the Co-Investigating Judges 'shall' *proprio motu* or at the request of the Co-Prosecutors order release, where the conditions for detention are no longer fulfilled. The use of the verb 'shall' instead of 'may' bears witness of the fact that the Co-Investigating Judges do not possess any *discretion* in deciding whether or not to detain a charged person.

⁵⁹¹ Consider e.g. ECCC, Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 15 September 2009, par. 8; ECCC, Order on Extension of Provisional Detention, *IENG Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2009, par. 9. Consider also Article 203 of the Cambodian Code of Criminal Procedure.

⁵⁹² ECCC, Decision on Ieng Thirith's Fitness to Stand Trial, *NUON Chea et al.*, Case No. 002/19-09-2007, T. Ch., 17 November 2011, par. 80 ("As, pursuant to the presumption of innocence, liberty is considered the norm, detention is an extraordinary measure which must only be imposed in accordance with procedures established by law").

⁵⁹³ ECCC, Closing Order, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, 15 September 2010, par. 1619.

⁵⁹⁴ According to Internal Rule 68, the issuance of the closing order normally puts an end to the provisional detention or bail order. However, by a 'specific, reasoned decision', the Co-Investigating Judges may decide to maintain the provisional detention, where they consider that the conditions for ordering provisional detention or bail continue to be met. Such order ceases to have effect after four months, unless the charged person is brought before the Trial Chamber before that time (Rule 68 (3) IR).

⁵⁹⁵ Rule 63 (1) (a) ECCC IR. See *supra*, Chapter 7, II.1.

Rule 64 (2) ECCC IR provides for the right for a charged person to submit an application for provisional release at any time during the detention.⁵⁹⁶ In line with the ICC's procedural regime, 'changed circumstances' are required for a new application for provisional release.⁵⁹⁷ Different from the ICC, the Internal Rules further specify that a new application can be filed at least three months after the final determination on the previous application.

Even though pre-trial release is the rule, the practice of the ECCC reveals a different picture. All charged persons have so far been detained ahead of the trial proceedings. Duch was arrested in July 2007.⁵⁹⁸ The other charged persons were all arrested in November 2007.⁵⁹⁹ In practice, pre-trial detention thus seems firmly established as the rule. Only Ieng Thirith has been released from detention in September 2012 after she was found unfit to stand trial.⁶⁰⁰ In turn, the possibility of provisional or conditional release remains a theoretical possibility where any practice is lacking.⁶⁰¹ It will further be explained what factors have been advanced to explain the necessity of pre-trial detention.

§ *Adversarial hearing*

Importantly, the procedural regime of the Extraordinary Chambers does not encompass a regime of automatic pre-trial detention, characteristic of the *ad hoc* tribunals and the SCSL. It rather provides for the feature of an adversarial hearing, prior to the ordering of provisional detention. Such a concept, unknown to the procedural regimes of the international criminal tribunals, is aimed at providing the charged person with the opportunity to respond to the

⁵⁹⁶ Such application will be forwarded to the Co-Prosecutors, who will reply within five days. The Co-Investigating Judges will decide within five days from receipt of the Co-Prosecutors' submission.

⁵⁹⁷ Rule 64 (3) ECCC IR.

⁵⁹⁸ ECCC, Order of Provisional Detention, *KAING Guek Eav "Duch"*, Case No. 001/18-07-2007-ECCC-OCIJ, OCIJ, 31 July 2007.

⁵⁹⁹ ECCC, Provisional Detention Order, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, OCIJ, 14 November 2007; ECCC, Provisional Detention Order, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ, OCIJ, 14 November 2007; ECCC, Order of Provisional Detention, *NUON Chea*, Case No. 002/14-08-2006, OCIJ, 19 September 2007; ECCC, Provisional Detention Order, *KHIEU Samphan*, Case No. 002/14-08-2006, OCIJ, 19 November 2007.

⁶⁰⁰ See ECCC, Decision on Reassessment of Accused IENG Thirith's Fitness to Stand Trial following Supreme Court Chamber Decision of 13 December 2011, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/TC, T. Ch., 13 September 2012.

⁶⁰¹ KHIEU Samphan requested to be provisionally released, given his medical conditions. However, the Co-Investigating Judges decided that it would be 'premature' to affirm that the charged person's condition is incompatible with detention where additional medical examinations were necessary. See ECCC, Order Refusing the Request for Release, *KHIEU Samphan*, Case No. 002/14-08-2006, OCIJ, 23 June 2008, par. 5.

submissions of the Co-Prosecutors.⁶⁰² A more detailed discussion of this peculiar concept is therefore warranted. The charged person should at this occasion be informed of the right to assistance of counsel.⁶⁰³ According to the Pre-Trial Chamber, it can be inferred from Rule 63 (1) ECCC IR that the right to assistance of counsel can be waived.⁶⁰⁴ Nevertheless, the formal requirements for such waiver pursuant to Rule 58 (2) ECCC IR do not apply.⁶⁰⁵ On the question of what requirements do apply in such circumstances, the Pre-Trial Chamber held, based on its analysis of the relevant jurisprudence of the *ad hoc* tribunals, that the waiver should be *unequivocal* and *voluntary*, the latter term meaning that the waiver should be *informed, knowing and intelligent*.⁶⁰⁶ This presupposes that the charged person is given the opportunity to make a rational appreciation of the effects of proceeding without a lawyer.⁶⁰⁷ Normally, there is no need to inform the charged person about his or her right to remain silent before the start of the adversarial hearing, as the charged person is not being questioned.⁶⁰⁸

In *NUON Chea*, the Pre-Trial Chamber concluded that the charged person's waiver was unequivocal and voluntary.⁶⁰⁹ However, this conclusion can be doubted. In particular, it seems that the waiver *was not unequivocal*. Moreover, the waiver can hardly be deemed informed, given the various contradictory statements made by the Co-Investigating Judges about the nature and purpose of the adversarial hearing. For reasons of clarity, it is necessary here to reproduce some excerpts of the initial hearing and the adversarial hearing (which immediately followed the initial hearing).

⁶⁰² ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 30.

⁶⁰³ Where defence counsel is absent and the charged person requests for the assistance of counsel, the Co-Investigating Judges will request the Defence Support Section to temporarily assign a defence counsel drawn from the list. See Rule 63 (1) (c) ECCC IR.

⁶⁰⁴ ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 18. As previously discussed, the Pre-Trial Chamber held that, given the distinct purpose served by interviews and adversarial hearings, the right to waive the assistance of counsel included in Rule 58 (interview of the charged person) of the Internal Rules cannot readily be applied in such context. While it may be read to apply to any form of questioning of the charged person, the Pre-Trial Chamber concluded that it does not apply where the charged person is not questioned in the course of the adversarial hearing. See *ibid.*, par. 16 – 17 and the discussion thereof, *supra*, Chapter 4, IV.1.3.

⁶⁰⁵ *Ibid.*, par. 17-18.

⁶⁰⁶ *Ibid.*, par. 17-39. *In casu*, the Pre-Trial concluded that the waiver was voluntary and unequivocal. The decisions cited by the Pre-Trial Chamber were discussed, *supra*, Chapter 4, IV.1.1.

⁶⁰⁷ *Ibid.*, par. 31.

⁶⁰⁸ *Ibid.*, par. 40.

⁶⁰⁹ ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 39.

During the initial hearing the following exchange took place:

International Co-Investigating Judge ('ICIJ'): "Because your lawyer is not here today, would you like to make a statement in regard to the charges against you or the facts against you?"

Nuon Chea ('NC'): "I would like to make some statement against these charges"

National Co-Investigating Judge ('NCIJ'): "I think probably there will be some kind of misunderstanding, I may like to clarify. Just now I informed you about your rights. During the Initial Appearance and after this I will announce, notify about the information or the possibility of Provisional Detention, because in this Initial Appearance and you haven't got the lawyer, the continued proceedings whether you will be detained or not. What would you like to comment on if you don't have your lawyer with you."

ICIJ: "So because we conduct the Adversarial Hearing, would you like to make a statement?"

NC: "Now?"

[The French-English interpreter takes over]

ICIJ: "If you would like to make a statement, this would be the time to do it. We are going to record them."

[the Khmer-English interpreter proceeds]

NC: "I would like to make a statement now."

NCIJ: "So after your statement, the judges will have to discuss, will have an adversarial hearing to decide or rule on the possibility of provisional detention. In this regard, do you think you will wait until these kind of hearing can take place or do you think that the hearing can be conducted soon, or in a few more minutes?"

NC: "To continue on what matter?"

NCIJ: "Just now you said you have a lawyer, but the lawyer is not here. So the next proceeding, after the initial hearing, when you have been notified about your rights and charges against you, next we will discuss about the conditions or possibility of the conditions of detention and with the participation of the Co-Prosecutors as requested. You can respond to them. If you don't have a lawyer you can also do so, or if you have a lawyer you can still respond. In that situation, the judges will make a decision of the possibility of Provisional Detention. So do you want to wait until you have your lawyer here or do you want to proceed these proceedings.?"

NC: "Of course I want to continue these proceedings on my own."

ICIJ: "So to put it more clearly, you have to be informed about your rights. Because there will be the adversarial hearing where there will be the participation from the Co-Prosecutors of the Extraordinary Chambers in the Courts of Cambodia and you should

also know that you have the right to have a lawyer and with the lawyer, he will be able to defend you.”

NC: “You mean the lawyer be...the hearing will be conducted in 24 hours or just in the next few minutes.”

ICIJ: “Since your lawyer cannot participate in these proceedings now, he can only be here tomorrow, so if you wait until your lawyer comes to the hearing, the hearing can only be conducted from tomorrow.”

NC: “I don’t have any problem or any secrets to hide.”

NCIJ: “So are you sure, because in order not to misunderstand, in order to not say that the court failed to tell you about your rights, I would like to clarify again the Judges already raised that we will conduct an Adversarial Hearing with the participation of the Co-Prosecutors and you can respond to them with your own statements and if you have a lawyer, the lawyer can assist you in this response also. If you think we can conduct a hearing now without a lawyer, it is your own right. And if you need a lawyer, so it has to be adjourned and then tomorrow, when the lawyer comes, then the court can continue. So I would like to finally clarify that whether the hearing can be conducted now, or can we wait until your lawyer come, because you haven’t got your lawyer here. Adversarial hearing can continue now.”

NC: “I think we can have it conducted now. But now I can go ahead on my own.

Although my lawyer is not available today, I still want the debate to be held today.”⁶¹⁰

The transcript reveals that the explanation given by the Co-Investigating Judges on the purpose and scope of the adversarial hearing was confusing and at times contradictory. Given this confusion, it may rightly be doubted whether the charged person understood the effect of the waiver of this right. At the start of the adversarial hearing, the Co-Prosecutors made the following statement, which further evidences the confusion:

National Co-Prosecutor (‘NCOP’) : “Point number two, we request that the Judges should inform this Adversarial Hearing clearly to the Charged Person. Because in the record he says that he needs his lawyer. As the name already listed in this record. When he already understands that this Adversarial Hearing proceeding, he does not need a lawyer. So make sure he understands this Adversarial Hearing matter, because it is the matter of consideration of the possibility of Provisional Detention of the Charged Person. So that

⁶¹⁰ ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 15.

he can envisage whether he would prefer having a lawyer here or not, now. So this is the suggestion of the Co-Prosecutors. I would like to make sure that he is well informed about the matter of the Adversarial Hearing and his right of having a lawyer. Because judges will issue a decision.”⁶¹¹

When the national Co-Investigating Judge subsequently asks NUON Chea whether he had stated that he did not need a lawyer, he responded:

NC: “I don’t need a lawyer now, but tomorrow my lawyer come. In general, I need a lawyer, but now my lawyer is not here.”

NCOJ: “Because this relates to the possibility of Provisional Detention, though Judge Lemonde already clarified this and I also explained to you do you understand that? So I would like to explain again to you, after the Initial appearance, would you like to have a lawyer. Because, in the Adversarial Hearing that to be conducted will be considered the possibility of Provisional Detention.”

NC: “I need a lawyer, I already proposed the name. For a foreign lawyer, I don’t know his name yet. I only know that Mr. Son Arun the national lawyer.”

ICOJ: “I like to explain to you that everyone here understands that you can wait, because it is your interest, you can wait until your lawyer comes, so that the Adversarial Hearing can be conducted, because in that hearing it is about the possibility of Provisional Detention but if you can defend yourself here in this process without a lawyer, then we can continue.”

NC “I would like to clarify that I can defend my own now, but from tomorrow onwards, when the lawyer comes, I will need his assistance. For the International Co-Lawyer I will seek advice from my national lawyer.”⁶¹²

What is required for a waiver to be made voluntary, is that the waiver is *informed, knowingly and intelligent*. The person should be able to make a rational appreciation of the effects of proceeding without a lawyer.⁶¹³ Importantly, where there are indications that the person is confused, steps must be undertaken to ensure that the suspect does actually understand the nature of his or her rights.⁶¹⁴ While the Co-Investigating Judges explained the nature and

⁶¹¹ *Ibid.*, par. 15.

⁶¹² *Ibid.*, par. 15.

⁶¹³ See *supra*, Chapter 4, IV.1.1.

⁶¹⁴ ICTR, Decision on the Prosecutor’s Motion for the Admission of Certain Materials, *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, T. Ch. I, 14 October 2004, par. 17; See *supra*, Chapter 4, IV.1.1.

scope of the adversarial hearing several times during the initial appearance, the transcript shows that during the adversarial hearing, the confusion remained. In that context, the voluntariness may be doubted. Where the charged person made different statements on whether he wants his lawyer to be present at the adversarial hearing, the waiver seems ambiguous and therefore not unequivocal in nature.

The Co-Prosecutors, defence counsel and charged persons should be heard at the occasion of the adversarial hearing. The charged person can request additional time to prepare his or her defence; in that case, a reasoned order may be issued by the Co-Investigating Judges for the immediate detention of the person for a period up to seven days.⁶¹⁵ During that period, the charged person will again be brought before the Co-Investigating Judges who will proceed with the adversarial hearing, whether or not in the presence of the defence counsel. Once the charged person is detained, he or she should be brought before the Co-Investigating Judges at least every four months.⁶¹⁶

§ Requirements for provisional detention

According to Rule 63 (2) ECCC IR, the detention order should contain the initial maximum detention period, the factual and legal grounds upon which the detention is based and a statement of rights. According to the Pre-Trial Chamber, this does not imply that the Co-Investigating Judges should indicate a view on all factors, but only requires the Co-Investigating Judges to set out the legal grounds and facts taken into account in their decision.⁶¹⁷

Detention may be ordered by the Co-Investigating Judges where there are ‘well founded reasons to believe’ that the charged person has committed the crimes described in the introductory or supplementary submission.⁶¹⁸ What is required is that facts or information

⁶¹⁵ Rule 63 (1) (b) IR as inserted following the amendment of Rule 63 (1) ECCC IR, adopted during the second revision of the Internal Rules on 1 February 2008. Prior to this amendment, police custody orders were issued placing the charged persons in police custody for a maximum of 48 hours. See *e.g.* ECCC, Police Custody Decision, *IENG Sary*, Case No. 002/14-08-2006, OCIJ, 12 November 2007; ECCC, Police Custody Decision, *IENG Thirith*, Case No. 002/14-08-2006, OCIJ, 12 November 2007.

⁶¹⁶ Rule 68 (3) ECCC IR.

⁶¹⁷ ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 66.

⁶¹⁸ Rule 63 (3) ECCC IR.

exist which would satisfy an objective observer that the person may have committed the offences.⁶¹⁹ Consequently, the ‘well-founded reasons to believe’ can be equated with the ‘reasonable grounds to believe’ criterion found in Article 58 ICC Statute as interpreted by the jurisprudence.⁶²⁰

Different from the *ad hoc* tribunals and the SCSL, the existence of a strong suspicion alone will not suffice to order provisional detention. A second condition needs to be fulfilled. In line with the ICC’s provisional detention scheme, detention should serve a legitimate purpose and should thus be considered to be *necessary*.⁶²¹ According to the Co-Investigating Judges, the principle of necessity implies that “if these objectives could be achieved by some other reasonable means, then they must be considered”, and as such understood the principle of necessity as encompassing a principle of subsidiarity.⁶²² Detention may be ordered for different reasons, (1) to prevent the charged person from exercising pressure on witnesses or victims and prevent collusion between the charged person and accomplices from crimes within the jurisdiction of the ECCC, (2) to preserve evidence or to prevent its destruction; (3) to ensure the presence of the charged person during the proceedings, (4) to protect the security of the person or (5) to preserve public order. These justifications are formulated in the alternative, where one of the grounds is met; this suffices to justify the provisional detention of the charged person.⁶²³ The requirement is disjunctive and there is no need to examine all criteria where the Judges deem that they have sufficiently demonstrated the need for provisional detention in reference to one or more of the criteria of Rule 63 (3) (b) of the

⁶¹⁹ The Pre-Trial Chamber reasoned that the term ‘well-founded reason’ corresponds with the requirement of ‘*raisons plausibles*’ in the French version of the Internal rules which, on its turn, corresponds with the wording of the French version of Article 5 (1) (c) of the ECHR. Consequently, what is required is the ‘reasonable suspicion’ standard of Article 5 (1) (c) of the ECHR. This implies that the term is similar to the requirement of ‘reasonable grounds to believe’ under Article 58 (1) ICC Statute, according to which ‘facts or information should exist which *could satisfy an objective observer* that the person concerned may have committed the offence’ are required (ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 43-46; ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 71; ECCC, Decision on Appeal against Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009, par. 24). Critical of the application of the ‘well-founded reason to believe’ requirement by the Co-Investigating Judges, the Pre-Trial Chamber and the Trial Chamber is STARYGIN. See S. STARYGIN, ECCC in Pre-Trial Action: Was there Good Reason to Order Pre-Trial Detention of the ECCC Defendants, in «Human Rights in the Post-Conflict Context», Vol. 9, 2011, p. 11.

⁶²⁰ See *supra*, Chapter 7, II.2.

⁶²¹ ECCC, Order on Extension of Provisional Detention, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, OCIJ, 10 November 2008, par. 18.

⁶²² *Ibid.*, par. 18.

⁶²³ See *e.g.* ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 83.

Internal Rules. Remarkable is the inclusion of the preservation of public order and the protection of the security of the person as justifying grounds, where none of the international criminal tribunals provides for such legitimate objectives.⁶²⁴

In line with the international criminal tribunals, an overarching *principle of proportionality* applies to any decision not to release a person and should be considered when the Co-Investigating Judges are considering the possibility of granting bail (other forms of detention).⁶²⁵ A decision not to release a person results from a balancing exercise between the competing public interest requirements (as laid down in Rule 63 (3) (b) ECCC IR) on the one hand and the presumption of innocence on the other hand (Article 35 new ECCC Law and Rule 21 (1) (d) ECCC IR). The Pre-Trial Chamber relied on the case law of the ICTY in holding that this balancing exercise should at all times be proportionate, in so far as it should be (1) suitable (2) necessary and (3) its degree and scope remain in a reasonable relationship to the envisaged target.⁶²⁶ The provisional measures should at no time capricious or excessive. A principle of subsidiarity applies where the more lenient measure must be applied where that would be sufficient.

§ *Extension of provisional detention*

An extension is only possible where the conditions for detention continue to be met “notwithstanding the passage of time and taking into consideration the results of the judicial investigation.”⁶²⁷ The power to extend detention is *discretionary* in nature.⁶²⁸ Any decision on the extension of provisional detention should be in writing and set out the reasons for such

⁶²⁴ However, it should be noted that the *ad hoc* tribunals and the SCSL occasionally referred to ‘public order concerns’ in exercising its discretion to refuse provisional release. Consider e.g. SCSL, Fofana - Decision on Application for Bail Pursuant to Rule 65, *Prosecutor v. Norman et al.*, T. Ch., 5 August 2004, par. 82 – 84.

⁶²⁵ ECCC, Decision on Khieu Samphan’s Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 14 and 15), PTC, 3 July 2009, par. 91. With regard to detention during the trial, consider e.g. ECCC, Decision on Khieu Samphan’s Application for Immediate Release, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC/TC, T. Ch., 26 April 2013, par. 15 (“When detention is continued at trial, jurisprudence requires the Court to ensure that detention remains proportionate to the circumstances of that case including its complexity and the prospective sentence”). See also ECCC, Decision on Reassessment of Accused IENG Thirith’s Fitness to Stand Trial following Supreme Court Chamber Decision of 13 December 2011, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/TC, T. Ch., 13 September 2012, par. 22.

⁶²⁶ See *supra*, Chapter 8, II.2.4.

⁶²⁷ ECCC, Order on Extension of Provisional Detention, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, OCIJ, 10 November 2009, par. 10.

⁶²⁸ See e.g. ECCC, Decision on IENG Thirith’s Appeal against Order on Extension of Provisional Detention, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC16), PTC, 11 May 2009, par. 61.

extension (Rule 63 (7) ECCC IR).⁶²⁹ Therefore, the simple statement that conditions continue to be met, referring to the reasons given by the Pre-Trial Chamber in its decision on the appeal against the detention order does not seem sufficient.⁶³⁰

When the Pre-Trial Chamber on appeal considered the extension of the provisional detention, it distinguished between (1) the assessment of the requirement of ‘well-founded reasons to believe’ under Rule 63 (3) (a) ECCC IR and (2) the grounds necessitating detention (Rule 63 (3) (b) of the ECCC IR).⁶³¹ As far as the ‘well-founded reasons to believe’ are concerned (1), the Pre-Trial Chamber found that the Co-Investigating Judges correctly fulfilled their obligation when they restated the existing reasons for detention in the previous Pre-Trial Chamber appeal decision, adding some references to new pieces of incriminatory evidence, and when the Defence did not raise any exculpatory evidence when this was requested by the Co-Investigating Judges.⁶³² Once the existence of ‘well-founded reasons to believe’ is established, this suffices throughout the pre-trial stage of the proceedings, unless exculpatory evidence is identified which undermines these ‘well founded reasons’.⁶³³ Consequently, the Co-Investigating Judges can limit their review to all exculpatory or inculpatory evidence that has been put on the case file since the last review.⁶³⁴ The Co-Investigating Judges and Pre-Trial Chamber will look at the evidence afresh, taking into account the new evidence (either

⁶²⁹ Rule 63 (7) ECCC IR. Consider also ECCC, Decision on Appeal against Order on Extension of Provisional Detention, *NUON Chea*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009, par. 21 (arguing that it is an international standard that all decisions of judicial bodies are required to be reasoned).

⁶³⁰ See in that regard the reasoning by the Co-Investigating Judges in the Order on the Extension of Provisional Detention of Nuon Chea: ECCC, Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/10-09-2007-ECCC-OCIJ, OCIJ, 16 September 2008, p. 2 (the Co-Investigating Judges added a list of some new inculpatory evidence).

⁶³¹ ECCC, Decision on Appeal against Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009. It should be noted that the decision is not entirely clear. While paragraph 22 of the decision refers to Rule 63 (a) ECCC IR, Rule 63 [(3)] (a) is actually meant, a view which is supported by the heading of the sub-section: “VII. The standard used by the Co-Investigating Judges on the well-founded reasons” (emphasis added).

⁶³² *Ibid.*, par. 23. Where the Co-Investigating Judges only referred to new incriminatory evidence, the Pre-Trial Chamber concluded that this implies that the Investigating Judges did not find exculpatory evidence sufficient to mention in their order.

⁶³³ ECCC, Decision on Appeal of Ieng Sary against OCIJ’s Order on Extension of Provisional Detention, *IENG Sary*, Case No. 002/19-19-2007-ECCC/OCIJ (PTC17), PTC, 26 June 2009, par. 21.

⁶³⁴ Consider e.g. ECCC, Order on Extension of Provisional Detention, *IENG Sary*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 14 (“due to the relatively recent nature of the Pre-Trial Chamber’s analysis of the case file, the Co-Investigating Judges do not consider it necessary to further elaborate on the key evidence, considering it sufficient to note that they endorse the above analysis as an accurate summary of the case against Ieng Sary”); ECCC, Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 15 September 2009, par. 11; ECCC, Order on Extension of Provisional Detention, *IENG Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2009, par. 13.

of incriminatory or exculpatory nature) that has been put on the case file.⁶³⁵ The simple statement by the Co-Investigating Judges that they re-assessed the totality of the evidence afresh, was considered sufficient by the Pre-Trial Chamber to conclude that ‘well-founded reasons to believe’ still existed. However, the Pre-Trial Chamber noted that “it would have been preferable for the Co-Investigating Judges to give more details about the evidence they have gathered which supports their conclusion that there continue to be well-founded reasons to believe that the charged person may have committed the crimes with which she has been charged.”⁶³⁶

In the consideration of the grounds necessitating the provisional detention (2), the Co-Investigating Judges cannot just state that the charged person did not present new facts or circumstances showing ‘changed circumstances’. The Pre-Trial Chamber held that the Co-Investigating Judges should consider whether or not the risks that substantiated the initial detention *still exist*.⁶³⁷ The passage of time is a relevant consideration in determining the legitimacy of extending the provisional detention of the charged person.⁶³⁸

In *IENG Thirith*, the Defence had not made any submissions on the fulfilment of the conditions of Rule 63 (3) (b). Notwithstanding the careful consideration of these conditions by the Pre-Trial Chamber in its decision on the appeal against the detention order, the Co-Investigating Judges considered whether these conditions *are currently satisfied* in light of the findings of the Pre-Trial Chamber and all the circumstances at the time of expiry of the initial

⁶³⁵ ECCC, Decision on IENG Sary’s Appeal against Order on Extension of Provisional Detention, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC32), PTC, 30 April 2010, par. 30; ECCC, Decision on Khieu Samphan’s Appeal against Order on Extension of Provisional Detention, *KHIEU Samphan*, Case No. 002/19-09-2007, PTC, 30 April 2010, par. 25; ECCC, Decision on IENG Thirith’s Appeal against Order on Extension of Provisional Detention, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC33), PTC, 30 April 2010, par. 27.

⁶³⁶ See ECCC, Decision on IENG Thirith’s Appeal against Order on Extension of Provisional Detention, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC16), PTC, 11 May 2009, par. 25; ECCC, Order on Extension of Provisional Release, *IENG Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 18.

⁶³⁷ ECCC, Decision on Appeal against Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009, par. 30 (the Pre-Trial Chamber holds that the extension order by the Co-Investigating Judges “lacks sufficient reasoning”).

⁶³⁸ ECCC, Order on Extension of Provisional Detention, *IENG Sary*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 37 – 43; ECCC, Order on Extension of Provisional Detention, *KHIEU Samphan*, Case No. 002/14-08-2006, OCIJ, 18 November 2008, par. 29; ECCC, Decision on Appeal against Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009, par. 31.

order.⁶³⁹ Where there has not been a change in circumstances, the Co-Investigating Judges concluded that detention is still necessary. Such standard for review has been endorsed by the Pre-Trial Chamber.⁶⁴⁰

The above standard is reminiscent of the ‘changed circumstances’ requirement of the Article 60 (3) ICC Statute’s periodic review mechanism. Further drawing the parallel with the ICC’s periodic review system, it may be argued that references to the fact that the Defence did not put forward anything indicating that detention is no longer necessary, should be avoided. It gives rise to an impression that the burden is on the Defence to adduce new facts or circumstances as to why the charged person should be released and it is irrelevant to the standard of review under Article 63 (7) ECCC IR. On some occasions, the Co-Investigating Judges and the Pre-Trial Chamber seem to have effectively put the burden on the Defence to adduce new facts or circumstances as to why detention would no longer be necessary.⁶⁴¹

§ Interlocutory appeal against decisions on detention or release

Pursuant to Rule 63 (4) and (7) of the ECCC IR, the order for provisional detention as well as decisions on the extension of detention can be appealed before the Pre-Trial Chamber.

⁶³⁹ ECCC, Order on Extension of Provisional Release, *IENG Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 24 (emphasis added); ECCC, Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 15 September 2009, par. 16; ECCC, Order on Extension of Provisional Detention, *IENG Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2009, par. 19; ECCC, Order on Extension of Provisional Detention, *IENG Sary*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2009, par. 20; ECCC, Order on Extension of Provisional Detention, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 18 November 2009, par. 23.

⁶⁴⁰ Consider *e.g.* ECCC, Decision on IENG Sary’s Appeal against Order on Extension of Provisional Detention, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC32), PTC, 30 April 2010, par. 28 – 29 and par. 33 -34.

⁶⁴¹ Notably, in the case against IENG Sary, the Pre-Trial Chamber noted with approval the order on the extension of provisional detention where “the Co-Lawyers for the Charged Person, apart from observing the advanced age and the fact that his wife is also here in detention, did not present new facts or circumstances that show that conditions under Rule 63 (3) (b) have changed in order to convince the Co-Investigating Judges or this Chamber that detention is not warranted at present.” See ECCC, Decision on Appeal of Ieng Sary against OCIJ’s Order on Extension of Provisional Detention, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC17), PTC, 26 June 2009, par. 25. The Co-Investigating Judges had argued in their decision that they would be ‘guided’ by the findings of the Pre-Trial Chamber in its previous judgment, but “if new evidence has been placed before the Co-Investigating Judges which was not available to the Pre-Trial Chamber and which suggests a change in circumstances, then this approach would have to be revised. However, this is presently not the case.” Such formulation of the standard of review may be read as requiring the Defence to adduce facts or circumstances to prove ‘changed circumstances’. Consider *e.g.* ECCC, Order on Extension of Provisional Detention, *IENG Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2009, par. 24 (“The Co-Investigating Judges have not found any change in the circumstances [...]. In addition, the Co-Investigating Judges note that the Defence in its observations do not make any submission addressing the risk of the Charged Person failing to attend...”).

Likewise, orders on provisional release under Rule 64 (1) and (2) of the ECCC IR can be appealed before the Pre-Trial Chamber. Lastly, decisions ordering release on bail can be appealed before the Pre-Trial Chamber.⁶⁴²

Remarkably, the scope of such appeal is much broader than provided for under the comparable appeal mechanisms at the international criminal tribunals. Firstly, and reflecting the inquisitorial style of proceedings, the Pre-Trial Chamber controls the regularity of all procedural steps undertaken by the Co-Investigating Judges prior to the issuance of the detention order. Secondly, the Pre-Trial Chamber should examine the exercise of discretion by the Co-Investigating Judges, *by undertaking its own analysis* thereby applying the standard for provisional detention as set out in Internal Rule 63 (3) ECCC IR and should check whether the facts justify the provisional detention. Thirdly, the Pre-Trial Chamber should assess whether the circumstances referred to in the order still exist. Lastly, the Pre-Trial Chamber should consider additional issues not dealt with which are the subject of specific grounds of appeal.⁶⁴³ Victims that have been admitted as civil parties in the proceedings can participate in provisional detention appeals.⁶⁴⁴

More problematic are the delays in the issuance of decisions by the Pre-Trial Chamber. For example, in Case 002, the provisional detention order for *IENG Thirith* was issued on 14 November 2007, whereas the appeal decision by the Pre-Trial Chamber was not issued until 9 July 2008, almost eight months later. Similarly, where *IENG Sary* appealed the detention order issued by the Co-Investigating Judges, he had to wait 11 months before a decision was issued. These long delays even led *Khieu Samphan* to withdraw his appeal against the detention order, 10 months after it was filed.⁶⁴⁵ As previously noted with regard to the ICC, where a possibility is foreseen to appeal decisions on the lawfulness of detention, human

⁶⁴² Rule 65 (1) ECCC IR.

⁶⁴³ ECCC, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias “Duch”, *KAING Guek Eav alias “Duch”*, Case No. 001/18-07-2007-ECCC-OCIJ, PTC, 3 December 2007, par. 8; ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 9.

⁶⁴⁴ ECCC, Decision on Civil Party Participation in Provisional Detention Appeals, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), 20 March 2008. TURNER points out that dangers are involved in allowing civil parties to participate in detention appeals. Where the presumption of innocence is arguably stronger before charges have been confirmed, the “unfiltered stories [of victims] may interfere with this presumption.” See J.I. TURNER, Commentary: Decision on Civil Party Participation in Provisional Detention Appeals, in «American Journal of International Law», Vol. 103, 2009, pp. 121- 122.

⁶⁴⁵ ECCC, Decision Relating to Notice of Withdrawal of Appeal, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC04), 15 October 2008.

rights law requires that such appeal is decided upon speedily. A delay of almost eight months is extremely worrisome and clearly incompatible with international human rights norms.⁶⁴⁶

II.4.1.2. Grounds justifying pre-trial detention

When compared to the justifications for arrest and detention as enlisted in Article 58 (1) (b) ICC Statute; it appears that justifications (1) (to prevent the charged person from exercising pressure on witnesses or victims and prevent any collusion between the charged person and accomplices from crimes within the jurisdiction of the ECCC) and (2) (to preserve evidence or to prevent its destruction), cover the ‘obstruction or endangerment of the investigation or prosecution’ justification, which can be found in Article 58 (1) (b) (ii) ICC Statute. They are normally discussed together by the Pre-Trial Chamber as they are supported by similar arguments.⁶⁴⁷ Also the justification of ensuring the presence of the charged person at trial corresponds with the justifications provided for under the ICC’s provisional detention scheme. Unknown then to the ICC are grounds (4) (to protect the security of the person) and (5) (to preserve public order). These latter grounds especially deserve our close consideration.

§ Preventing interference with witnesses and victims, collusion and preservation of evidence

Access to elements of the dossier, including the written records of the witness interviews has been an important factor which has been taken into consideration by the Co-Investigating Judges, even in the absence of the indication of a concrete risk of interference with victims or witnesses.⁶⁴⁸ The inquisitorial style of proceedings implies that witness statements that have

⁶⁴⁶ See the discussion, *supra*, Chapter 8, II.3.4.

⁶⁴⁷ See *e.g.* ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, *NUON Chea*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 59; ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 95; ECCC, Decision on Khieu Samphan’s Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 14 and 15), PTC, 3 July 2009, par. 40.

⁶⁴⁸ ECCC, Provisional Detention Order, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, OCIJ, 14 November 2007, par. 17. The Co-Investigating Judges reasoned that “henceforth, IENG Sary will have access to all of the elements in the case file of the judicial investigation” [...] Whereas the nature of the alleged crimes makes it difficult for a suspect to identify and influence the very large number of potential witnesses before the judicial investigations begins, the same is not true once the charged person has knowledge of the identity of the inculpatory witnesses and victims involved in the proceedings. The Co-Investigating Judges consequently acknowledge that these fears would particularly be justified *where the charged person would have uncontrolled communications with these people*, given that IENG Sary has numerous family members and former subordinates in the regions concerned. Some of them hold influential positions, sometimes even having armed guards. Consider also: ECCC, Provisional Detention Order, *IENG Thirith*, Case No. 002/19-09-2007-

been taken by the Co-Investigating Judges (or the Co-Prosecutors) are put on the case file, to which the parties have access.⁶⁴⁹ Taking this factor into consideration, absent a *concrete* risk of interference with witnesses (based on the past behaviour or acts of the charged person), deviates from the practice of the international criminal tribunals and should be rejected.⁶⁵⁰ The relevant jurisprudence of the Pre-Trial Chamber diminished the importance of this factor when it rightly emphasised that evidence should exist, of any past actions and/or behaviour of the charged person which in itself would display a *concrete* risk that he may use that to interfere with victims and witnesses.⁶⁵¹ This comports with the jurisprudence of the Trial Chamber.⁶⁵²

Several arguments have been put forward by the Co-Investigating Judges to underline the importance of this particular factor. The Co-Investigating Judges have argued that “whereas the nature of the alleged crimes makes it difficult for a suspect to identify or influence the very large number of potential witnesses before the judicial investigation begins, the same is not true once the charged person has knowledge of the identity of the inculpatory witnesses

ECCC/OCIJ, OCIJ, 14 November 2007, par. 7 (some ‘concretisation’ is perhaps offered in the last sentence where reference is made to the fact that “the fear of pressure being exercised is particularly justified, especially since the Charged Person has numerous family members and sympathizers in the regions of Phnom Malai, Pailin and Phnom Penh, some of whom currently hold influential positions and even have armed guards.” However, it may be objected that the fact that the charged person has sympathisers does not imply that these sympathizers will interfere with witnesses and victims); ECCC, Provisional Detention Order, *KHEU Samphan*, Case No. 002/14-08-2006, OCIJ, 19 November 2007, par 7.

⁶⁴⁹ See *supra*, Chapter 3, IV.1.3.

⁶⁵⁰ See *supra* Chapter 8, II.2.6.2; Chapter 8, II.3.5.2.

⁶⁵¹ Compare the appeal of IENG Thirith against provisional detention, where the Pre-Trial Chamber found that “the Charged Person’s past actions and behaviour in themselves display a concrete risk that she could use her influence to interfere with witnesses and victims” and the appeal of her husband IENG Sary against his pre-trial detention, where the Pre-Trial Chamber concluded, in the absence of a concrete risk, that “detention is not a necessary measure to prevent the Charged Person from exerting pressure on witnesses and victims and destroying evidence.” See ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 51 and ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 99 -100. Also in other instances, the Pre-Trial concluded that provisional detention is necessary because of a concrete risk that the charged person may exert pressure on victims and witnesses. Consider *e.g.* ECCC, Decision on Appeal against Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009, par. 31 (“This probability is based upon the past behaviour of the Charged Person. [...] [T]here is fresh evidence in the case file upon which the Pre-Trial Chamber finds that the Charged Person exerted pressure on [redacted] by threatening him in order to withdraw confessions that implicated members of the upper echelon. Other evidence found in the case file shows that the fear of witnesses from intimidation remains a reality.” (footnotes omitted)); ECCC, Decision on IENG Thirith’s Appeal against Order on Extension of Provisional Detention, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC16), PTC, 11 May 2009, par. 42 (referring to threats ousted during the hearing before the Pre-Trial Chamber).

⁶⁵² ECCC, Decision on Reassessment of Accused IENG Thirith’s Fitness to Stand Trial following Supreme Court Chamber Decision of 13 December 2011, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/TC, T. Ch., 13 September 2012, par. 20.

and victims involved in the proceedings.”⁶⁵³ Where the witnesses have already been heard and their statements have been added to the dossier, a chance still exists that they are heard again during the investigation or during the trial hearings.⁶⁵⁴ In addition to this, witnesses may have given leads in their statements and named other potential witnesses who have not yet been interviewed.⁶⁵⁵ A concern that was levelled by the Pre-Trial Chamber is the limited number of remaining witnesses that can still testify as to the charged person’s involvement in the alleged crimes.⁶⁵⁶ However, if there is no evidence to support a concrete risk of interference, such arguments should be rejected. This also applies to the general references by the Pre-Trial Chamber to the fact that “the mere presence of the Charged Person in society can exert pressure on witnesses and prevent them from testifying.”⁶⁵⁷

In line with other tribunals, the *former hierarchical position* or the political involvement of the charged person is taken into account in the assessment whether the charged person may attempt and be in a position to pressurise victims and witnesses (for example where the witnesses or victims were the charged person’s subordinates).⁶⁵⁸ According to the Pre-Trial

⁶⁵³ ECCC, Order on Extension of Provisional Release, *IENG Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 26 (The Co-Investigating Judges add that the risk is corroborated by the charged person’s behaviour and public statements. Reference is made to statements made by the charged person in the press).

⁶⁵⁴ *Ibid.*, par. 26; ECCC, Decision on IENG Thirith’s Appeal against Order on Extension of Provisional Detention, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC16), PTC, 11 May 2009, par. 41.

⁶⁵⁵ ECCC, Order on Extension of Provisional Release, *IENG Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 26; ECCC, Decision on IENG Thirith’s Appeal against Order on Extension of Provisional Detention, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC16), PTC, 11 May 2009, par. 41.

⁶⁵⁶ ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 96. Nevertheless, the Pre-Trial Chamber consequently concluded that detention is not a necessary measure to prevent the charged person from exerting pressure on witnesses and victims or to destroy evidence where the Chamber could not find “evidence of any past actions and/or behaviour of the Charged Person which in themselves would display a concrete risk that he might use that influence to interfere with witnesses and victims.” See *ibid.*, par. 99-100.

⁶⁵⁷ Consider e.g. ECCC, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias “Duch”, *KAING Guek Eav alias “Duch”*, Case No. 001/18-07-2007-ECCC-OCIJ, PTC, 3 December 2007, par. 32.

⁶⁵⁸ ECCC, Order of Provisional Detention, *NUON Chea*, Case No. 002/14-08-2006, OCIJ, 19 September 2007, par. 5 (referring to his hierarchical position as “Brother No. 2”); ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 45 (the Pre-Trial Chamber finds that a degree of influence was necessarily involved in her senior position (Minister of Social Affairs) and involvement in political movements); ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 97 (The Pre-Trial Chamber underlines that IENG Sary was Minister of Foreign Affairs, and a member of the Standing Committee of the Communist Party of Kampuchea, and remained politically active after 1979); ECCC, Order on Extension of Provisional Release, *IENG Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 26; ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 45; ECCC, Order Refusing Request for Release, *KHIEU Samphan*, Case No. 002/19-09-

Chamber, since a degree of influence necessarily attaches to such senior positions or political involvement, such influence does not stop when one does not longer occupy the position.⁶⁵⁹ Consequently, it may allow the charged person to organise others and put pressure on victims and witnesses.⁶⁶⁰

Again, a concrete risk should be identified. When the Co-Investigating Judges in the Order Refusing the Request for Release of KHIEU Samphan agreed that a “genuine risk of retaliation” against victims or witnesses existed and was corroborated by public statements made by the charged person, the Pre-Trial Chamber disagreed and found that the statement (one newspaper article) was not sufficient to indicate a concrete risk of the charged person pressurizing victims or witnesses. The Pre-Trial Chamber determined that it had not found evidence on past actions or behaviour which, in themselves, would indicate a concrete risk that the charged person may use his influence to pressurise witnesses.⁶⁶¹

Occasionally, the risk of destruction of evidence was also referred to. The Pre-Trial Chamber held that NUON Chea may destroy evidence, and based such finding on an interview with the charged person *Duch*, where he stated that he was reprimanded by NUON Chea for not destroying ‘evidence’, as he had done.⁶⁶²

Generally, subjective fears expressed by victims and witnesses are taken into consideration in the assessment of the risk of interfering with witnesses and victims.⁶⁶³ The argument is that

2007-ECCC-OCIJ, OCIJ, 28 October 2008, par. 16, referring to the fact that some witnesses stated that they were the charged person’s subordinates. A fact which was rejected by the Pre-Trial Chamber on appeal, see ECCC, Decision on Khieu Samphan’s Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 14 and 15), PTC, 3 July 2009, par. 44.

⁶⁵⁹ ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 97.

⁶⁶⁰ *Ibid.*, par. 97.

⁶⁶¹ ECCC, Decision on Khieu Samphan’s Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 14 and 15), PTC, 3 July 2009, par. 48.

⁶⁶² ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 61.

⁶⁶³ An extreme example of the importance attached to these witness fears can be found in a reference made by the Pre-Trial Chamber in its decision on the appeal by NUON Chea against the Detention Order. The Chamber referred to a comment made by Dutch while he was interviewed as a charged person. In that interview, Dutch stated that he was reprimanded by *Nuon Chea* for not destroying ‘evidence’, as he himself had done. The Pre-Trial Chamber subsequently argues that in light of the fear already expressed by witnesses of testifying before the Court, *although* this incident happened 25 years ago, *if* victims knew about this incident (which apparently was a private conversation between Nuon Chea and Dutch), it *could* negatively affect their willingness to testify.

when the charged person would be released, witnesses might refuse to participate in future proceedings.⁶⁶⁴ On this particular point, the jurisprudence of the ECCC deviates from the jurisprudence of the *ad hoc* tribunals which clarified that subjective witness fears are not sufficient to deny provisional release.⁶⁶⁵

Other factors which were considered include the public support of the charged person in certain regions, in particular insofar as it allows the charged person to organise others to put pressure on victims and witnesses.⁶⁶⁶ Further, the display of public hostility towards supporters of the prosecution of the senior leaders of the Democratic Kampuchea may, according to the Pre-Trial Chamber, be an indication of a concrete risk that the charged person would use his or her influence to interfere with witnesses and victims and may thus increase the witnesses' fears.⁶⁶⁷

§ *To ensure the presence of the charged person during the proceedings*

In the assessment of the risk of absconding, the national and international connections of the charged person are an important consideration.⁶⁶⁸ Attention is further paid to the charged person's former political position, which may imply that the person has allies in foreign countries,⁶⁶⁹ the fact that the charged person used to travel abroad frequently⁶⁷⁰ and the

See ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 63.

⁶⁶⁴ ECCC, Order Refusing Request for Release, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 28 October 2008, par. 16.

⁶⁶⁵ See *supra*, Chapter 8, II.2.6.2.

⁶⁶⁶ ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 46-47.

⁶⁶⁷ *Ibid.*, par. 51.

⁶⁶⁸ *Ibid.*, par. 54 (The Pre-Trial Chamber refers to the connections of the charged person with people in the area close to the Thai border, where she used to live, which may help the charged person to flee across the Thai border); ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 102 (also referring to the fact that the charged person used to live in Pailin, near the Thai border and that the governor and his deputy may assist the charged person in obtaining a V.I.P card to cross the border); ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 68; see further ECCC, Order on Extension of Provisional Release, *IENG Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 28.

⁶⁶⁹ ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 104; ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 55.

⁶⁷⁰ ECCC, Provisional Detention Order, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, OCIJ, 14 November 2007, par. 18; ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 55; ECCC, Decision on Appeal against

availability of financial means that could facilitate an escape.⁶⁷¹ The fact “that it is more likely than not that the charged person is known in the region, at both sides of the border”, has also been relied upon as contributing to the risk of flight.⁶⁷² When the charged person indicated that he could have attempted to flee before, since he knew that efforts were being undertaken to prosecute, at a minimum, the high ranking leaders of the Khmer Rouge, the Pre-Trial Chamber rejected such argument. It simply noted that “the situation is not longer the same now that he is under investigation before the ECCC.”⁶⁷³

The gravity of the crimes and the length of the sentence to be expected if the charged person would be convicted are equally considered.⁶⁷⁴ In line with the analysis of the international criminal tribunals, the Pre-Trial Chamber and the Supreme Court Chamber clarified that the risk of flight cannot solely be based on the gravity of the crimes and the possible sentence.⁶⁷⁵ This factor may also be relevant regarding the risk of public disorder since, considering the

Provisional Detention Order of IENG Sary, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 103.

⁶⁷¹ ECCC, Provisional Detention Order, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, OCIJ, 14 November 2007, par. 18; ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 56; ECCC, Order on Extension of Provisional Release, *IENG Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 28.

⁶⁷² ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 54; ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 102.

⁶⁷³ ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 105.

⁶⁷⁴ ECCC, Order of Provisional Detention, *NUON Chea*, Case No. 002/14-08-2006, OCIJ, 19 September 2007, par. 5; ECCC, Order of Provisional Detention, *KAING Guek Eav “Duch”*, Case No. 002/14-08-2006, OCIJ, 31 July 2007, par. 22; ECCC, Order on Extension of Provisional Release, *IENG Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 33. Consider also ECCC, Decision on Reassessment of Accused IENG Thirith’s Fitness to Stand Trial following Supreme Court Chamber Decision of 13 December 2011, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/TC, T. Ch., 13 September 2012, par. 21.

⁶⁷⁵ ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 66; ECCC, Order on Extension of Provisional Release, *IENG Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 32; ECCC, Decision on Immediate Appeal by KHIEU Samphan on Application for Release, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC/TCSC(04), SCC, 6 June 2011, par. 40 – 41 (“The expectation of a lengthy sentence cannot be held against the accused *in abstracto* as the sole factor determining the outcome of an application for release, because all the accused persons before the ECCC, if convicted, are likely to face heavy sentences. Therefore, the Supreme Court Chamber finds that even though the Trial Chamber invoked a valid statutory condition for detention, it regarded the potential severity of the sentence as determinative, thus giving undue weight for justifying the Accused’s detention”). In this regard, the Supreme Court Chamber held that the Trial Chamber erred in only relying on this factor in ordering the Accused’s detention pursuant to Rule 63 (3) (b) (iii) ECCC IR. Compare ECCC, Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, *NUON Chea et al.*, Case No. 002/19-09-2007/ECCC/TC, T. Ch., 16 February 2011, par. 39, 40.

gravity of the alleged crimes, the release of the charged person could provoke protests and indignation which, on its turn, could lead to acts of violence.⁶⁷⁶

Further factors taken into consideration include public statements ousted⁶⁷⁷ or the possession of a false passport.⁶⁷⁸ It is more problematic that the Pre-Trial Chamber considered the fact that the charged person exercised his right to remain silent to be a relevant factor. The Chamber found “the assertion [by the Defence] that the Charged Person has publicly and consistently stated his willingness to participate in these proceedings [...] not persuasive since the Charged person has, until now, exercised his right to remain silent.”⁶⁷⁹ Most disturbingly, the Supreme Court Chamber referred to the “enormous organizational and logistical undertaking involving four accused, most of whom have health problems, and numerous civil parties and multi-person legal teams” as the only factor to establish the risk of flight.⁶⁸⁰ In turn, the risk of flight was the only legal basis for the accused person’s detention. It added that “[e]ven a single instance of an accused failing to appear before the court may undermine the prospect of arriving at a judgment in a reasonable time.”⁶⁸¹ Consequently, in the absence of any concrete evidence on the risk of absconding, the Supreme Court Chamber relied on the right to speedy proceedings (of the accused and of the co-accused persons) to justify further detention. Clearly, this reasoning bears on the *consequences* of the charged person not showing up at trial but is irrelevant as to the risk of flight. Therefore, such reasoning is to be rejected.

When the Defence referred to the distinct characteristics of the ECCC *vis-à-vis* international criminal tribunals (the Court is not dependent on state cooperation, may issue arrest warrants, and has a judicial police at its disposal, which increases the possibilities for the ECCC to monitor the charged person and re-arrest him or her in case of flight) as diminishing the risk

⁶⁷⁶ ECCC, Order Refusing Request for Release, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 28 October 2008, par. 19.

⁶⁷⁷ ECCC, Provisional Detention Order, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, OCIJ, 14 November 2007, par. 18 (IENG Sary made numerous public statements indicating that he refuses to appear before the Extraordinary Chambers).

⁶⁷⁸ ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 104.

⁶⁷⁹ ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 69.

⁶⁸⁰ ECCC, Decision on Immediate Appeal by KHIEU Samphan on Application for Release, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC/TCSC(04), SCC, 6 June 2011, par. 54.

⁶⁸¹ *Ibid.*, par. 54.

of flight, the Pre-Trial Chamber rejected such argument.⁶⁸² According to the Pre-trial Chamber, the existence of a judicial police and the authority to issue arrest warrants “does nothing to reassure this Court that the risk of flight is non-existent.”⁶⁸³ The Pre-Trial Chamber added that “when the risk of flight is being discussed the issue is not to give the benefit of the doubt to the charged person and check the possibilities to ensure his presence in case he will flee and not appear in court.”⁶⁸⁴ However, the Pre-Trial Chamber seemed to forget that such analysis is ultimately about weighing probabilities. The question as to what would happen if the judicial police were obliged to re-arrest the person concerned, is a relevant consideration in that regard.⁶⁸⁵

§ *Preservation of the public order*

The preservation of public order as justification for the deprivation of liberty has been accepted in the jurisprudence of the ECtHR as a legitimate public interest, on condition that domestic law provides for it. According to the Court, certain offences may, by reason of their particular gravity and the public reaction to them, give rise to a social disturbance capable of justifying pre-trial detention, at least for a certain time.⁶⁸⁶ Such justification is limited to ‘exceptional circumstances’.⁶⁸⁷ In conformity with the case law of the ECtHR, the Pre-Trial Chamber held that in order to conclude that detention is necessary to preserve public order, *facts capable of showing that the accused’s release would actually disturb public order* must exist.⁶⁸⁸ In addition, detention on such grounds remains legitimate only if the public order

⁶⁸² As argued by the Defence in: ECCC, Decision on IENG Sary’s Appeal against Order on Extension of Provisional Detention, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC32), PTC, 30 April 2010, par. 35.

⁶⁸³ *Ibid.*, par. 39.

⁶⁸⁴ *Ibid.*, par. 39.

⁶⁸⁵ See *supra*, Chapter 8, II.2.6.1.

⁶⁸⁶ ECtHR, *Letellier v. France*, Application No. 12369/86, Series A, No. 207, Judgment of 26 June 1991, par. 51; ECtHR, *Kemmache v. France (Nos. 1 and 2)*, Application Nos. 12325/86; 14992/89, Judgment of 27 November 1991, par. 52; ECtHR, *Tomasi v. France*, Application No. 12850/87, Series A, No. 241-A, Judgment of 27 August 1992, par. 91; ECtHR, *I.A. v. France*, Application No. 28213/95, Reports 1998-VII, Judgment of 23 September 1998, par. 104; ECtHR, *Aleksandr v. Russia*, Application No. 15217/07, Judgment of 12 March 2009, par. 136 - 137; ECtHR, *Yakovlev v. Russia*, Application No. 5453/08, Judgment of 29 April 2010, par. 84 - 85 (in the two latter cases, this ground was rejected where Russian domestic laws did not provide for such ground as a justification for the deprivation of liberty).

⁶⁸⁷ ECtHR, *Letellier v. France*, Application No. 12369/86, Series A, No. 207, Judgment of 26 June 1991, par. 51.

⁶⁸⁸ ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 76. Consider also ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 64; ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par.

remains threatened.⁶⁸⁹ The Pre-Trial Chamber repeatedly determined that a threat to the public order existed. It based such finding on reports that the prosecutions may encompass a fresh risk to the Cambodian society and “lead to the resurfacing of anxieties and a rise in the negative social consequences that may accompany them”⁶⁹⁰; on resolutions made by the UN General assembly that the crimes committed during the Democratic Kampuchea are still a matter for concern for the Cambodian society;⁶⁹¹ the interest of the Cambodian population in the proceedings before the ECCC (demonstrating that the trials are still a matter of great concern for the Cambodian population and the international community),⁶⁹² or the everyday disturbances and violent crimes, which, according to the Pre-Trial Chamber, are a fact of common knowledge.⁶⁹³ The Pre-Trial Chamber noted that notwithstanding the presumption of innocence, the way the charged persons are perceived is changed since ‘reasonable suspicion’ was established.⁶⁹⁴

In this context, the Pre-Trial Chamber highlighted that even where specific evidence is required to support such a risk, the assessment necessarily involves a measure of prediction, specifically considering the crimes within the jurisdiction of the international(ised) criminal

111 (indicating that the standard relied upon by the Defence, “facts show”, is different from the standard of “facts capable of showing”).

⁶⁸⁹ ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 76; ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 64; ECCC, Order on Extension of Provisional Release, *IENG Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 31.

⁶⁹⁰ In that regard, the Pre-Trial Chamber repeatedly referred to reports which concluded that a proportion of the population suffers from post-traumatic stress disorder. Consider *e.g.* ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 113 or ECCC, Decision on Appeal against Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009, par. 39. As reiterated in: ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 66; ECCC, Order on Extension of Provisional Detention, *IENG Sary*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 29 (this argument seems underpinned by one journalistic article (Rob Savage, Monthly Eastern Globe, “Post Traumatic Stress Disorder: A Legacy of Pain and Violence”, July 2007, pp. 24-27).

⁶⁹¹ United Nations, Resolution Adopted by the General Assembly – Khmer Rouge Trials, U.N. Doc. A/RES/57/228, 27 February 2003.

⁶⁹² ECCC, Decision on Appeal against Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009, par. 41.

⁶⁹³ See *e.g.* ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), PTC, 20 March 2008, par. 77 – 81; ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 116; ECCC, Decision on Appeal against Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009, par. 42.

⁶⁹⁴ ECCC, Decision on Appeal of Ieng Sary against OCIJ’s Order on Extension of Provisional Detention, *IENG Sary*, Case No. 002/19-19-2007-ECCC/OCIJ (PTC17), 26 June 2009, par. 36.

tribunals.⁶⁹⁵ It is surprising that this ground for the deprivation of liberty has not been foreseen by the procedural framework of the ICC, where legitimate fears of public disturbances upon the release of the suspect or accused may likewise exist.⁶⁹⁶ However, the jurisprudence illustrates how the vagueness may lead to abuse.⁶⁹⁷ DAVIDSON observes that “[t]he ECCC public order ground has thus become something of a blank check for detention. Every ECCC bail decision has denied bail and cited, amongst other grounds, public order as a basis for detention.”⁶⁹⁸ While at present this picture has somewhat changed, the importance of the public order ground in the jurisprudence of the ECCC cannot be neglected.⁶⁹⁹ What is apparent in the jurisprudence of the ECCC is that a threat to public order should not necessarily stem from the persons’s own conduct but can be based on the type of crimes concerned.⁷⁰⁰ That said, such interpretation is not necessarily in breach of international human rights norms where the ECtHR in *Letellier* did not hold that the court should necessarily have

⁶⁹⁵ ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 65 (the Pre-Trial Chamber refers to the fact that the crimes committed are still a matter of concern for the society, of which it finds proof in the great interest the Cambodian population takes in the hearings of the Pre-Trial Chamber (par. 68)); ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 112.

⁶⁹⁶ R. PETIT and A. AHMED, A Review of the Jurisprudence of the Khmer Rouge Tribunal, in «Northwestern Journal of International Human Rights», Vol. 8, 2010, p. 176 (noting that “[t]he Tribunal is unique among international criminal tribunals in that it provides for disturbance of public order as grounds for provisional detention”); A. ZAHAR and G. SLUITER, *International Criminal Law: A Critical Introduction*, Oxford, Oxford University Press, 2008, p. 288.

⁶⁹⁷ Consider C. DAVIDSON, May it Please the Court? The Role of Public Confidence, Public Order, and Public Opinion in Bail for International Criminal Defendants, in «Columbia Human Rights Law Review», Vol. 43, 2012, pp. 349 – 413. The author submits that “although, in theory, using public confidence or public order factors to decide whether to detain international criminal defendants can be consistent with human rights norms, as courts typically use these factors, they prove vague, logically inconsistent, and run the risk of allowing public opinion to override the fundamental human rights of criminal defendants” (*ibid.*, p. 353). With regard to the ECCC, the author notes that “[t]he ECCC public order experience indicates that public order may be a tempting and easily abused ground, but the ECCC statute and rules provided judges with no guidance on the meaning of public order. Criteria are needed to constrain judges” (*ibid.*, p. 408). Therefore the author suggests that a ‘strong showing of the threat to public order or public safety’ as well as a ‘strong preliminary showing of the defendant’s guilt’ should be required.

⁶⁹⁸ ICTY, Decision on Provisional Release, *Prosecutor v. Šainović et al.*, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, p. 371.

⁶⁹⁹ Consider e.g. ECCC, Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, *NUON Chea et al.*, Case No. 002/19-09-2007/ECCC/TC, T. Ch., 16 February 2011 (rejecting the public order submissions because of lack of substantiation).

⁷⁰⁰ C. DAVIDSON, May it Please the Court? The Role of Public Confidence, Public Order, and Public Opinion in Bail for International Criminal Defendants, in «Columbia Human Rights Law Review», Vol. 43, 2012, p. 375. The author notes that only in one case, the Pre-Trial Chamber referred to the actual conduct of the charged person. See ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 71 (the Pre-Trial Chamber notes that the charged person “has publicly shown her hostility toward those who suggested that the senior leaders of the Democratic Kampuchea regime should be put on trial and to those deemed to have spoken about her alleged role in this regime.” “It is possible to envisage that the Charged person will issue further statements that, in the context of the today’s Cambodian society, have the potential to affect public order, notably if they were issued after the Charged Person’s release from provisional detention”).

regard to the attitude and conduct of the accused when released but may also focus on “certain offences”.⁷⁰¹ It is to be noted that the report of the EUCommHR in *Letellier* had previously held that the attitude or conduct of the accused when released should be considered.⁷⁰² Admittedly, as has been confirmed by the case law of the ECCC, the ECtHR in *Letellier* did require “facts capable of showing that the accused’s release would actually disturb public” and that detention on such grounds remains legitimate only if the “public order remains actually threatened”.⁷⁰³

§ *Safety of the charged person*

Evidently, the justification for pre-trial detention based on the safety of the charged person is open to abuse.⁷⁰⁴ On a number of occasions, the Co-Investigating Judges cited safety considerations in ordering provisional detention.⁷⁰⁵ Where the Defence argued that most of the charged persons lived openly and at liberty during the thirty years before their arrest and detention, often without threats, the Co-Investigating Judges and the Pre-Trial Chamber usually rejected these arguments.⁷⁰⁶ The Pre-Trial Chamber reasoned that “such non-interference could be placed in the context of the impunity that reigned for almost thirty years” or the fact that the charged person’s home was guarded.⁷⁰⁷ Personal acts of vengeance

⁷⁰¹ ECtHR, *Letellier v. France*, Application No. 12369/86, Series A, No. 207, Judgment of 26 June 1991, par. 51.

⁷⁰² See ECommHR, *Letellier v. France*, Application No. 12369/86, Report of 15 March 1990, par. 52. “Pour la Commission le trouble à l’opinion publique dérivant de la mise en liberté d’une personne réputée innocente ne saurait résider seulement dans la gravité du crime qui lui est reproché ou des soupçons qui pèsent contre elle. Elle constate que les juges ne se sont pas fondés sur d’autres circonstances comme l’attitude et la conduite qui pourraient être celles de l’accusée une fois remise en liberté pour étayer l’existence d’un danger de trouble à l’ordre public”). As noted by C. DAVIDSON, *May it Please the Court? The Role of Public Confidence, Public Order, and Public Opinion in Bail for International Criminal Defendants*, in «Columbia Human Rights Law Review», Vol. 43, 2012, p. 394, fn. 192.

⁷⁰³ *Ibid.*, par. 51.

⁷⁰⁴ FAIRLIE notes that “such cases need to be carefully evaluated, as instances in which it is asserted that detention is for the ‘protection’ of the accused are often the most objectionable.” See M.A. FAIRLIE, *The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled*, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, p. 1131, fn. 156.

⁷⁰⁵ ECCC, Provisional Detention Order, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, OCIJ, 14 November 2007, par. 16; ECCC, Provisional Detention Order, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ, OCIJ, 14 November 2007, par. 6; ECCC, Provisional Detention Order, *KHIEU Samphan*, Case No. 002/14-08-2006, OCIJ, 19 November 2007, par. 6; ECCC, Order of Provisional Detention, *NUON Chea*, Case No. 002/14-08-2006, OCIJ, 19 September 2007, par. 5; ECCC, Order of Provisional Detention, *KAING Guek Eav “Duch”*, Case No. 002/14-08-2006, OCIJ, 31 July 2007, par. 22.

⁷⁰⁶ For an exception, see ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008, par. 60 - 63.

⁷⁰⁷ Consider e.g. ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, *Prosecutor v. IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 108; ECCC, Decision on Appeal against Order on Extension of Provisional Detention, *NUON Chea*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009, par. 36.

from one or more victims cannot be ruled out.⁷⁰⁸ Relying on threats uttered during the first public hearing of the Pre-Trial Chamber in the *Duch* case, the Pre-Trial Chamber reasoned in several instances that where the alleged crimes are related to the charges of which the defendant in that case was charged, “this aggression could be vented towards this charged person.”⁷⁰⁹

II.4.1.3. Length of pre-trial detention

According to Rule 21 (4) of the Internal Rules, ‘proceedings’ should be concluded within a reasonable time. Such proceedings include judicial investigations.⁷¹⁰ Furthermore, the ECCC’s procedural detention scheme sets strict limitations to the length a person can spend in provisional detention by determining that the period of provisional detention can only be extended two times.⁷¹¹ Notwithstanding these safeguards as to the length of the deprivation of liberty, the Co-Investigating Judges also consider the length of the pre-trial detention, when deciding on the extension of the provisional detention or release. Indeed, the *nexus* between the time a charged person spent in detention and the diligence displayed in the conduct of the investigations is a relevant factor in the consideration of the continuation of detention or release.⁷¹² The assessment consists of two factors: the ‘reasonableness of the length of the detention’ and the ‘diligence of the Co-Investigating Judges in conducting their investigation’.⁷¹³

⁷⁰⁸ ECCC, Order Refusing Request for Release, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 28 October 2008, par. 20. On appeal, the Pre-Trial Chamber referred to various incidents that occurred in the course of the proceedings encompassing emotional and angry reactions from victims. See ECCC, Decision on Khieu Samphan’s Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 14 and 15), PTC, 3 July 2009, par. 53 – 58.

⁷⁰⁹ ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 109; ECCC, Decision on Appeal against Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009, par. 35.

⁷¹⁰ ECCC, Decision on Appeal against Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009, par. 45.

⁷¹¹ Rule 63 (7) ECCC IR.

⁷¹² ECCC, Decision on Appeal against Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009, par. 44; ECCC, Decision on Appeal of Ieng Sary against OCIJ’s Order on Extension of Provisional Detention, *IENG Sary*, Case No. 002/19-19-2007-ECCC/OCIJ (PTC17), PTC, 26 June 2009, par. 38.

⁷¹³ See *e.g.* ECCC, Decision on IENG Sary’s Appeal against Order on Extension of Provisional Detention, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC32), PTC, 30 April 2010, par. 59; ECCC, Decision on Khieu Samphan’s Appeal against Order on Extension of Provisional Detention, *KHIEU Samphan*, Case No. 002/19-09-2007, PTC, 30 April 2010, par. 44; ECCC, Decision on IENG Thirith’s Appeal against Order on Extension of

The Co-Investigating Judges have underlined the importance of the passage of time in determining the legitimacy of the continued provisional detention of a charged person.⁷¹⁴ Where the Co-Investigating Judges refer to the case law of the ECtHR regarding the right to be tried within a reasonable time (Article 6 (1) ECHR), they disregard the right to trial within reasonable time or release as provided for under Article 5 (3) ECHR or Article 9 (3) ICCPR. While some overlap between these provisions certainly exists, the latter provisions require special diligence if the person is detained and demand for greater diligence on the part of the prosecuting authorities.

On its part, the Pre-Trial Chamber referred to the right to trial within reasonable time or release as provided for in Article 9 (3) ICCPR or Article 5 (3) ECHR.⁷¹⁵ In line with the jurisprudence of other international criminal tribunals, the Pre-Trial Chamber held that the right to be tried within a reasonable time requires the judicial authorities to ensure that the detention is reasonable in light of the particular circumstances of the case.⁷¹⁶ Further in line with the *ad hoc* tribunals, the Pre-Trial Chamber identified five factors which are relevant in considering the reasonableness of the length of the provisional detention: to know (1) the effective length of the detention; (2) the length of the detention in relation to the nature of the crime; (3) the physical and psychological consequences of the detention on the detainee; (4) the complexity of the case and the investigations; and (5) the conduct of the entire procedure.⁷¹⁷ An important factor taken into consideration by the Pre-Trial Chamber in its

Provisional Detention, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC33), PTC, 30 April 2010, par. 48.

⁷¹⁴ *E.g.* ECCC, Order on Extension of Provisional Detention, *IENG Sary*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 37; ECCC, Order on Extension of Provisional Release, *IENG Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 35; ECCC, Order Refusing Request for Release, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 28 October 2008, par. 27; ECCC, Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 15 September 2009, par. 25; ECCC, Order on Extension of Provisional Detention, *IENG Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2009, par. 27; ECCC, Order on Extension of Provisional Detention, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 18 November 2009, par. 29.

⁷¹⁵ See *e.g.* ECCC, Decision on IENG Thirith's Appeal against Order on Extension of Provisional Detention, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC16), PTC, 11 May 2009, par. 56.

⁷¹⁶ *Ibid.*, par. 57.

⁷¹⁷ Consider *e.g.* ECCC, Decision on Khieu Samphan's Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 14 and 15), PTC, 3 July 2009, par. 69; ECCC, Decision on IENG Thirith's Appeal against Order on Extension of Provisional Detention, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC16), PTC, 11 May 2009, par. 58. See *supra*, Chapter 8, II.2.10.

assessment is the large-scale investigative actions required by the gravity and nature of the alleged crimes.⁷¹⁸

The Co-Investigating Judges noted that while the right to remain silent and not to cooperate actively with the judicial authorities during the judicial investigations are undisputed, “this attitude is not conducive to speedy proceedings.”⁷¹⁹ Where the Defence objected that such statement infringes upon the right of the charged person to remain silent, the Pre-Trial Chamber held that it cannot be concluded that any adverse inference was drawn against the charged person. The statement was a mere comment about the fact that exercising this right is not conducive to assist the Judges in discovering exculpatory evidence.⁷²⁰

II.4.1.4. Bail orders and conditional release

At any time, the Co-Investigating Judges may decide, *proprio motu* or at the request of the Co-Prosecutors, that the charged person should be released on bail. The principle of subsidiarity dictates that bail should be ordered where it would be sufficient to satisfy the needs served by the deprivation of liberty. Conditions may be imposed, including to ensure the presence of the charged person at trial and to ensure the protection of others. The bail order may be terminated, changed, suspended or conditions may be added by the Co-Investigating Judges at any time *proprio motu* or upon request by the Co-Prosecutors.⁷²¹ The charged person may file an application to change or suspend the conditions of a bail order or to suspend it.⁷²² However, no release on bail has so far been ordered. Any conditions for release of the charged person are outweighed by the necessity of provisional detention.⁷²³ In denying requests for alternative measures, the Co-Investigating Judges referred to the

⁷¹⁸ Consider *e.g.* ECCC, Decision on IENG Sary’s Appeal against Order on Extension of Provisional Detention, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC32), PTC, 30 April 2010, par. 61; ECCC, Decision on Khieu Samphan’s Appeal against Order on Extension of Provisional Detention, *KHIEU Samphan*, Case No. 002/19-09-2007, PTC, 30 April 2010, par. 47; ECCC, Decision on IENG Thirith’s Appeal against Order on Extension of Provisional Detention, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC33), PTC, 30 April 2010, par. 50.

⁷¹⁹ ECCC, Order on Extension of Provisional Release, *IENG Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008, par. 37.

⁷²⁰ ECCC, Decision on IENG Thirith’s Appeal against Order on Extension of Provisional Detention, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC16), PTC, 11 May 2009, par. 68.

⁷²¹ Rule 65 (4) ECCC IR.

⁷²² Rule 65 (5) ECCC IR.

⁷²³ ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 121.

‘particular gravity of the crimes’ and the fact that no bail would be rigorous enough to ensure that the abovementioned requirements are sufficiently satisfied.⁷²⁴

II.4.1.5. Alternative forms of detention

While the Defence has repeatedly requested the Co-Investigating Judges and the Pre-Trial Chamber to consider alternative forms of detention, so far no such requests have been honoured. In the absence of any explicit provision in the Internal Rules for alternative forms of detention, the Pre-Trial Chamber considers this to be an alternative request for release by bail order, under the condition of hospitalisation or house arrest.⁷²⁵ A balancing exercise is subsequently undertaken between the grounds necessitating the detention of the charged person and the conditions proposed by the charged person.⁷²⁶ In all cases so far, it was decided that the conditions proposed by the charged person were outweighed by the necessity of the provisional detention.⁷²⁷

II.4.1.6. Provisional release on humanitarian grounds

Since the statutory documents, the Internal Rules and Cambodian law are silent on the possibility to release a charged person on health considerations, the Pre-Trial Chamber sought guidance in procedural principles established at the international level and applied the case law of the ICTY. It thus held that a person may exceptionally be released where his or her conditions are incompatible with detention.⁷²⁸ This finding was further supported by the presence of a provision providing for release of a suspect from police custody in case health conditions make him or her unsuitable for custody.⁷²⁹ Old age is not in itself an obstacle to

⁷²⁴ Consider *e.g.* ECCC, Provisional Detention Order, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, OCIJ, 14 November 2007, par. 19; ECCC, Order Refusing Request for Release, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 28 October 2008, par. 24.

⁷²⁵ ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008, par. 119-120.

⁷²⁶ *Ibid.*, par. 121.

⁷²⁷ Consider *e.g.* ECCC, Decision on IENG Sary’s Appeal against Order on Extension of Provisional Detention, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC32), PTC, 30 April 2010, par. 64; ECCC, Decision on Khieu Samphan’s Appeal against Order on Extension of Provisional Detention, *KHIEU Samphan*, Case No. 002/19-09-2007, PTC, 30 April 2010, par. 49.

⁷²⁸ ECCC, Decision on Khieu Samphan’s Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 14 and 15), PTC, 3 July 2009, par. 80.

⁷²⁹ Rule 51 (6) IR.

detention.⁷³⁰ The compatibility of the the state of health of the accused person with detention is decided on a case-by-case basis in light of the overall circumstances of the case.⁷³¹

II.4.2. The Special Panels for Serious Crimes

II.4.2.1. General

Similar to the ECCC, the SPSC have consistently emphasised that *pre-trial detention is the exception, and pre-trial liberty the rule*.⁷³² It will be illustrated how various aspects of the SPSC's provisional detention regime confirm such a pronouncement. The procedural framework envisaged limitations to the period suspects or accused persons could be detained, specific justifications were required for pre-trial detention and a periodic review mechanism was provided for. All these elements further reveal the exceptional nature of pre-trial deprivation of liberty. However, the practice did not confirm this picture. Illegal detention was a widespread problem at the SPSC.⁷³³ Furthermore, several commentators refer to the "excessive use of pre-trial detention" at the SPSC.⁷³⁴

As previously discussed, under the TRCP, upon arrest, the person had to be brought before the Investigating Judge and a review hearing was organised.⁷³⁵ At the occasion of this review hearing, the Investigating Judge could confirm the arrest and order detention, release the

⁷³⁰ ECCC, Order Refusing Request for Release, *Khieu Samphan*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 28 October 2008, par. 33 (in their decision, the Co-Investigating Judges refer to the *Papon* case of the ECtHR. See ECtHR, *Papon v. France*, Application No. 64666/01, Judgment of 7 June 2001).

⁷³¹ *Ibid.*, par. 33 (referring to ECtHR, *Mouisel v. France*, Application No. 67263/01, Judgment of 14 November 2002, par. 37 - 41; ECtHR, *Priebke v. Italy*, Application No. 48799/99, Judgment of 5 April 2001).

⁷³² SPSC, Decision to the Application for Release of the Accused Jose Cardoso Ferreira alias Muzhino, *Prosecutor v. Franca da Silva alias Jhoni Franca et al.*, Case No. 04/2001, SPSC, 27 April 2002, par. 48 ("It shall not be a general rule that persons waiting trial be detained in custody, but release shall be subject to a guarantee to appear for trial"); SPSC, Judgment, *Prosecutor v. Carlos Ena*, Case No. 5/2002, COA, 24 September 2003, p. 3; SPSC, Decision to the Application for Release of the Accused Lino de Carvalho, *Prosecutor v. Lino Carvalho*, Case No. 10/2001, SPSC, 28 October 2002, par. 17; SPSC, Decision to the Application for Release of the Accused Carlos Ena, *Prosecutor v. Carlos Ena*, Case No. 5/2002, SPSC, 12 June 2003, par. 20; SPSC, Decision on Prosecutor's Request for Pre-Trial Detention, *Prosecutor v. Sisto Barros et al.*, Case No. 01/2004, SPSC, 17 March 2004, par. 44; SPSC, Judgement of the Court of Appeal of East Timor, *Prosecutor v. Júlio Fernandes et al.*, Case of Appeal No. 2000/1, COA, 14 February 2001 ("it is a measure of constraint of exceptional nature (as are all measures of constraint) which should only be taken or extended when the imposition or extension is really essential to guarantee other superior values; and when all assumptions established by law are met").

⁷³³ JSMP, Dili District Court: Final Report, November 2003, p. 4 (<http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN014017.pdf>, last visited 15 January 2014).

⁷³⁴ C. REIGER and M. WIERDA, *The Serious Crimes Process in Timor-Leste: In Retrospect*, 2006, p. 25 (in this regard, REIGER and WIERDA refer to the fact that the TRCP offered little guidance on the function of the Investigating Judge, an office that was non-existent under the Indonesian criminal justice system).

⁷³⁵ See *supra*, Chapter 7, V.2.3 and V.3.3.

suspect or order substitute restrictive measures.⁷³⁶ This order was appealable.⁷³⁷ Victims had the right to be heard at the review hearing.⁷³⁸

It followed from Section 20.7 TRCP that detention could only be ordered in case (1) there were ‘reasonable grounds to believe’ that a crime had been committed, (2) there was ‘sufficient evidence’ to support the ‘reasonable belief’ that the suspect was the perpetrator and (3) there were ‘reasonable grounds to believe’ that detention was necessary.⁷³⁹ It followed from Section 20.8 TRCP that these ‘reasonable grounds to believe that detention is necessary’ included (1) reasonable grounds to believe that the suspect will flee to avoid criminal proceedings, (2) the risk that evidence would be tainted, lost, destroyed or falsified, (3) reasons to believe that witnesses or victims may be pressured, manipulated or their safety endangered, or (4) reasons to believe that the suspect will continue to commit offences or poses a danger to public safety or security.⁷⁴⁰ Where the ordering of pre-trial detention was made dependent on the fulfilment of the conditions outlined above, there was *no discretion* for the Investigating Judge to order detention absent their fulfilment.⁷⁴¹ Consequently, the Investigating Judge had to order the release if he found that there were insufficient grounds to continue the detention or if the Public Prosecutor dismissed the case.⁷⁴² The *burden of proof* was on the Prosecution.⁷⁴³ Absent was the legitimate ground of protecting the safety of the accused person (cf. ECCC). Commentators have argued that the Investigating Judges often only made generic reference to the legitimate grounds for detention under Section 20.8 TRCP.⁷⁴⁴ As indicated above, it follows from the case law of the ECtHR that such use of

⁷³⁶ Section 20.6 TRCP.

⁷³⁷ Section 23.1 TRCP.

⁷³⁸ Section 12.3 TRCP.

⁷³⁹ In one case, the Court of Appeal seems to have applied a different (incorrect) threshold where it seemingly required “a strong belief that the defendant will be convicted for having committed a given crime.” Critical of such threshold, see C. CORACINI, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the Special Panels for Serious Crimes 2003 – 2005, Vol. XIII, Antwerp, Intersentia, 2009, p. 200 (arguing that such threshold could contravene the right to be presumed innocent until guilt is proven).

⁷⁴⁰ Section 20.8 (a) - (d) TRCP.

⁷⁴¹ Consider the wording of Section 20.7 TRCP (“The Investigating Judge *may* confirm the arrest and order the detention of the suspect *when...*” (emphasis added)).

⁷⁴² Section 22.1 and 19A.7 TRCP.

⁷⁴³ Consider *e.g.* SPSC, Decision to the Application for Release of the Accused Jose Cardoso Ferreira alias Muzhino, *Prosecutor v. Franca da Silva alias Jhoni Franca et al.*, Case No. 04/2001, SPSC, 27 April 2002, par. 29 (highlighting the difference with the ICTY provision on provisional release). However, occasionally, the burden seems to have effectively been put on the suspect.

⁷⁴⁴ JSMP, Dili District Court: Final Report, November 2003, p. 33 (<http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN014017.pdf>, last visited 15 January 2014).

identical or stereotyped language raises doubts about the justification for the continued detention.⁷⁴⁵

§ *Periodic review of detention – Limitation in time*

The detention of a suspect had to be reviewed by the Investigating Judge every 30 days.⁷⁴⁶ The Court of Appeal held that the suspect was not entitled to a hearing at this occasion.⁷⁴⁷ This interpretation is at tension with international human rights law, which requires that the Judge “*must hear* the individual brought before him in person and review, by reference to legal criteria, whether or not the detention is justified.”⁷⁴⁸ Such periodic review allows the Judge to take changed circumstances into consideration. Normally, the maximum duration of the pre-trial detention was six months from the moment of arrest.⁷⁴⁹ Where a crime was punishable with a sentence of imprisonment of more than five years, the maximum period

⁷⁴⁵ ECtHR, *Mansur v. Turkey*, Application No. 16026/90, Series A, No. 319-B, Judgment of 15 April 1994, par. 55; ECtHR, *Kalashnikov v. Russia*, Application No. 47095/99, Reports 2002-VI, Judgment of 15 July 2002, par. 116; ECtHR, *Panchenko v. Russia*, Application No. 45100/98, Judgment of 8 February 2005, par. 107; ECtHR, *Vayıç v. Turkey*, Application No. 18078/02, Judgment of 20 June 2006, par. 35.

⁷⁴⁶ Section 20.9 TRCP. There is no express requirement that a hearing is organised at such occasion. Nevertheless, the default to organise a hearing is considered an irregularity: see SPSC, The Request for the Release of the Accused Benjamin Sarmento, Romerio Tilman and Joao Sarmento, *Prosecutor v. Sarmento et al.*, Case No. 18/2001, SPSC, 22 March 2002, par. 34 – 36 (referring to a decision of the Court of Appeal of 14 February 2001, which is binding on the SPSC pursuant to Section 2.3 UNTAET Regulation 2000/11).

⁷⁴⁷ SPSC, Judgement of the Court of Appeal of East Timor, *Prosecutor v. Júlio Fernandes et al.*, Case of Appeal No. 2000/1, COA, 14 February 2001, Judgment of Frederick Egonda-Ntende, JA, p. 8 (According to the Judge, such right followed from Section 2.1. TRCP, which includes the entitlement for every person to a fair and public hearing before a competent court, which right includes the right “to be heard before a decision, especially an adverse decision, is made in the course of proceedings for which he has been arraigned before the court.” However, the majority decision took another view and held that “it is not obligatory to hold a public hearing to review the pre-trial detention as pursuant to Section 20.9, nor to decide about the extension of the pre-trial detention as stated in Sections 20.11 and 20.12 TRCP. Therefore, this act cannot be considered, as the appellants wish it could, a nullity which cannot be remedied.” See SPSC, Judgement of the Court of Appeal of East Timor, *Prosecutor v. Júlio Fernandes et al.*, Case of Appeal No. 2000/1, COA, 14 February 2001, p. 3. For an convincing view that an obligation to hear the person existed, see S. LINTON, Prosecuting Atrocities at the District Court of Dili, in «Melbourne Journal of International Law», Vol. 2, 2001, pp. 428 – 429 (the author underlines, among others, that such approach “reveals an appreciation of the object and purpose of *Regulation 1999/1*”, which includes both the requirement that “all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards” as well as the requirement that the laws of East-Timor should not conflict with international standards. LINTON adds that the SPSC’s “failure to ensure a hearing in the presence of the accused and receive any submissions was not ‘a mere irregularity’ (in the words of the majority), but a fundamental issue going to the heart of fair trial guarantees in international law”). For a similar view, see S. LINTON, Cambodia, East Timor and Sierra Leone: Experiments in International Justice, in «Criminal Law Forum», Vol. 12, 2001, p. 227. Notably, in the *Sarmiento et al.* case, the SPSC, in referring to this holding by the Court of Appeal, distinguished between the *right to be heard* and the *right to a hearing*. See *infra*, fn. 753.

⁷⁴⁸ ECtHR, *Assenov v. Bulgaria*, Application No. 90/1997/874/1086, Judgement of 28 October 1998, par. 146 (emphasis added).

⁷⁴⁹ Section 20.10 TRCP.

could be extended by three months by the Investigating Judge or the Judge to whom the matter had been referred following the filing of the indictment, upon the request of the Public Prosecutor. The interests of justice had to require such extension and there had to be compelling reasons to order so.⁷⁵⁰ For particularly complex cases which carried an imprisonment of ten years or more, the Investigating Judge or the Judge to whom the matter had been referred, could extend the detention as long as was reasonable in the circumstances, at the request of the Prosecutor, provided that the interests of justice required so and having regard to the international standards of fair trial.⁷⁵¹ These two instances where the maximum period of pre-trial detention could be extended allowed for the consideration of ‘the prevailing circumstances in East Timor’.⁷⁵² Arguably, in these situations, the Defence had to be given the opportunity to be heard. However, no clear provision was made for holding a hearing.⁷⁵³ In *Prosecutor v. Carlos Ena*, the Court of Appeal determined that since the indictment was only composed of six pages and there were only ten prosecution witnesses and 6 defence witnesses, the proceedings were of a normal complexity and the ‘complexity’ requirement was not satisfied.⁷⁵⁴

While obvious, the Court of Appeals had to emphasise that the pre-trial detention could not be extended with retroactive effects.⁷⁵⁵ From the moment the warrant of arrest expires, the basis for the deprivation of liberty disappears and the detention becomes illegal.⁷⁵⁶ In the *Fernandes* case, when detention orders against a number of persons had expired or were about to expire, the SPSC took the mind-blowing step of issuing new arrest warrants to ‘fix’ this problem.⁷⁵⁷ The same practice was applied in the *Los Palos* case.⁷⁵⁸ The Court of Appeals

⁷⁵⁰ Section 20.11 TRCP. The decision can be appealed to the Court of Appeal (Section 23 TRCP).

⁷⁵¹ Section 20.12 UNTAET Regulation 2000/30. The decision can be appealed to the Court of Appeal (Section 23 UNTAET Regulation 2000/30).

⁷⁵² Section 20.11 and 20.12 TRCP.

⁷⁵³ SPSC, The Request for the Release of the Accused Benjamin Sarmento, Romerio Tilman and Joao Sarmento, *Prosecutor v. Sarmento et al.*, Case No. 18/2001, SPSC, 22 March 2002, par. 38-39: the SPSC derives such obligation from the right to a fair trial (Section 2 UNAET Regulation 2000/30 and Article 9 (3) ICCPR). Consider also SPSC, Judgement of the Court of Appeal of East Timor, *Prosecutor v. Júlio Fernandes et al.*, Case of Appeal No. 2000/1, COA, 14 February 2001, Judgment of Frederick Egonda-Ntende, JA, p. 8 (arguing that there should be a hearing in the presence of the accused and his legal representative, if any). Consider also the discussion *supra*, fn. 747.

⁷⁵⁴ SPSC, Judgment, *Prosecutor v. Carlos Ena*, Case No. 5/2002, COA, 24 September 2003, pp. 7 - 8.

⁷⁵⁵ SPSC, Judgement of the Court of Appeal of East Timor, *Prosecutor v. Júlio Fernandes et al.*, Case of Appeal No. 2001/1, COA, 14 February 2001, p. 6.

⁷⁵⁶ *Ibid.*, p. 7.

⁷⁵⁷ See the discussion of this case, *supra*, Chapter 7, II.1.

⁷⁵⁸ See JSMP Trial Report, *The General Prosecutor v. Joni Marques and nine others (The Los Palos Case)*, March 2002, p. 14 (“In mid-January 2001, the prosecutors again realised that several detention orders had

overruled this decision of the SPSC.⁷⁵⁹ Also other problems related to the length of the pre-trial detention plagued the SPSC. Among others, the issue arose that the period of detention had already expired at the time a case was transferred to the SPSC.⁷⁶⁰ Another infamous case is *Victor Alves*. His lawyers challenged his detention, holding, among others, that the maximum period of pre-trial detention had expired.⁷⁶¹ At the relevant time, it followed from the then applicable Indonesian code of criminal procedure that the person needed to be released if no proceedings were initiated within 110 days following the deprivation of liberty. However, UNTAET adopted Regulation 2000/14, with immediate effect, which replaced the time limitations of pre-trial detention provided under the Indonesian code of criminal procedure and automatically validated all previous arrests and detentions made before 10 May 2000.⁷⁶² However, the Judge decided to set aside Regulation 2000/14 where he found that its provisions violated international human rights standards and concluded that the detention of Victor Alves was unlawful.⁷⁶³

§ *Standard of proof*

It followed from Sections 20.7 and 20.8 TRCP that the Court must be satisfied that there are ‘reasons to believe’ that detention is necessary for one of the legitimate grounds under Section 20.8 of TRCP.⁷⁶⁴ Occasionally, the SPSC seems to have applied an erroneous standard of proof. For example, the SPSC in its reasoning in *Sarmento* not only reversed the burden of proof but also imposed an unattainable threshold when it reasoned that “there is *not evidence* that the accused Joao Sarmento *could not have* financial resources or no contact in West

expired, or were due to expire. These included Hilario Da Silva, who had been illegally detained since 2 January 2001, Gonsalo Dos Santos who had been illegally detained since 27 December 2001, and Alarico Fernandes and Gilberto Fernandes who both had been illegally detained since 8 January 2001. On 11 January, the Prosecutor requested that the Special Panel extend the detention of a number of Serious Crimes accused persons, including all of the *Los Palos* detainees. The Special Panel ruled the following day that it could not issue detention extensions when the detention had already expired. However, the court decided to simply issue new arrest warrants, even though the accused, with one exception, were already in detention”).

⁷⁵⁹ *Ibid.*, p. 15.

⁷⁶⁰ *Ibid.*, p. 15.

⁷⁶¹ S. LINTON, *Rising from the Ashes: The Creation of a viable Criminal Justice System in East Timor*, in «Melbourne University Law Review», Vol. 25, 2001, p. 140.

⁷⁶² *Ibid.*, p. 141.

⁷⁶³ *Ibid.*, p. 141; JSMP Trial Report, *The General Prosecutor v. Joni Marques and nine others (The Los Palos Case)*, March 2002, p. 14.

⁷⁶⁴ While Section 20.8 (a), (c) and (d) TRCP explicitly state that ‘reasons to believe’ are required, Section 20.8 (b) TRCP requires a different standard, namely the existence of “*a risk* that evidence *may* be tainted, lost, destroyed or falsified” (emphasis added).

Timor or Indonesia. The fact that his relatives are in East Timor is not in itself a guarantee.”⁷⁶⁵ Indeed, an abstract risk of absconding always exists: what is needed to be shown are ‘reasons to believe’ that the person will flee, which arguably requires more than a mere abstraction. In the same case, the SPSC insisted that there is ‘no certainty’ that the accused will not flee. Again, the SPSC not only reversed the burden but also set a much higher standard of proof than the ‘reasons to believe’ threshold under Section 20.8 of the TRCP.

When the SPSC considered the risk of interference with victims and witnesses (Section 20.8 (c) TRCP), the SPSC relied on Rule 65 (B) ICTY RPE and concluded that it was not satisfied that the accused will not pose a danger to victims or witnesses, apparently accepting the ‘balance of probabilities’ threshold as elaborated in the jurisprudence of the *ad hoc* tribunals.⁷⁶⁶ Also when the SPSC considered the risk of flight, the SPSC occasionally concluded that it was not satisfied that the person would not flee.⁷⁶⁷ Such borrowing from the *ad hoc* tribunals’ provisional release scheme should be rejected where a different standard of proof is provided for under the TRCP and where it effectively reverses the burden of proof, putting it on the Defence.

§ Requests for review of detention

The suspect or accused person held the right, upon request, to have their detention reviewed *at regular intervals* by a competent Judge or a panel of Judges.⁷⁶⁸ When detention was reviewed, the burden of proof rested on the Prosecution.⁷⁶⁹ This right was limited by the jurisprudence

⁷⁶⁵ SPSC, The Request for the Release of the Accused Benjamin Sarmento, Romerio Tilman and Joao Sarmento, *Prosecutor v. Sarmento et al.*, Case No. 18/2001, SPSC, 22 March 2002, par. 60 (emphasis added).

⁷⁶⁶ SPSC, Decision on the Application for Release of the Accused Jose Cardoso Ferreira alias Muzhino, *Prosecutor v. Franca da Silva alias Jhoni Franca et al.*, Case No. 04/2001, SPSC, 27 April 2002, par. 37; (renumbered by author); SPSC, Decision on the Application for Release of the Accused Benjamin Sarmento, *Prosecutor v. Sarmento*, Case No. 18/2001, SPSC, 7 February 2003, par. 33 (where the Court refers to case law of the ICTY, it adds that: “the Court takes into account that in the ICTY the rule places the burden of proof of showing the absence of the grounds for detention on the defense while in UNTAET Regulation 2000/30 the burden of proof of such factors is on the prosecution”).

⁷⁶⁷ *Ibid.*, par. 49. Other decisions applied the correct standard. Consider *e.g.* SPSC, Decision on the Application for Initial Detention of the Accused Aprecio Mali Dao, *Prosecutor v. Aprecio Mali Dao*, Case No. 18/2003, SPSC, 29 April 2004, par. 46 (concluding that “[t]here are reasons to believe that Aprecio may flee the jurisdiction of the court once released”).

⁷⁶⁸ Section 6.3 (k) TRCP.

⁷⁶⁹ SPSC, Decision on the Application for Release of the Accused Jose Cardoso Ferreira alias Muzhino, *Prosecutor v. Franca da Silva alias Jhoni Franca et al.*, Case No. 04/2001, SPSC, 27 April 2002, par. 29.

to situations where ‘new grounds’ or a ‘change in circumstances’ existed.⁷⁷⁰ The right arose when (1) the previous period of detention expired and (2) when there were changes affecting any of the grounds upon which the accused person’s detention is based.⁷⁷¹ However, the SPSC accepted that the additional time spent in detention since the last order of detention constituted “a change in the circumstances of the case.”⁷⁷² There was no concrete time limit, exceeding which it could be automatically considered that such new grounds appeared. It was a matter for the Court to be considered on a case-by-case basis and in light of several factors that may account for the length of detention.⁷⁷³ At the occasion of this review, there was no need for the Court to revisit the grounds that have already been taken into consideration in previous decisions on pre-trial detention or release.⁷⁷⁴

II.4.2.2. Grounds justifying pre-trial detention

Decisions on continued detention mostly considered the risk of flight and only seldomly focussed on the preservation of evidence or the endangerment of public safety.⁷⁷⁵ As stated above, often only a generic reference was made to the grounds justifying detention. In the case of *Júlio Fernandes et al.*, the Court of Appeals lashed out at the decision of the SPSC, which simply stated that “there are reasons to believe that the accused will try to escape to

⁷⁷⁰ *Ibid.*, par. 15 (“The right of the accused to have his detention reviewed at regular intervals[s] does not mean that a party can bring before the Court the same reasons upon which the Court initially decided. Only new grounds have to be submitted”); SPSC, Decision to the Application for Release of the Accused Lino De Carvalho, *Prosecutor v. Lino Carvalho*, Case No. 10/2001, SPSC, 28 October 2002, par. 13; SPSC, Decision on the Application for Release of the Accused Benjamin Sarmento, *Prosecutor v. Sarmento*, Case No. 18/2001, SPSC, 7 February 2003, par. 15.

⁷⁷¹ SPSC, Decision to the Application for Release of the Accused Jose Cardoso Ferreira alias Muzhino, *Prosecutor v. Franca da Silva alias Jhoni Franca et al.*, Case No. 04/2001, SPSC, 27 April 2002, par. 21; SPSC, Decision on the Application for Release of the Accused Benjamin Sarmento, *Prosecutor v. Sarmento*, Case No. 18/2001, SPSC, 7 February 2003, par. 20.

⁷⁷² SPSC, Decision to the Application for Release of the Accused Jose Cardoso Ferreira alias Muzhino, *Prosecutor v. Franca da Silva alias Jhoni Franca et al.*, Case No. 04/2001, SPSC, 27 April 2002, par. 19, 22; SPSC, Decision to the Application for Release of the Accused Lino De Carvalho, *Prosecutor v. Lino Carvalho*, Case No. 10/2001, SPSC, 28 October 2002, par. 47-48; SPSC, Decision on the Application for Release of the Accused Benjamin Sarmento, *Prosecutor v. Sarmento*, Case No. 18/2001, SPSC, 7 February 2003, par. 19; SPSC, Decision on the Application for Release of the Accused Abilio Mendez Correia, *Prosecutor v. Abilio Mendez Correia*, Case No. 19/2001, SPSC, 10 June 2003, par. 12; SPSC, Decision to the Application for Release of the Accused Carlos Ena, *Prosecutor v. Carlos Ena*, Case No. 5/2002, SPSC, 12 June 2003, par. 19.

⁷⁷³ SPSC, Decision on the Application for Release of the Accused Abilio Mendez Correia, *Prosecutor v. Abilio Mendez Correia*, Case No. 19/2001, 10 June 2003, par. 12; SPSC, Decision to the Application for Release of the Accused Carlos Ena, *Prosecutor v. Carlos Ena*, Case No. 5/2002, SPSC, 12 June 2003, par. 19.

⁷⁷⁴ SPSC, Decision on the Application for Release of the Accused Abilio Mendez Correia, *Prosecutor v. Abilio Mendez Correia*, Case No. 19/2001, SPSC, 10 June 2003, par. 12; SPSC, Decision to the Application for Release of the Accused Carlos Ena, *Prosecutor v. Carlos Ena*, Case No. 5/2002, SPSC, 12 June 2003, par. 19.

⁷⁷⁵ S. ZAPPALÀ, Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the Special Panels for Serious Crimes*, Vol. XIII, Antwerp, Intersentia, 2008, p. 98.

avoid criminal proceedings” and that “there are reasons to believe that the witnesses and/or victims can be put under pressure, manipulated or their safety endangered.” The Appeals Chamber repeated that “[t]he Court should mention the facts that led to the decision and has to mention the evidence (even if it has not been proven true) based on which it can state that those facts exist.”⁷⁷⁶

§ Risk of flight

The gravity of the alleged crime and the sentence that could be expected upon conviction were factors taken into consideration in the assessment of the risk of flight.⁷⁷⁷ Also the alleged role the accused played in the crimes charged was considered.⁷⁷⁸ In the aforementioned *Sarmento* case, the SPSC seemed to have based its conclusion in the first place on the *gravity of the crimes* and the *sentence* that could be imposed.⁷⁷⁹ However, some reference was also made to other factors, including financial resources or international contacts. As it was argued before, it follows from human rights law that the gravity of the crime and the length of the expected sentence cannot be the only ground upon which detention is based.

Other factors that were considered in the assessment of the risk of flight included the voluntariness of surrender (following a previous release or escape) or the fact that relatives or the accused live(d) in West Timor.⁷⁸⁰ The importance of the latter factor can be explained by the lack of cooperation by Indonesia.⁷⁸¹

⁷⁷⁶ SPSC, Judgement of the Court of Appeal of East Timor, *Prosecutor v. Júlio Fernandes et al.*, Case No. 2000/1, COA, 14 February 2001, pp. 8 – 9. (the Court of Appeals added that “the judicial decision has to include all evidence facts, all factual elements and legal elements which are necessary to convince, at least rationally, the receiver of the decision and the public in general that in view of those evidence elements one has to conclude that certain facts have been proven; and that, in view of the facts which have been proven and the applicable law, the decision made was the only possible one. The prestige of a Court lies, to a great extent, in the ability to be based on legal premises, make others rationally accept the Court’s decisions”).

⁷⁷⁷ SPSC, Decision on the Application for Release of the Accused Jose Cardoso Ferreira alias Muzhino, *Prosecutor v. Franca da Silva alias Jhoni Franca et al.*, Case No. 04/2001, SPSC, 27 April 2002, par. 49 – 50.

⁷⁷⁸ *Ibid.*, par. 28 (“As a general principle, the greater the accused’s role in an alleged crime, the more difficult it will be for the Court to release him”).

⁷⁷⁹ SPSC, The Request for the Release of the Accused Benjamin Sarmento, Romerio Tilman and Joao Sarmento, *Prosecutor v. Sarmento et al.*, Case No. 18/2001, SPSC, 22 March 2002, par. 52 and 57. S. ZAPPALÀ, Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the Special Panels for Serious Crimes*, Vol. XIII, Antwerp, Intersentia, 2008, p. 97.

⁷⁸⁰ SPSC, Decision on the Application for Release of the Accused Benjamin Sarmento, *Prosecutor v. Sarmento*, Case No. 18/2001, SPSC, 7 February 2003, par. 48; SPSC, Decision on the Application of Release of the Accused Salvador Soares aka Salvador Leos Marobo, *Prosecutor v. Salvador Soares*, Case No. 07/2002, SPSC, 16 September 2002; SPSC, Decision on the Application for Initial Detention of the Accused Aprecio Mali Dao,

§ *The risk of interference with victims or witnesses*

The risk of interference with victims and witnesses was accepted as a ground for detention *in the absence of any concrete indication* of attempted interference or manipulation. For example, where the accused was detained and therefore did not have the *possibility* to interfere, this factor was taken into consideration. Together with the factor that releasing the accused at that stage may have had a negative impact on the willingness of the victims and/or witnesses to participate in the trial proceedings, this factor was considered sufficient to establish ‘reasons to believe’.⁷⁸² It was added that where the evidence has already been gathered, risks of interference may still exist as many witnesses are expected to appear before the Court to testify.⁷⁸³ Similarly abstract and general in nature was the reasoning of the SPSC in *Sarmiento* where it held that “the fact that they did not do it in the past [tried to pressurise, manipulate or endanger the safety of witnesses] is not a guarantee they will not do it in the future. No one can predict the future.” Such reasoning falls short of the requirement to establish ‘reasons to believe’ and should be rejected as it puts an unattainable burden on the Defence.⁷⁸⁴

A different approach, in line with the holdings of the *ad hoc* tribunals, was taken by the SPSC in the *Sisto Barros* case, where the Court (Judge Rapoza) held that “[t]he fact that victims or witnesses may apprehend a risk to themselves because they have provided information to the Public Prosecutor may be considered on the question of the defendant’s detention only to the

Prosecutor v. Aprecio Mali Dao, Case No. 18/2003, SPSC, 29 April 2004, par. 47; SPSC, Judgment, *Prosecutor v. Carlos Ena*, Case No. 5/2002, COA, 24 September 2003, p. 5.

⁷⁸¹ A MOU was concluded between the Republic of Indonesia and the UN Transitional Administration in East Timor Regarding Cooperation in Legal, Judicial and Human Rights Related Matters (done at Jakarta on 5 April 2000 and at Dili at 6 April 2000 (<http://www.unmit.org/legal/Other-Docs/mou-id-untaet.htm>, last visited 1 December 2010). Consider in particular Section 2 (c) on the enforcement of warrants for arrest and Sections 9 and 10 on the transfer of persons for the purpose of criminal prosecution.

⁷⁸² SPSC, Decision on the Application for Release of the Accused Jose Cardoso Ferreira alias Muzhino, *Prosecutor v. Franca da Silva alias Jhoni Franca et al.*, Case No. 04/2001, SPSC, 27 April 2002, par. 36 (p. 9); such ‘negative impact’ was also considered in SPSC, Decision on the Application for Release of the Accused Benjamin Sarmiento, *Prosecutor v. Sarmiento*, Case No. 18/2001, SPSC, 7 February 2003, par. 35.

⁷⁸³ *Ibid.*, par. 38.

⁷⁸⁴ SPSC, The Request for the Release of the Accused Benjamin Sarmiento, Romerio Tilman and Joao Sarmiento, *Prosecutor v. Sarmiento et al.*, Case No. 18/2001, SPSC, 22 March 2002, par. 58. It can be argued that the reasoning of the SPSC should be understood as implying that the gravity of the crimes and the length of the possible sentence led the SPSC to conclude that there was a risk of interference: proof of such understanding can be found in the decision by the SPSC (Judge Maria Natercia Gusmao Pereira) on a subsequent application for release: see SPSC, Decision on the Application for Release of the Accused Benjamin Sarmiento, *Prosecutor v. Sarmiento*, Case No. 18/2001, SPSC, 7 February 2003, par. 30.

extent that such apprehension is based *on the conduct of the defendant*.⁷⁸⁵ Consequently, mere subjective witness fears will not in themselves suffice to order detention for risk of interference. Similarly, the fact that the accused persons have been living in the proximity of the residences of the victims and witnesses for a long time, was not accepted as a factor for increasing the risk of interference with victims or witnesses since no incidents had occurred.⁷⁸⁶

II.4.2.3. Length of the pre-trial detention

The case for release gets stronger when the period of detention lengthens.⁷⁸⁷ The length of pre-trial detention was an exceptional ground on which to release the suspect or accused.⁷⁸⁸ The SPSC held that not the delay in itself provoked release but the length of detention going beyond what was reasonable.⁷⁸⁹ There was no concrete time limitation, behind which pre-trial detention became unreasonable. The reasonableness of the pre-trial detention was assured by Section 20.10 – 20.12 TRCP, encompassing strict time limitations for pre-trial detention. It also provided for the possibility to extend pre-trial detention for particularly complex cases which carried an imprisonment of ten years or more *as long as the length of the pre-trial detention was reasonable in the circumstances, and having due regard to international fair trial standards*. In addition, Section 6.3 (f) TRCP guaranteed the suspect or accused a trial without undue delay. The consideration of reasonableness of the length of the detention and of the right to be tried without undue delay had to be done on a case-by-case basis and various elements had to be considered. Different from other international criminal tribunals, the SPSC held that the reasonable length of the detention should be assessed on the basis of the time that has already been spent in detention, “not over the hypothetical future period that a

⁷⁸⁵ SPSC, Decision on Prosecutor’s Request for Pre-Trial Detention, *Prosecutor v. Sisto Barros et al.*, Case No. 01/2004, SPSC, 17 March 2004, par. 50 (emphasis added).

⁷⁸⁶ *Ibid.*, par. 50.

⁷⁸⁷ SPSC, The request for the Release of the Accused Benjamin Sarmento, Romerio Tilman and Joao Sarmento, *Prosecutor v. Sarmento et al.*, Case No. 18/2001, SPSC, 22 March 2002, par. 8.

⁷⁸⁸ SPSC, Decision on the Application for Release of the Accused Jose Cardoso Ferreira alias Muzhino, *Prosecutor v. Franca da Silva alias Jhoni Franca et al.*, Case No. 04/2001, SPSC, 27 April 2002, par. 39 (p. 9); SPSC, The request for the Release of the Accused Benjamin Sarmento, Romerio Tilman and Joao Sarmento, *Prosecutor v. Sarmento et al.*, Case No. 18/2001, SPSC, 22 March 2002, par. 62; SPSC, Decision on the Application for Release of the Accused Benjamin Sarmento, *Prosecutor v. Sarmento*, Case No. 18/2001, SPSC, 7 February 2003, par. 36.

⁷⁸⁹ SPSC, Decision to the Application for Release of the Accused Carlos Ena, *Prosecutor v. Carlos Ena*, Case No. 5/2002, SPSC, 12 June 2003, par. 18.

postponement of the case could add.⁷⁹⁰ However, the Court added that the perspective of this future time can be taken into account by the Court as an additional element to be considered. In that regard, the imminent opening of the trial is an element which was taken into consideration in the assessment of the reasonableness of the length of the detention.⁷⁹¹

II.4.2.4. Conditional release

The principle of subsidiarity in provisional detention situations entailed that whenever substitute restrictive measures were sufficient and adequate to satisfy the ends of detention, detention had to be stopped and substitute restrictive measures had to be imposed.⁷⁹² The jurisprudence of the SPSC reveals that substitute restrictive measures were occasionally imposed.⁷⁹³ Substitute restrictive measures could be ordered by the Investigating Judge in cases where there was a risk of interference with witnesses, victims or other persons participating in the proceedings or in cases where there was a risk of destruction of evidence.⁷⁹⁴ Furthermore, the Investigating Judge could order that bail or another surety was posted, in addition to restrictive measures, to ensure the appearance of the suspect or accused at trial.⁷⁹⁵ Where this provision thus seemed to limit the application of these measures to instances where such was necessary to protect evidence, it has been argued that such measures could also be imposed where there could be a risk of flight or of public security and safety.⁷⁹⁶ The measures provided for in the TRCP included house arrest, geographic limitations of the

⁷⁹⁰ *Ibid.*, par. 18.

⁷⁹¹ SPSC, Decision on the Application for Release of the Accused Abilio Mendez Correia, *Prosecutor v. Abilio Mendez Correia*, Case No. 19/2001, SPSC, 10 June 2003, par. 14-15 (*in casu*, where the court could not assure that the trial would commence within one month, the proximity of the trial could not be considered to be reason to keep the accused person under detention); SPSC, Decision to the Application for Release of the Accused Carlos Ena, *Prosecutor v. Carlos Ena*, Case No. 5/2002, SPSC, 12 June 2003, par. 21.

⁷⁹² See *e.g.* SPSC, Decision to the Application for Release of the Accused Lino De Carvalho, *Prosecutor v. Lino Carvalho*, Case No. 10/2001, SPSC, 28 October 2002, par. 17.

⁷⁹³ Consider *e.g.* SPSC, Hearing of 20.02.2001, *Prosecutor v. Joseph Leki*, Case No. 05/2000, SPSC, 21 January 2001, p. 2 (house detention pursuant Section 21.1 (a) TRCP); SPSC, Decision on the Application for Release of the Accused Abilio Mendez Correia, *Prosecutor v. Abilio Mendez Correia*, Case No. 19/2001, 10 June 2003, par. 27; SPSC, Decision to the Application for Release of the Accused Lino De Carvalho, *Prosecutor v. Lino Carvalho*, Case No. 10/2001, SPSC, 28 October 2002, par. 51 (p. 9).

⁷⁹⁴ Section 21 (1) TRCP.

⁷⁹⁵ Section 21 (2) and (3) TRCP.

⁷⁹⁶ S. ZAPPALÀ, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the Special Panels for Serious Crimes, Vol. XIII, Antwerp, Intersentia, 2008, p. 100. According to ZAPPALÀ, where Section 21 (1) only refers to one of the conditions for detention, substitute measures can also be imposed where there exists a risk of flight or a danger to public security and safety. Limiting such measures to instances where there exists a risk of interference with evidence is “only a mistaken impression based on a mere textual reading of the provisions.” It is this author’s opinion that the reading together of Section 21 (1) and (2) clarifies that substitute restrictive measures can equally be imposed where detention is grounded on a risk of flight.

freedom of movement, periodic checks on the suspect, or the prohibition to visit certain places or to speak to named individuals.⁷⁹⁷ In *Carvalho*, the SPSC held that the (procedural) principle of legality limited the substitute restrictive measures that could be imposed to those restrictive measures enunciated in Section 21 (1) UNTAET Regulation 2000/30. However, the SPSC seemed to leave the door open for the imposition of other measures where the Court believed they were necessary “to ensure the integrity of evidence related to the alleged crime or the safety and security of the victims, witnesses” and provided that these measures were “necessary and lawful.”⁷⁹⁸

The conditions imposed included the prohibition to interfere, harass or endanger victims or witnesses. Such a restrictive measure was limited to the protection of victims and witnesses in the case concerned and it was *no general measure of security*.⁷⁹⁹ These measures served different objectives, to know the guarantee the implementation of the penalty or the broader administration of justice (including the preservation of the investigation and preventing the further commission of offences).⁸⁰⁰

In ordering conditional release (the imposition of alternative measures), personal assurances and assurances of the community to which the suspect or accused sought to be released were important.⁸⁰¹

⁷⁹⁷ Section 21 (1) TRCP.

⁷⁹⁸ SPSC, Decision to the Application for Release of the Accused Lino De Carvalho, *Prosecutor v. Lino Carvalho*, Case No. 10/2001, SPSC, 28 October 2002, par. 21. According to ZAPPALÀ, the procedural principle of legality requires that procedural provisions clarify the circumstances and the conditions in which detention can be imposed. However, he doubts whether more lenient measures must be set out in the same detailed manner: see S. ZAPPALÀ, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the Special Panels for Serious Crimes, Vol. XIII, Antwerp, Intersentia, 2008, p. 99. Reference is made to the decision in *Blaškić* where the ICTY President allowed for house arrest in the absence of any explicit provision for it. The reasoning was that where pre-trial detention is allowed for, every more lenient restriction of the right to liberty should be allowed for. This may formally be at tension with the procedural principle of legality but respects the presumption of innocence. See the discussion of this decision, *supra*, Chapter 8, II.2.9. Consider also SPSC, Decision on the Application for Release of the Accused Abilio Mendez Correia, *Prosecutor v. Abilio Mendez Correia*, Case No. 19/2001, SPSC, 10 June 2003, par. 19.

⁷⁹⁹ SPSC, Decision to the Application for Release of the Accused Jose Cardoso Ferreira alias Muzhino, *Prosecutor v. Franca da Silva alias Jhoni Franca et al.*, Case No. 04/2001, SPSC, 27 April 2002, par. 19, 22; SPSC, Decision to the Application for Release of the Accused Lino De Carvalho, *Prosecutor v. Lino Carvalho*, Case No. 10/2001, SPSC, 28 October 2002, par. 25 (p. 7).

⁸⁰⁰ SPSC, Judgment, *Prosecutor v. Carlos Ena*, Case No. 5/2002, COA, 24 September 2003, p. 9.

⁸⁰¹ SPSC, Decision on the Application for Release of the Accused Abilio Mendez Correia, *Prosecutor v. Abilio Mendez Correia*, Case No. 19/2001, 10 June 2003, par. 20 -21.

II.4.3. Special Tribunal for Lebanon

Similar to the ICC, the STL provides for an alternative to pre-trial detention and for a suspect or an accused “*not* to be arrested and *not* to be held in custody in The Hague during pre-trial proceedings.”⁸⁰² Indeed, as previously explained, the procedural set-up of the STL provides for the possibility for the suspect or accused to appear before the tribunal following a summons to appear, without being detained, or following the issuance of a safe conduct.⁸⁰³

Leaving these alternative routes aside, the statutory framework of the STL clearly confirms pre-trial release as the rule and detention as the exception. This exceptional nature of provisional detention was confirmed by the Pre-Trial Judge. In some of the first orders issued so far by the STL, he held that detention is only warranted where it proves strictly necessary.⁸⁰⁴ Caution is necessary and given the lack of sufficient practice, it remains to be seen whether a practice of pre-trial release will emerge.⁸⁰⁵

However, different additional elements of the procedural set-up of the pre-trial detention and release regime confirm the exceptional character of pre-trial detention. They include (1) the limitation of provisional detention to certain categories of persons; (2) the putting of the burden on the Prosecutor in release applications; (3) the installment of a periodic detention review mechanism and (4) the obligation incumbent on the Pre-Trial Judge or Chamber to ensure that the person is not detained for an unreasonable period of time due to inexcusable delay by the Prosecutor.

⁸⁰² See e.g. STL, Rules of Procedure and Evidence: Explanatory Memorandum by the Tribunal’s President, 25 November 2010, par. 25.

⁸⁰³ Rule 78 and Rule 79 STL RPE respectively. See *supra*, Chapter 7, IV.

⁸⁰⁴ STL, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06, PTJ, 29 April 2009, par. 22; STL, Order Setting a Time Limit for Filing of an Application by the Prosecutor in Accordance with Rule 17 (B) of the Rules of Procedure and Evidence, Case No. CWPTJ/2009/03, PTJ, 15 April 2009, par. 7. It may also be noted that at the occasion of the last amendment of the STL RPE, all references to ‘provisional release’ were replaced by ‘release’. Such amendment was made “as to clarify that detention, and not release, is exceptional.” See STL, Summary of the Accepted Rule Amendments and some Key Rejected Rule Amendment Proposals Pursuant to Rule 5 (I) of the Special Tribunal for Lebanon’s Rules of Procedure and Evidence (Third Plenary of Judges), November 2010, p. 50.

⁸⁰⁵ It is noted that the first case before the STL proceeds *in absentia*.

§ *Detention on remand*

Rather than providing for automatic pre-trial detention following transfer, Rule 101 STL RPE provides for detention on remand for specific categories of persons. These categories include (i) detained persons transferred to the tribunal (which category includes persons that are detained in Lebanon in the case of the attack against Prime Minister Rafiq Hariri and others and whose transfer is sought by the tribunal⁸⁰⁶ as well as other persons detained by the Lebanese authorities whose transfer to the tribunal is sought⁸⁰⁷), (ii) the detention of suspects or accused arrested by Lebanon or another state following a warrant of arrest and who are transferred to the tribunal (Rule 83 STL RPE), and (iii) the detention of accused persons arrested following their voluntary appearance at the tribunal.⁸⁰⁸ Additionally, it should be reiterated that the issuance of a warrant of arrest does not only require the confirmation of the indictment but (in line with the ICC) also presupposes the existence of a legitimate ground for detention, to know (1) to ensure the appearance of a person ‘as appropriate’, (2) to prevent the obstruction or endangerment of the investigation or prosecution by the person, including through interference with witnesses or victims or (3) to prevent criminal conduct of a kind of which he stands accused.⁸⁰⁹ The preservation of the public order is not included as a legitimate ground. Similarly, the transfer and provisionally detention of a suspect does not only presuppose that the person qualifies as a suspect, but requires that detention is necessary (1) to prevent the escape of the suspect, (2) to ensure that the person does not obstruct or endanger the investigation or the court proceedings (for instance by posing a danger to, or intimidating, any victim or witness), or (3) to prevent criminal conduct of a kind of which he is suspected.⁸¹⁰

⁸⁰⁶ Consider in particular Article 4 (2) STL Statute and 17 (A) and (B) STL RPE. As noted by the STL Pre-Trial Judge, Article 4 (2) STL Statute should not be understood as implying that *all* persons detained in Lebanon in connection with the Hariri case should be transferred to the tribunal, including persons the Pre-Trial Judge considers to release, at the request of the Prosecutor. See STL, Order Directing the Lebanese Judicial Authorities Seized with the Case of the Attack against Prime Minister Rafiq Hariri and Others to Defer to the Special Tribunal for Lebanon, Case No. CH/PTJ/2009/01, PTJ, 27 March 2009, par. 12 – 15.

⁸⁰⁷ The transfer of other persons detained by the Lebanese authorities to the custody of the tribunal pursuant to Rule 17 (G) STL RPE and Rule 80 STL RPE (temporary surrender of detained person).

⁸⁰⁸ Rule 101 (A) STL RPE. It has been proposed to limit detention on remand following transfer to seven days, during which period the Prosecutor would have to request the provisional detention of the suspect or accused. This proposed amendment was rejected. See STL, Summary of the Accepted Rule Amendments and some Key Rejected Rule Amendment Proposals Pursuant to Rule 5 (I) of the Special Tribunal for Lebanon’s Rules of Procedure and Evidence (Third Plenary of Judges), November 2010, p. 49.

⁸⁰⁹ Rule 79 (A) STL RPE. See the discussion on warrants of arrest, *supra*, Chapter 7, II.1.

⁸¹⁰ Rule 63 (B) (ii) and (iii) STL RPE. See the discussion on the arrest and provisional detention of suspects, *supra*, Chapter 7, III.3.

A right for the *accused* to apply for release is provided for under Rule 101 (B) STL RPE. According to Rule 102 (A) STL RPE, release may only be *refused* if (i) detention is necessary to ensure appearance at trial, (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings, (for instance by posing a danger to, or intimidating, any victim or witness), or (iii) to prevent criminal conduct of a kind of which he is suspected. It is clear from the wording of the provision that the burden is on the Prosecutor to show that provisional detention is necessary.⁸¹¹ The Pre-Trial Judge rightly argued that implicit in Rule 101 (A) STL RPE is the requirement, in line with international human rights standards, that the person is suspected or accused of a crime within the jurisdiction of the tribunal.⁸¹² He added that “[i]f that condition is not met, reviewing the other conditions for provisional detention set out in Rule 102 becomes superfluous.”⁸¹³ As shown before, the case law of the ECtHR clarified that the persistence of a reasonable suspicion is a *sine qua non* for the validity of the continued detention.⁸¹⁴

Similarly, a right of the *suspect* provisionally detained at the seat of the tribunal and the Prosecutor to apply for release is provided for.⁸¹⁵ Following the amendment of Rule 101 (B) STL RPE, the test of Rule 63 STL RPE is to be applied to such applications.⁸¹⁶ As previously mentioned, it requires that the Pre-Trial Judge should consider continued detention to be a necessary measure (a) to prevent the escape of the suspect, (b) to ensure that the person does not obstruct or endanger the investigation or the court proceedings, including by posing a danger to, or intimidating, any victim or witness, or (c) to prevent criminal conduct of a kind of which he is suspected.⁸¹⁷ In line with other tribunals, both the host state and the state to which the person seeks to be released should be heard prior to release.⁸¹⁸

⁸¹¹ For a confirming view, consider M. GILLETT and M. SCHUSTER, The Special Tribunal for Lebanon Swiftly Adopts Its Rules of Procedure and Evidence, in *Journal of International Criminal Justice*, Vol. 7, 2009, p. 889.

⁸¹² STL, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06, PTJ, 29 April 2009, par. 30.

⁸¹³ *Ibid.*, par. 30.

⁸¹⁴ See *supra*, Chapter 7, V.4.1; Chapter 8, 2.10.

⁸¹⁵ Rule 63 (G) STL RPE. It follows from 63 (H) STL RPE that Rules 101 and 102 STL RPE regarding detention on remand of accused persons apply *mutatis mutandis* to the detention of suspects.

⁸¹⁶ Rule 101 (B) STL RPE as amended at the occasion of the Third Plenary of Judges, 10 November and corrected on 29 November 2010 (STL/BD/2009/01/Rev. 3).

⁸¹⁷ Rule 63 (B) (iii) STL RPE.

⁸¹⁸ Rule 101 (C) STL RPE.

§ Periodic review of the ruling on release or detention

Further proof of the exceptional character of pre-trial detention can be found in the requirement incumbent on the Pre-Trial Judge or Chamber to review its ruling on detention or release at least every six months (periodic review), or at any time at the Prosecutor's or detained person's request.⁸¹⁹ At such occasion, the Pre-Trial Judge or Chamber may review its decision, if 'changed circumstances' require so.⁸²⁰ While no strict time limitations for the length of detention are provided for, Rule 101 (E) STL RPE stipulates that the tribunal should ensure that the person is not detained for an unreasonable period *due to an inexcusable delay by the Prosecutor*. If such delay occurs, the Pre-Trial Judge or Chamber *may* order release, with or without conditions.⁸²¹

§ Conditional release

Conditional release may be ordered, including a bail bond.⁸²² Conditions that may be imposed should be necessary to ensure the presence of the accused at trial or for the protection of others.

Lastly, decisions in relation to release are appealable. When the Prosecutor appeals this decision, the appeal should be filed within one day and when the detained person appeals, the appeal should be filed within seven days.⁸²³ The Prosecutor may request a stay of the decision on release pending the appeal.⁸²⁴

⁸¹⁹ Rule 101 (D) STL RPE. Previously, Rule 101 (D) only referred to a 'periodic review'. During the 3th revision of the RPE, the provision was amended to clarify that the 'periodic review' implies that the decision should be reviewed at least every six months. See the STL RPE as amended on 10 November 2010 at the occasion of the third plenary of Judges and corrected on 29 November 2010 (STL/BD/2009/01/Rev.3 (Incorporating STL/BD/2009/01/Rev.3/Corr. 1)). Compare with the periodic review mechanism provided for in Article 60 (3) ICC Statute and Rule 118 (2) ICC RPE, which was previously discussed, *supra*, Chapter 8, II.3.3.

⁸²⁰ Rule 101 (D) STL RPE.

⁸²¹ Emphasis added. It should be reiterated that the period a suspect can be detained on remand (detention prior to the confirmation of the indictment) is limited. Consider Rule 63 (D) STL RPE ('in the event the indictment has not been confirmed and an arrest warrant signed by the Tribunal, the suspect *shall* be released or, if appropriate, delivered to the authorities of the requested State' (emphasis added)).

⁸²² Rule 102 (B) STL RPE.

⁸²³ Rule 102 (C) STL RPE.

⁸²⁴ Rule 102 (D) STL RPE.

PRELIMINARY FINDINGS

In this chapter, the provisional detention and release regimes of the different international(ised) criminal courts and tribunals under review were analysed in depth. On the basis of this analysis, a number of conclusions can now be drawn. It was found that whereas most tribunals scrutinised proclaim that pre-trial release is the rule and detention the exception, the *ad hoc* tribunals and the SCSL hold that detention is neither the rule nor the exception and that the particular circumstances of each case should be considered. This approach was critically evaluated in light of international human rights norms, which clearly require that release is the norm and detention the exception.

The other institutions under review proclaim that pre-trial liberty is the rule and pre-trial detention the exception. That said, the practice does not always confirm this picture. Therefore, rather than taking such pronouncements for granted, a number of ‘features’ were discussed above which can be reflective of a system where pre-trial release is the rule. These factors include: (i) the absence of discretion for the Judges in decisions on provisional detention/interim release, (ii) the requirement that one or more legitimate grounds are present for the ordering of provisional detention, (iii) the fact that the burden of proof in decisions on provisional detention/interim release is on the Prosecutor, (iv) the presence or not of a periodic review mechanism regarding pre-trial detention, (v) strict time limitations for provisional detention and (vi) the possibility for the Judges to order conditional release.

With regard to the first of these ‘features’, a distinction can be drawn. The practice of the *ad hoc* tribunals and the SCSL leaves *discretion* to the Judges to deny provisional release where all conditions have been fulfilled. Other tribunals under review reject the idea of such judicial discretion in decisions on provisional detention/interim release. The removal of judicial discretion is a remarkable improvement where the analysis of international human rights norms clearly depicts that the accused should be released where no ‘genuine requirement of public interest’ is present, which outweighs the person’s right to personal liberty. Furthermore, the absence of discretion enhances transparency.⁸²⁵ Since not only the ICC, but also the internationalised criminal courts and tribunals discussed do not leave any discretion

⁸²⁵ C.L. DAVIDSON, No shortcuts on Human Rights: Bail and the International Criminal Trial, in «American University Law Review», Vol. 60, 2010, p. 61.

with the Judges in provisional detention/release cases, it may be concluded that there is a tendency to remove judicial discretion in provisional release/detention matters. Where judicial discretion *is* provided for, it is important that *proportionality* constitutes an independent consideration with regard to a decision on provisional detention/interim release.

The ICC as well as the internationalised criminal tribunals discussed require that pre-trial detention is necessary for one or more *legitimate purpose(s)*. In contrast, the *ad hoc* tribunals and the SCSL provide for a regime of automatic pre-trial detention, absent any showing of the necessity thereof. The requirement of a legitimate purpose brings the provisional detention/interim release regime in line with international human rights norms. As indicated above, it follows from the jurisprudence of the ECtHR that the persistence of a reasonable suspicion is a *conditio sine qua non* for the lawfulness of the continued detention. However, after a certain amount of time, the persistence of a reasonable suspicion can no longer suffice. A ‘genuine requirement of public interest’ should exist for continued detention, which, notwithstanding the presumption of innocence, outweighs the person’s right to personal liberty.

With regard to the *burden of proof*, it emerges from the analysis above that the *ad hoc* tribunals and the SCSL clearly put the burden of proof on the accused. In contrast, the other international(ised) criminal tribunals scrutinised put the burden of proof on the Prosecutor. It was concluded that such an approach stands to be preferred where the former approach violates human rights law. Putting the burden on the Prosecutor is characteristic of a system which considers pre-trial detention to be the exception and release to be the rule. However, it was noted with concern that even in those systems which purport that the burden of proof is on the Prosecutor, in practice this burden was often shifted to the accused. Notably, on many occasions, Pre-Trial Chambers of the ICC effectively shifted the burden to the accused when they took the *ex parte* decision on the warrant of arrest as their point of departure for the consideration of a request for provisional release.

Most tribunals scrutinised above make allowance for a *periodic review mechanism* of pre-trial detention, or a review at the occasion of the extension of the pre-trial detention (ICC, SPSC, STL and ECCC). It was concluded that such a review mechanism provides the detained person with an effective safeguard against the undue prolongation of the detention. It follows from international human rights norms that pre-trial detention should be limited in time and

that the person has a right to be tried within a reasonable time or to be (conditionally) released. Furthermore, this mechanism allows the taking into consideration of any changed circumstances.

Furthermore, it was found that none of the international criminal tribunals and only some internationalised criminal tribunals (ECCC, SPSC) provide for strict time limitations of any provisional detention. The international criminal tribunals in particular would benefit from such time limitations where accused persons usually spend a very long time in pre-trial detention. However, as a general rule, all tribunals acknowledge that persons should not be detained for an unreasonable period in pre-trial detention.

Finally, all tribunals scrutinised provide for the possibility of *conditional release*. It was argued that conditions imposed should serve to negate or mitigate the risks which allow for pre-trial detention. This ensures that substitute restrictive measures are ordered in accordance with the principle of subsidiarity. It was argued that, unlike at the ICC, the ordering of conditional release should not be discretionary. In order to fully comply with the principle of subsidiarity, conditional release should be ordered where the conditions imposed suffice to safeguard the legitimate grounds for provisional detention under Article 58 (1) (b) ICC Statute.

In general, it is difficult to identify shared rules and/or practices with regard to provisional detention/interim release. Nevertheless, some further commonalities can be identified. First, while not strictly required under human rights law, all international(ised) criminal tribunals seem to allow for interlocutory appeals against provisional detention/release decisions. It was noted with concern that at several tribunals scrutinised (ICC, ECCC) substantive delays exist before a decision on appeal is rendered.

All tribunals reviewed recognise the interference with victims, witnesses or other persons as a ground legitimising pre-trial detention or, alternatively, require the absence of any risk of such interference as a pre-condition for provisional release. It was noted with concern that not all tribunals require the identification of a concrete danger of interference. Therefore, it was argued that the identification of a concrete danger should be required and that general witness fears should not be considered sufficient. The mere compliance of the Prosecutor with disclosure obligations should not prevent the provisional release of accused persons. In a

similar vein, all tribunals recognise the risk of flight as a public interest requirement justifying pre-trial detention or require the absence of any risk of flight as a precondition for the ordering of provisional release. A gamut of factors was identified which are usually considered by the tribunals in the assessment of such risk. The single most important factor is probably the voluntary surrender of the suspect or accused. In addition, the gravity of the crimes as well as the possibility of a lengthy prison sentence are factors which are often considered. Human rights law requires that these factors are not considered in isolation.

Other grounds justifying the pre-trial detention are not commonly shared. They include the contribution to the further commission of the crimes, the prevention of collusion, the more general protection of evidence, the protection of the security of the person or the preservation of the public order. It was noted that these public interest requirements are compatible with international human rights law. Notably, at least some of the concerns underlying these justifying grounds are also considered by the *ad hoc* tribunals and the SCSL where they exercise their discretion to refuse provisional release.

Further, it emerges that a major obstacle to provisional release lays in the *de facto* requirement that the host state agrees to allow the accused on its soil and guarantees that the person will appear for trial and will not interfere with witnesses, victims or other persons. Tellingly, the ICC Appeals Chamber refused the conditional release of Bemba, where no state had been identified that was able to impose the conditions. It was argued that States Parties are under an obligation to receive persons provisionally released. Arrangements should be made to ensure the state cooperation with regard to conditional release.

Finally, several international(ised) criminal courts and tribunals have allowed for the release of the person detained prior to the commencement of the trial on humanitarian/compassionate grounds. These releases are usually determined on a case-by-case basis, taking into consideration all circumstances. Therefore, no general rules could be discerned.

SECTION V: CONCLUSIONS

Chapter 9: General Conclusions and Recommendations

I. INTRODUCTION

This concluding chapter summarises and synthesises the main findings of this study and formulates a number of recommendations. Tendencies which have been noted have been included where relevant. In this manner, it seeks to answer the central research question formulated at the beginning. It should be recalled that in this study, an answer was sought to the question of (i) whether any rules and/or practices on the investigation phase in international criminal procedure are commonly shared by the different international(ised) criminal courts and tribunals under review? This question will be discussed in Parts II (Main Findings) and III (Commonly Shared Rules Identified) below. Additionally, (ii) what changes to these rules are necessary to guarantee the fairness of these investigations has been asked. This question will be answered in Part IV of this Chapter (Recommendations).

II. MAIN FINDINGS

II.1. The obstacles in identifying commonly shared rules

Several obstacles have been identified at the outset of this study, which make the identification of common rules on the conduct of investigations a hazardous undertaking. Overall, it was found that international criminal procedure lacks a strong theoretical foundation, which takes its specific characteristics and its intended goals into consideration. International criminal procedure is still at a nascent stage. Some uncertainties still surround its sources. Among others, it was found that the prospects of identifying rules of customary international law or general principles of law on criminal procedure are limited considering the important differences which exist between domestic criminal justice systems. However, contradicting this observation, the jurisprudence of the international criminal courts and tribunals often draws from certain national practices, resolving procedural questions in a rather 'freestyle' manner. In addition, a lack of clarity persists as to the goals international criminal justice and international criminal procedure are intended to serve. Where these international(ised) criminal courts and tribunals proclaim to serve a plethora of goals, their

(hierarchical) relationship remains unclear. This takes a great deal away from the normative force of these objectives. While it is possible to say something meaningful on the manner in which proceedings should be designed on the basis of any of these goals in isolation, different goals call for different answers which are not compatible *per se*. How a clear ranking order and understanding on the compatibility of different goals is a prerequisite for the tailoring of the courts' procedural set-up to match the most important goals these courts are set to achieve has also been illustrated. A potential solution could be the singling out of those goals which international criminal justice and procedure do not share with domestic criminal justice systems. However, this does not resolve all of the remaining questions. An example may illustrate how certain goals may influence the procedural design. The present study has shown how the affiliation of a suspect to a certain faction or group is sometimes taken into account by the international Prosecutor in order to have a balanced approach and to prosecute all the parties that committed crimes within the jurisdiction of the court or tribunal. It may be argued that this approach is legitimate in light of at least some of the goals these courts and tribunals were intended to serve. In particular, the goals of restoring peace and security or reconciliation may be better served by this 'balanced approach'.

Lastly, uncertainty remains as to the extent to which human rights norms may be tailored to the specific exigencies and unique characteristics of proceedings before international(ised) criminal tribunals ('contextualised'). It was found that the jurisdictions included are internally bound by human rights law. In addition, a number of jurisdictions covered explicitly attribute an interpretative function to these norms. Furthermore, it was held that some adaptation of international human rights norms is necessary. However, it proved to be much more difficult to determine the level of adaptation or contextualisation which would be acceptable. A cautionary approach is called for where the specific characteristics of international criminal proceedings are relied upon to justify the contextualisation of international human rights norms. In most instances where the adaptation has been suggested, this has had the effect of lowering the protection offered by these norms. Risks are involved where international(ised) criminal courts and tribunals can adjust international human rights norms they are bound to respect to suit their own needs and this in the absence of outside scrutiny. It was shown how in general, international human rights norms are flexible enough *not* to require any adjustment or re-orientation. In most instances, the necessity of contextualisation falls within the ambits, of and is accommodated by, the flexibility inherent to international human rights norms. It

allows for the balancing of different interests and the adaptation to the unique circumstances of international criminal proceedings.

Any contextualisation surpassing these boundaries should be treated with caution. If not, the contextualisation of international human rights may well prevent these norms from realising to the full extent their potential as ‘minimum standards’, which should not only be upheld by the international(ised) criminal courts and tribunals, but also by national criminal justice systems and other international actors involved in the investigation. After all, this presupposes that the same minimum level of protection is guaranteed by the different jurisdictions involved in the conduct of investigations (the court or tribunal, national criminal justice systems and other international actors). Of course, this presupposes in turn that these international human rights norms are also binding on the national jurisdictions and international organisations (be it in the form of treaty obligations, or in so far as they reflect a rule of customary international law or a general principle of law). In this manner, international human rights norms have the ability to prevent, to some extent, that the fragmentation, which results from the division of labour between the international and national level in investigating these crimes would be to the detriment of the protection of the suspect or accused person.

A good illustration of this potential was offered by ICC Trial Chamber II in the *Katanga and Ngudjolo Chui* case. Where the Chamber held that the procedural right to remain silent under Article 55 (2) (b) ICC Statute only applies where a suspect is interrogated by the Court or by national authorities ‘at its behest’, the Trial Chamber still decided to exclude from evidence a self-incriminating statement made by the accused during national proceedings which were unrelated to the Court, provided that the interrogation breached ‘internationally recognized human rights’.

One important shortcoming has also been noted regarding the use of international human rights norms as an evaluative tool to answer the second part of the central research question (‘what changes to these rules are necessary to guarantee the fairness of these investigations’). Human rights are not sufficiently detailed to determine the manner in which international criminal proceedings ought to be organised and what procedural system should be preferred. Different procedural solutions may be considered that are in conformity with these more abstract minimum rules. This holds equally true for the organisation and structure of the investigation phase.

In general, many hurdles exist for every attempt to determine any common norms of international criminal procedure on the investigation phase. These obstacles may well frustrate any effort to discern commonly shared rules on the conduct of investigations in the law of international criminal procedure. Nevertheless, and notwithstanding the important inconsistencies, the identification of some common rules proved to be possible.

II.2. The importance of the status of person(s) affected by the investigation

On several occasions, the importance of objective definitions of the status of the individuals involved in the investigation (witnesses, suspects or accused persons) was highlighted, where different rights and safeguards apply to these categories of individuals. The definitions of ‘suspect’ and ‘accused persons’ have important protective consequences. In addition, the status of the person concerned may determine whether that person can be arrested or not. These definitions should strictly be applied in international criminal investigations. For example, from the moment any facts arise during the questioning of a witness, on the basis of which there are grounds to believe that the witness has committed a crime falling within the jurisdiction of the court or tribunal, he or she should be treated as a suspect.

II.3. The ‘under regulation’ of the investigation stage of proceedings

On several occasions throughout this study, it was felt that the law of international criminal procedure relevant to the investigation phase lacks the detail to sufficiently safeguard the fairness of these investigations *vis-à-vis* the persons targeted thereby. While a tendency towards more detailed regulation can be noted (consider e.g. Article 59 ICC Statute on arrest proceedings in the custodial state), further regulation seems required to ensure the fairness of proceedings.

This is best felt with regard to the investigative powers of the international Prosecutor, which, in many instances, are generic at best. It was concluded that the applicability of a procedural principle of legality to the law of international criminal procedure cannot easily be established, and how the incorporation thereof in the ICC Statute was explicitly rejected during the negotiations. However, even in the absence of this principle, in cases where investigative acts infringe upon the rights and liberties of the individuals concerned, it follows from the lawfulness requirement (‘in accordance with the law’) under human rights law that

sufficient procedural safeguards should be in place. More precisely, international human rights law requires a regulation which is sufficiently detailed and precise (foreseeable) as well as adequately accessible for any infringement of the rights of individuals. It is doubtful whether the current state of international criminal procedure is in full conformity with this requirement. In addition, the ECtHR has confirmed the requirement that procedures be laid down by law on several occasions.

It could be objected that the broad nature of investigative powers should be understood in light of the necessity to rely on the cooperation of states and in light of the fact that these investigative actions are normally executed under domestic law. However, this response is insufficient. Domestic requirements may not be provided for in the specific case or are circumvented. In addition, practice has proven that investigative acts are sometimes executed through an agency (e.g. the execution of a search and seizure operation by SFOR on behalf of the ICTY Prosecutor in Bosnia and Herzegovina). Furthermore, the Prosecutor may sometimes execute coercive measures directly on the territory of the state concerned. In all of the above situations, gaps in the protection of suspects, accused persons or persons otherwise affected by the investigation may arise. In general, where these broad powers result in much discretion being left to the actors involved in the investigation, and where these actors tend to borrow from municipal criminal procedure, this may lead to unclear situations and incoherencies, especially where domestic concepts undergo a transformation when they are adopted by international(ised) criminal tribunals.

The rudimentary regulation of the Prosecutor's power to conduct non-custodial coercive investigative actions has clearly been shown. Most international(ised) criminal courts were found to regulate individual non-custodial coercive measures (including search and seizure operations, interception of communications, etc.) in a very limited manner only, or even do not provide for any regulation, in which case the power to rely on these investigative measures follows directly from the overarching prosecutorial power to collect evidence. This contrasts greatly with the more 'civil law style inspired' design of the investigation phase at the SPSC and the ECCC. In general, the ECCC and the SPSC provide for a detailed set of formal and material procedural conditions for the use of individual investigative actions. Particularly problematic is the absence of any provision concerning the rights of suspects or accused persons (or persons otherwise involved) with regard to these coercive investigative actions. As an example, it was noted how Article 55 (2) ICC Statute only focuses on the rights

of suspects during questioning. A proposal, during the negotiations on the Rome Statute, to include an express search and seizure privacy right has also been rejected.

On other occasions, procedural norms were also judged to lack in detail. For example, how only the procedural frameworks of the ICC and the ECCC provide for detailed procedural rules on the taking of witness statements has been discussed. The case law of the *ad hoc* tribunals merely provides us with guidelines as to the ideal standard for the taking of witness statements. Nevertheless, in light of the possibility of introducing these statements in evidence, public, detailed, and standardised procedures for the taking of witness statements are an important tool in enhancing the transparency of the questioning and the statement-taking process. While the inclusion of these detailed technical rules in the RPE may be objected to, these rules may for example be included in practice directions (cf. STL) or standard operating procedures, provided that they are made publicly available.

II.4. Gaps in the legal protection of suspects and accused persons

How the fragmentation of investigations over different jurisdictions may lead to a reduction in the legal protection of the persons affected and may lead to *lacunae* in their protection has been highlighted. This will be the case if international(ised) criminal courts and tribunals decline responsibility for acts carried out by states at the tribunal's request or for other external events from which they benefit.

The shared responsibility of the tribunals and the states whose cooperation is sought in protecting the human rights of the individual(s) concerned should be accepted, in order to address these potential reductive effects. Consequently, both the court and the requested state have the responsibility to protect the rights of the individual(s) concerned where cooperation is sought from states or other international actors. In this regard, some jurisprudence to the contrary notwithstanding, the case law of the *ad hoc tribunals* concerning arrest and detention confirmed that shared responsibilities exist between the tribunal and the requested state in the effectuation of the arrest and detention in the requested state. The tribunal is responsible for *some* aspects of the deprivation of liberty at its behest. In this regard, the Prosecutor has a duty of due diligence. Where it has been argued that the court should take responsibility for all violations that occurred in the context of the case, this stance seems only to be confirmed with regard to the remedy of setting jurisdiction aside. Nevertheless, it is illogical to take

responsibility for the violations of third parties where these amount to an abuse of process but to refuse to take this responsibility for lesser violations by third parties. It was shown how none of the jurisdictions under review proved willing to take responsibility for *all* violations of the person's rights, even where they cannot be attributed to the tribunal. The ICC has so far refused to take responsibility for violations which occurred prior to the sending of the cooperation request where there had not been a concerted action, even in relation to violations that would warrant a permanent stay of proceedings, if they were committed by one or more court organs. In general, and in order to prevent gaps in the protection of the suspect or accused person, it will be recommended below that the Court should take responsibility for all violations in the context of a case.

As a caveat, the acceptance of the shared responsibility of states and international(ised) criminal courts and tribunals may occasionally lead to a reduction of efficiency. An example may serve to clarify this point. Judicial supervision by the international(ised) criminal tribunal or court should be provided for where the Prosecutor resorts to the use of coercive investigative measures, in order to safeguard the rights of the suspect or accused person, as will be recommended below. However, where a coercive measure is then normally carried out by national law enforcement officials under domestic law, following a request from the Prosecutor, it may well be that a judicial authorisation should also be obtained at the national level, which in turn, results in the duplication of work and a loss of efficiency.

The potential reductive effects of the fragmentation of international criminal investigations is also why provisions such as Article 59 ICC Statute are important. This provision details how a State Party, which receives a request from the Court for the (provisional) arrest and surrender of a person, should execute this request. In this manner, this provision has the potential of preventing gaps in the protection of the rights of the person arrested, and guarantees at least the protection of international criminal procedure. It was nevertheless shown that several aspects of this provision are not entirely clear, including the precise scope of the rights persons arrested are entitled to and what the proper process to be followed is. In addition, whether the right of every person deprived of liberty under human rights law to be promptly brought before a judge or a 'judicial officer' is fully protected by Article 59 (2) ICC Statute remains uncertain, where the competent judicial authority cannot review whether the warrant of arrest was issued properly and where it cannot order release. The mechanism providing that the legality of the warrant of arrest may be challenged before the Pre-Trial

Chamber may not fully resolve these shortcomings where this procedure is not automatic in nature.

III. COMMONLY SHARED RULES IDENTIFIED

III.1. Procedural safeguards (shield dimension of international criminal procedure)

The many differences in the procedural constellations of the jurisdictions covered notwithstanding, some similarities could be identified through the comparative analysis of the procedural frameworks. Furthermore, many of the rules so identified reflect or confirm (or occasionally even surpass) international human rights norms. In particular, a number of procedural safeguards were identified which were earmarked as firmly established in international criminal procedure. Still, regarding other rules, how far newer courts and tribunals will follow the established practice of their predecessors, and of the *ad hoc* tribunals in particular, remains to be seen. So far, the practice of the ICC has proven that the willingness to accept this practice should not necessarily be taken for granted.

A substantial number of procedural safeguards were identified with regard to the interrogation of suspects and accused persons under international criminal procedure: (i) the right for suspects and accused persons to have the assistance of counsel during interrogation, (ii) the right for the suspect or the accused person to be informed about the right to be assisted by counsel during the interrogation as well as the possibility to waive it, provided that this waiver is given voluntarily, (iii) the right for the suspect or accused person to remain silent during questioning, of which right the suspect or the accused person should be informed prior to the start of the interrogation, (iv) the prohibition of the use of forms of oppressive conduct, including coercion, duress, threats as well as torture or other forms of cruel, inhuman or degrading treatment or punishment as well as (v) the right of the *accused* person to be informed in detail about the nature and cause of the charges against him or her, in a language he or she understands, and prior to the start of the interrogation. Lastly, (vi) the suspect or accused person enjoys the right to the free assistance of an interpreter during interrogation, if he or she cannot understand or speak the language used.

Moreover, a number of safeguards, while not commonly shared by all jurisdictions, are provided for by the procedural frameworks and/or practice of the majority of them. These include (i) the right that in cases where the waiver of the right to counsel is revoked, the questioning should stop immediately and only start again when counsel has been assigned to the suspect or accused. Neither the ICC Statute nor the RPE explicitly mention this requirement. Moreover, and with the exception of the ECCC and the SPSC, the international(ised) criminal courts and tribunals reviewed provide that (ii) the suspect or accused should be cautioned that his or her statement can be used in evidence at trial. Furthermore, the case law or the relevant procedural rules of the majority of tribunals and courts hold that (iii) no adverse inferences can be drawn from the silence of the suspect or the accused person and that (iv) the suspect is to be informed, prior to the start of the interrogation, that there are reasonable grounds to believe that he or she has committed a crime within the jurisdiction of the court. All but one (SPSC) of the tribunals and courts reviewed require that normally, the interrogation of the suspect or accused person is video-recorded or audio-recorded. Some courts allow for an exception if the circumstances prevent this recording from taking place (ICC and the ECCC), or where circumstances make it absolutely impractical for this recording to take place (STL).

Only one procedural safeguard could be established which is shared by the majority of jurisdictions under review with regard to the questioning of witnesses. The use of forms of oppressive conduct, including coercion, duress, threats as well as torture or other forms of cruel, inhuman or degrading treatment during witness interviews is clearly prohibited. Other procedural safeguards, including the obligation to make a record of the witness interview or a privilege for the witness against self-incrimination are not commonly shared.

In a similar vein, the identification of commonly shared safeguards concerning the use of non-custodial coercive measures turned out to be difficult. The primary reason thereof is the lack of detailed regulations of these investigative measures in the procedures of most jurisdictions under review (as was discussed *supra*). International criminal procedure lacks clear and express, formal, and material requirements for the use of non-custodial coercive measures. Save for a few exceptions (e.g. the execution of coercive measures directly on the territory of a state by the ICC Prosecutor in cases of a ‘failed state’ scenario), no general and explicit requirement for the Prosecutor to obtain a judicial authorisation is provided for in the procedures of the international(ised) criminal courts and tribunals, nor is it confirmed in

practice. This contrasts with the procedures of the ECCC and the SPSC, which require a judicial authorisation, normally *ex ante*, for the use of non-custodial coercive measures. However, it was argued that this requirement to obtain a judicial authorisation *from the tribunal or court* derives from the application of human rights norms. Moreover, the principle that non-custodial coercive measures should be proportionate follows clearly from the procedural frameworks of the ECCC and the SPSC and is confirmed by the practice of some other tribunals (ICTY, ICC). Hence, this rule seems to be confirmed by the majority of the tribunals and courts. In a similar vein, this proportionality requirement ultimately derives from international human rights law.

The picture is different with regard to custodial coercive measures. The formal requirement according to which the issuance of an arrest warrant presupposes a judicial authorisation is firmly established in international criminal procedure. In addition, all tribunals provide for a material threshold for the issuance of an arrest warrant. Whether and in how far these thresholds differ, considering their different phrasing, remains to be determined. The threshold of the SCSL was found to fall below what is required under international human rights law and should be faulted.

The procedural frameworks of most tribunals do not provide for the rule according to which the suspect or accused person holds the right to be free from arbitrary arrest and detention. This was noted with surprise, where this right clearly follows from international human rights law. In a similar vein, other safeguards surrounding the deprivation of liberty are often not expressly provided for. Among others, the right to be promptly informed of the reasons for one's arrest is not always explicitly provided for in all situations where a person is deprived from liberty. For example, no right of *suspects* to be informed without delay about the reasons for their arrest in cases of a provisional arrest, pursuant to Rule 40 ICTY, ICTR, and SCSL RPE, could be found. However, in cases where this right is not clearly provided for, it has been confirmed by the jurisprudence. Hence, this safeguard constitutes a rule which is consistently applied by the different international(ised) criminal tribunals and courts. The importance of this right lies where it enables persons to challenge their detention, provided that information is given 'promptly' or 'at the time of the arrest'. The existence of the right of every person deprived of liberty to be brought before a judge or a 'judicial officer' promptly, while not always explicitly provided for, has been confirmed in practice and ultimately derives from international human rights norms. Furthermore, the right to challenge the

lawfulness of detention (*habeas corpus*) was found to be fully established in international criminal procedural law. It has been confirmed by the practice of all international criminal tribunals, and was provided for in the TRCP, including a strict time limitation to hear this challenge.

Finally, in cases where serious violations of the rights of the suspect or the accused person occur in relation to the deprivation of liberty, which render a fair trial impossible, the court or tribunal should refuse to exercise jurisdiction and should stay the proceedings permanently. In addition, while none of the statutory frameworks of the *ad hoc* tribunals and the Special Court provide for this, the practice of these institutions acknowledged the existence of an inherent or implied power to provide compensation to persons who have been the victim of unlawful or arbitrary arrest or detention. Where these remedies are imposed, they should be proportionate. In turn, the ICC's Statute as well as the TRCP explicitly provide for a right to compensation. The STL, short of providing a right to compensation for unlawful arrest or detention, provides for a right to *request* such compensation, and the awarding of this compensation is made dependent from a showing of a 'serious miscarriage of justice'. The majority of international(ised) criminal tribunals proved willing to acknowledge that the right to an effective remedy encompasses a right to financial compensation in cases of unlawful or arbitrary arrest or detention, provided that no other remedies would be effective.

Even though a substantial number of commonly shared rights and safeguards for suspects and accused persons could be identified, which are in accordance with international human rights norms, this does not imply that no discrepancies were found. Quite to the contrary, it was found that some aspects of international criminal procedure openly disregard existing international human rights norms.¹ A clear example which was identified is the principle that detention is the rule and release the exception, which still seems to be prevalent in international criminal procedure.

¹ Compare G. BOAS, J.L. BISCHOFF, N.L. REID and B. DON TAYLOR III, *International Criminal Law Practitioner Library*, Vol. III: *International Criminal Procedure*, Cambridge, Cambridge University Press, 2011, p. 13 (the authors hold that "no international criminal tribunal renders decisions applying rules of international criminal procedure to any issue in express (or implied) disregard for human rights norms, and international criminal procedure is founded on the legal principles articulated in the human rights regime").

III.2. Other commonly shared rules

The common rules and practices identified are by no means limited to these procedural safeguards. A number of other procedural rules are also shared by the different jurisdictions.

(i) Power-conferring rules (sword dimension of international criminal procedure)

Firstly, the international Prosecutor holds the power to initiate investigations. He or she possesses considerable discretion in initiating investigations. The use of the term ‘principle of opportunity’ was rejected where this terminology originates from national criminal procedural law and does not translate to the investigations and prosecutions by the international tribunals under review very well. Therefore, referring to the ‘considerable discretion’ of the international Prosecutor is to be preferred.

Moreover, all tribunals and courts have that certain safeguards as well as some restraints (institutional or judicial in nature) of prosecutorial discretion are provided for in common. Prosecutorial discretion is limited by the principles of equality and non-discrimination. Most courts and tribunals were found to expressly provide that all accused persons (or individuals) shall be equal before the court or tribunal, while the principle of non-discrimination is not expressly mentioned. However, as confirmed by the jurisprudence of the *ad hoc* tribunals and the SCSL, both principles ultimately derive from human rights law. Furthermore, it was found that at all courts and tribunals under review, discretion is both guaranteed and limited by the principle of prosecutorial independence, which prevents the Prosecutor from (actively) seeking or (passively) receiving instructions from any government or any other source on how to exercise his or her discretion. While the most elaborate forms of accountability, including forms of judicial oversight, are to be found at the ICC, an evolution towards more judicial oversight over prosecutorial discretion is noticeable, also at the *ad hoc* tribunals.

All of the jurisdictions examined provide the Prosecutor with general powers to collect evidence. The exception are the ECCC, where the powers of the Co-Prosecutors during the preliminary investigation are much more limited. These evidence-gathering powers include the prosecutorial power to question suspects, accused persons, and witnesses. None of the courts and tribunals under review explicitly provides for a corresponding right for the Defence to interview witnesses, which is in line with the general observation that defence investigative

powers are not expressly provided for (see the recommendation *infra*). In addition, the prosecutorial power to collect evidence includes the power to make use of non-custodial coercive investigative action.

(ii) Structure, organisation and nature of the investigation phase

In general, no judicial control is exerted over the determination by the Prosecutor to sanction the opening of a full investigation. However, an important exception is the situation in which the ICC Prosecutor makes use of his or her *proprio motu* powers. Furthermore, in cases of a decision by the ICC Prosecutor at the end of the pre-investigation phase not to sanction the opening of a full investigation, the Pre-Trial Chamber may exert control in some cases.

In addition, it appears that at most courts and tribunals, the level of judicial control over the investigation is limited. Obvious exceptions are the ECCC, where the investigation is led by the Co-Investigating Judges as well as the SPSC, where a judicial authorisation was required for the use of coercive measures by the Public Prosecutor. Regarding the other international(ised) criminal courts and tribunals examined, a trend has been noted towards more judicial intervention. As an example, whereas the Pre-trial Chamber (ICC) and the Pre-Trial Judge (STL) mostly intervene at the request of one of the parties, several self-standing powers could be discerned. Among others, the Pre-Trial Chamber and the Pre-Trial Judge may gather evidence *proprio motu* in cases of a ‘unique investigative opportunity’ or ‘unique opportunities to gather evidence’ respectively. Certain conditions have to be fulfilled. These judicial powers share the same function in so far as they assist the parties with the preparation of their respective cases. Moreover, these powers are in line with the recognition by the ICC’s practice of the primary responsibility of the ICC Pre-Trial Chamber in ensuring the protection of the rights of the suspects during the investigation stage of proceedings. Overall, these limited, but important judicial tools ensure the fairness of the proceedings.

Moreover, it seems that, as a rule, the Prosecutor and the Defence are in charge of the investigation proper. The investigation is the joint responsibility of the two Co-Investigating Judges at the ECCC only. In turn, the Defence is not allowed to undertake investigative activities beyond mere ‘preliminary inquiries’. The Defence can (as can the Co-Prosecutors or the civil parties) *request* the Co-Investigating Judges to undertake certain investigative acts, further reflecting the civil law style of proceedings at this stage of proceedings. In a similar

vein, at the SPSC, the Defence could request the Public Prosecutor or the Investigating Judge to order or conduct certain investigative acts. However, in practice, the Defence was not prohibited from conducting its own investigations.

A shared rule has also been identified with regard to the temporal limitation of the investigation. At these tribunals where the Prosecutor heads the investigation, he or she is exceptionally allowed to continue its investigations after the start of the prosecution phase proper. Sufficient care should be taken in this scenario that the rights of the defendant are respected.

How investigations before international(ised) criminal courts and tribunals are, as a rule, *reactive* in nature has also been shown. This sets them apart from national criminal justice systems, which have evolved as a consequence of the fight against organised crime and terrorism. Law enforcement is no longer purely reactive in nature and has been mobilised to serve preventive functions. How, in one reading, the jurisprudence of the ICC may be interpreted as allowing for investigations into situations to become *partly* proactive in nature has also been illustrated. More precisely, several Pre-Trial Chambers held that a situation can include not only crimes which had already been or were being committed at the time of the referral, but also crimes committed after that moment, insofar as they are sufficiently linked (nexus requirement) to the situation of crisis referred to the Court as on-going at the time of the referral. Thus, while the statutory threshold for the commencement of the investigation proper prevents fully proactive investigations ('reasonable basis to believe that a crime within the jurisdiction of the Court *has been or is being committed*'), this threshold is 'selective', in the sense that once it has been established, nothing prevents the Prosecutor from investigating other crimes within the jurisdiction of the Court, as long as these crimes are sufficiently connected to the situation of crisis. This allowance for pro-active investigative efforts would confirm the Courts preventive function, which finds confirmation in the Preamble to the Rome Statute.

The court's case law lacks uniformity on this point and it should further clarify whether or not this interpretation can be upheld. If so, in the absence of an express legal basis, the broad formulation of the ICC Prosecutor's investigative powers may be read as allowing for the use of special investigative techniques, such as covert surveillance, which lend themselves to proactive application. However, a number of requirements were identified which should apply

to the proactive application of investigative measures. These include (i) the requirement of a judicial purpose, (ii) the need for precise definition of proactive investigative powers, (iii) the related requirements of proportionality, subsidiarity, and judicial approval where proactive investigative techniques interfere with the right to privacy and, (iv) the requirement of independent and impartial supervision of proactive investigative efforts. In addition, (v) what information can be stored, how long, and under what conditions as well as the use to which this information can be put should be clear. It has been shown that almost all of these requirements are entirely problematic within the procedural framework of the ICC. Equally problematic is the fact that the procedural rights, under Article 55 (2) of the ICC Statute, are reserved to persons against whom ‘there are grounds to believe that [the] person has committed a crime within the jurisdiction of the Court’. Hence, they would not apply to individuals targeted by proactive investigative efforts. It can at present not be recommended that international criminal procedure allow for such proactive investigative efforts for all of these reasons. Moreover, proactive investigative efforts would not serve any purpose at most tribunals and courts under review.

(iii) Obligations incumbent on the parties in international criminal investigations

In addition to the safeguards and other rights outlined above, whether any obligations are incumbent on the parties in the conduct of investigations may be asked. One such obligation could be discerned which is commonly shared by the tribunals and courts under review. It consists of an overarching ethical duty of due diligence which is incumbent on the parties in the conduct of investigations. While this obligation is in most instances not explicitly provided for, it can indirectly be construed.

(iv) Arrest and detention

This study has shown how all but one of the jurisdictions under review allow for the deprivation of liberty in the absence of a judicial authorisation in cases in which some urgency is required. The only exception is the ICC, which always requires a prior judicial authorisation. It was also concluded that the majority of tribunals and courts under review have that they provide for the possibility that indictments or warrants of arrest are issued under seal and not publicly disclosed in common.

Additionally, all tribunals and courts provide for the possibility to *apply* for provisional release (which is to be distinguished from a right to provisional release). They also make allowance for conditional release. Furthermore, a commonality was found in that they allow for interlocutory appeals against provisional detention/release decisions.

All of the tribunals discussed recognise the risk of interference with the investigation, including victims, witnesses or other persons as a ground legitimising pre-trial detention or, alternatively, require the absence of any risk of this interference as a pre-condition for provisional release. Similarly, all tribunals recognise the risk of flight and the question of whether the accused, if released, will re-appear for trial as a public interest requirement justifying pre-trial detention or require the absence of any risk of flight as a precondition for the ordering of provisional release.

These commonalities notwithstanding, considerable divergences were found with regard to the provisional detention/release scheme, and in particular between the ‘older’ established tribunals and courts (the *ad hoc* tribunals and the SCSL) and the more recently established ones, hampering the identification of additional shared rules or practices. However, some tendencies could be noted. A clear tendency to remove judicial discretion in provisional release/detention matters was noted with regard to pre-trial detention. While the *ad hoc* tribunals and the SCSL left the discretion to deny provisional release in cases where all conditions were fulfilled to the Judges, other tribunals and courts reject this idea. This holding better corresponds to international human rights norms and enhances transparency.

IV. RECOMMENDATIONS

A substantial number of recommendations can be made on the basis of this study on how to improve international criminal procedure in order to ensure the fairness of the investigations. The most important recommendations have been outlined below. As a general note, far from calling for an overhaul of the procedural norms regulating the investigation phase, several of the recommendations below encompass small corrections to the predominant adversarial style of investigations and can be easily adopted. Some of these corrections are necessary to reduce the inequalities between the parties in the proceedings, which are most visible in the conduct of investigations and in the collection of evidence. While most recommendations concern the

law of international criminal procedure in general, some are directed to the ICC or other specific jurisdictions covered.

IV.1. The need to strive to ensure the protection of the rights of suspects and of accused person in light of the fragmentation of the investigation phase

The international criminal tribunals face the situation whereby the investigation is fragmented over several jurisdictions. The cooperation by states (and other international actors) is required because of the important limitations in the possibilities of these tribunals to gather evidence and information autonomously and independently on the territory of states or to effectuate the arrest of suspects or accused persons. Consequently, evidence is gathered or arrests are made by states or other international actors pursuant to a request by the tribunal. Where the request is consequently executed according to the domestic laws of the requested state, this leads to fragmentation of the investigation over several jurisdictions. It is suggested that these institutions should strive to avoid any reductive impact of this fragmentation on the protection of the rights of suspects and accused persons. Several steps should be undertaken in that regard. Otherwise, as concluded above, *lacunae* in the protection of the rights of suspects and accused persons may persist.

Several provisions have been identified in this study which hold the potential of mitigating these reductive effects. These provisions should be interpreted in such manner as to fully realise this potential. A concrete example may illustrate this point. Both Articles 55 (2) and 59 (2) ICC Statute protect the rights of persons in the conduct of investigations. The former provision strengthens the position of suspects by detailing certain procedural rights that the suspect is entitled to, also when questioned by national authorities at the Court's request. The latter provision strengthens the position of persons arrested by national authorities by detailing certain rights the person arrested at the request of the ICC is entitled to and by explicitly placing some obligations upon the requested state.

However, at least with regard to Article 59 (2) ICC Statute, the potential of this provision in ensuring the protection of the rights of persons arrested has not fully been realised. This provision concerning arrest proceedings in the custodial state is silent on the question whether any supervisory role is incumbent on the Pre-Trial Chamber *following* the surrender of the person to the Court. While the Court determined that it has the authority to review the arrest

proceedings in the custodial state pursuant to Article 59 (2), it compared its role to the ‘subsidiary’ role played by the ECtHR *vis-a-vis* national authorities. Such role is at odds with the previous holding, by the ICC Appeals Chamber, that the Pre-Trial Chamber has the primary responsibility of ensuring the protection of the rights of the suspects during the investigation stage of proceedings.

The Court has limited the protection offered by Article 59 (2) ICC Statute in at least three ways. First, (i) from the case law to date, it seems that the Court upholds the view that the rights included in Article 59 (2) primarily refer to the protection offered by national law, rather than to the relevant international human rights norms or the rights provided for under the ICC Statute. Secondly, (ii) while the Court determined that it has the authority to review the arrest proceedings in the custodial state pursuant to Article 59 (2), it held that this role is limited to international procedure. It held that it does not sit as a court of appeal on the decision of the national competent authority. Hence, its role seems limited to the assessment of whether the procedural rights of the person pursuant to Article 59 (2) (a) – (c) were respected, leaving the review of national procedure and substance with the national authorities. Finally, (iii) the Court held that violations occurring prior to the sending of the cooperation request will only be considered once a ‘concerted action’ between the Court and the State Party has been established. The Court is not responsible for the detention in the custodial state which was not *at the behest* of the tribunal. Article 59 (2) only applies to those proceedings that take place after the transmission of the relevant cooperation request for arrest and surrender by the Registrar.

In order to ensure that the person arrested does not suffer from the fragmentation of the investigation over several jurisdictions, it is suggested that the Court abandons its ‘subsidiary’ interpretation of its supervisory role over arrest proceedings in the custodial state. Consequently, the procedural rights included in Article 59 (2) should not be left to be determined by national law exclusively but should also include international human rights norms and the rights of persons under the ICC Statute. This interpretation would allow the scope of the supervisory role of the Pre-Trial Chamber to be broadened. Lastly, it is recommended that the Pre-Trial Chamber supervise all pre-transfer violations, even those which occurred prior to the sending of the cooperation request for arrest and surrender (see recommendation IV.3 below).

Overall, the major challenge for international criminal tribunals lies in reconciling the protective function these institutions took upon themselves as the ‘ultimate guarantor of individual rights and liberties in the course of the investigation’ with the ‘escapist posture’ they sometimes adopt whereby they seem to hide themselves behind the fragmentation of jurisdictions. This occasionally leads to schizophrenic tensions. For example, on the one hand, the ICC declined to take responsibility for all violations of the rights of the suspect or accused person in relation to the arrest and detention in the custodial state. On the other hand, the Court proved willing in the assessment of the length to the pre-trial detention to look to the pre-transfer detention as long as it is part of the “process of bringing the Appellant to justice for the crimes that form the subject-matter of the proceedings before the Court.” This surpasses the protection under international human rights norms.

IV.2. The need for a requirement of judicial authorisation for the use of non-custodial coercive measures in the collection of evidence

The need to strive to mitigate the reductive effect of the fragmentation of the investigation also favours the adoption of a formal requirement of judicial authorisation for the use, by the Prosecutor, of non-custodial coercive measures, normally *ex ante*. This requirement follows from international human rights norms. Where adopted, this ensures that no gap exists in the protection of the rights of the suspect or accused person. Indeed, while these coercive measures are normally executed through national authorities, who may already need judicial authorisation pursuant to municipal law, the Prosecutor can in some situations execute these measures directly on the territory of a state or execute them through international agents (e.g. SFOR). In addition, the possibility that this formal requirement of judicial authorisation does not exist under municipal law or that this requirement is disregarded cannot be excluded. It further confirms the role of the Judge as guarantor of individual rights and liberties in the course of the investigation.

IV.3. The need to provide for an effective remedy for all violations of the rights of the suspects or accused persons in the context of a case, including those violations which follow from actions taken by states at the request of the tribunal, or from other external events from which it benefited.

It has been suggested, above, that international(ised) criminal courts and tribunals should take responsibility for all violations that occur in the context of the case. At present, none of the jurisdictions included proved willing to take responsibility for *all* violations of the person's rights, even where they cannot be attributed to the tribunal. The ICC has so far refused to take responsibility for violations that occurred prior to the sending of the cooperation request in cases where there was no concerted action. Hence, the Court refuses responsibility for the arrest and detention which was not *at the behest* of the tribunal. In order to prevent gaps in the protection of the suspect or accused person, it is suggested that the Court should take responsibility for all violations in the context of a case.

With regard to serious violations of the rights of the suspect or the accused person that would render a fair trial impossible, it was indicated above that international(ised) criminal courts and tribunals should stay the proceedings permanently. The case law of the *ad hoc* tribunals considers it to be irrelevant what entity or entities are responsible for the violations when declining to exercise jurisdiction. In turn, the ICC reserves the remedy of setting jurisdiction aside only to violations committed by 'his/her accusers'. This formulation excludes acts committed by third parties unrelated to the Court or not at the behest of the Court. This phrase has been interpreted as to always require *attribution* to a Court organ. Therefore, the Court may only refuse to exercise jurisdiction in cases where there is an involvement by the Prosecution in the violation of the fundamental rights of the accused, either in the period *before* or in the period *following* the notification of a request. It seems to follow, from this reasoning, that the phrase 'his/her accusers' excludes the national authorities that execute a request for arrest and surrender, in the absence of further involvement of a Court organ.

The former position ought to be preferred where it avoids any gap in the protection of the rights of the suspect or accused person. This interpretation is also to be preferred to the jurisprudence of the ECCC, which holds that in cases where violations cannot be attributed to the Court, the application of the abuse of process doctrine is limited to instances of torture or serious mistreatment.

IV.4. The need for the Statute or the RPE to expressly provide for the applicable procedural safeguards.

It has been indicated, above, how some safeguards may be derived from international human rights norms but are not explicitly mentioned in the procedural texts of the courts and tribunals reviewed (e.g. the right to be free from arbitrary arrest and detention). It is recommended that these rights be incorporated in the procedural framework to avoid any gaps. Likewise, procedural safeguards and rights which are not explicitly provided for in the procedural frameworks of the international(ised) criminal tribunals, but which were confirmed by jurisprudence, should be clearly set out. Moreover, where cooperation is sought from states or other international actors, it may be advisable to include the relevant safeguards in the request. For example, a notification to the authorities of the requested state to ensure the rights of the person concerned, including the right to bring the person before a judge or a judicial officer promptly may be included in an arrest warrant, a request for the provisional arrest, or a provisional arrest and transfer order.

IV.5. Recommendations with regard to the structure and organisation of the investigation phase

§ The need to codify the investigative role of the Defence

With regard to the structure and organisation of the investigation phase in international criminal procedure, certain clarifications on the role of the parties in the investigation would benefit the fairness of the investigation. Firstly, the more adversarial style of investigations conducted at most of the international(ised) criminal tribunals covered notwithstanding, the procedural frameworks of these institutions give too limited an expression to the supposed investigative role of the Defence. The Defence's investigative powers are only indirectly provided for and derive from the general rights of the accused, including the right of the accused to have adequate time and facilities for the preparation of his or her defence and the principle of equality of arms. It is suggested that the investigative role of the Defence is spelled out explicitly.

§ The need to provide for the possibility that the Defence requests that the Prosecutor undertake certain investigative acts

In order to further alleviate the existing inequalities between the Defence and the Prosecution in conducting investigations, it is recommended that the possibility (which is only explicitly

provided for at the ECCC and the SPSC) for the Defence to request that the Prosecutor undertake certain investigative acts is provided for. Nothing seems to prevent the Defence from addressing these requests to the Prosecutor with regard to the ICC. This may to some extent reduce existing inequalities between the parties in the investigation phase. The adoption of this possibility by other tribunals nevertheless presupposes a Prosecutor who is guided by a principle of prosecutorial objectivity and a reduction of the adversarial ‘two cases’ approach in the investigation phase. Ideally, this possibility should be coupled with a strict time limitation for the Prosecutor to reply to these requests, the requirement of a reasoned decision if this request is turned down, and should be accompanied by the possibility to appeal prosecutorial orders turning this request down.

§ The need to adopt the principle of objectivity

It follows from the previous recommendation that the principle of objectivity, requiring the Prosecutor to investigate incriminating and exonerating evidence equally, should be adopted by all international(ised) criminal tribunals. This can be found at the ICC, the SPSC and the ECCC (Co-Prosecutors during the preliminary investigation, Co-Investigating Judges during the judicial investigation). In particular, and in addition to the recommendations formulated above, it may to some extent offer a solution to the difficulties the Defence encounters in accessing evidence.

IV.6. The need to provide for limitations in the Statute or RPE to the prosecutorial powers in the collection of evidence

Any recommendation to replace the broad evidence-gathering powers of the Prosecutors of international criminal courts and tribunals with a detailed regulation with regard to specific investigative acts, may not be realistic. However, some smaller recommendations may be made in this regard. Divergent approaches exist with regards to the question of whether a minimum threshold of initial suspicion is required for the commencement of the investigation phase and before the arsenal of investigative prosecutorial powers becomes available. While the *ad hoc* tribunals (‘sufficient basis to proceed’) and the ICC (‘reasonable basis to proceed’) provide for this threshold, the internationalised criminal courts and tribunals do not, with the exception of the threshold required for the opening of the judicial investigation (ECCC). However, the inclusion of this minimum threshold may be particularly called for in

international criminal procedure. First, as set out above, prosecutorial powers in international criminal procedure are broad and the limits thereof unclear. Consequently, the inclusion of such threshold in international criminal procedure puts welcome limitations to the Prosecutor's broad investigative powers. Moreover, it protects the interests of persons targeted and avoids the spending of scarce resources on investigations which do not stand any chance of resulting in an actual prosecution. Therefore, this minimum threshold is to be recommended on the basis of considerations of fairness and should preferably become part of the law of international criminal procedure. This would imply the existence of a 'pre-investigative' phase necessarily by implication.

In light of the broad investigative powers the international Prosecutor possesses, it is also important to know under what circumstances the Prosecutor will exercise his or her discretion to open an investigation. It was found that none of the courts and tribunals included in this study made the prosecutorial guidelines on the exercise of prosecutorial discretion public. It is recommended that the international(ised) criminal tribunals and courts provide for public and *ex ante* prosecutorial guidelines. This ensures transparency and coherence and serves to protect the principles of equality and non-discrimination, which ultimately derive from human rights law. These would further ensure the fairness of the proceedings by shielding the international Prosecutor from external political pressure. An important obstacle to the adoption of these guidelines is the necessity to first determine and rank the goals of international criminal prosecutions, where these influence any guidelines on the exercise of prosecutorial discretion.

IV.7. The need to conceive of pre-trial release as the rule and pre-trial detention as the exception

In international criminal procedure, unlike what is the case at the *ad hoc* tribunals and the SCSL, detention should be the exception and release the rule. While the majority of international(ised) courts and tribunals scrutinised proclaim to adhere to this position, the practice proves otherwise. It should be respected by these institutions, nevertheless, because this requirement follows from international human rights law. The burden of proof should be on the Prosecutor (as is the case at the majority of tribunals and courts) in the consideration of requests for provisional release. The opposite rule, which could be found at the *ad hoc* tribunals and the SCSL, where the burden of proof is put on the accused, violates international

human rights law. Putting the burden upon the Prosecutor is characteristic of a system which considers pre-trial detention to be the exception and release to be the rule. It was noted with concern that even those systems which purport that the burden is on the Prosecutor in practice often shift the burden to the accused person.

IV.8. The need to require legitimate grounds for any deprivation of liberty

Both the STL and the ICC require legitimate grounds for the issuance of an arrest warrant. This set-up differs from the *ad hoc* tribunals, where detention follows automatically upon arrest. From an international human rights law perspective, the absence of a legitimate ground upon which the arrest is based is not problematic *in itself*, but the existence of a “genuine requirement of public interest” is required for the further pre-trial detention which, the presumption of innocence notwithstanding, outweighs the person’s right to personal liberty. Consequently, the inclusion of these legitimate grounds necessitating the deprivation of liberty in international criminal procedure is recommended.

IV.9. The need to provide for time limitations with regard to the provisional arrest of suspects, especially in the absence of a judicial authorisation

As indicated previously, the procedures of most courts and tribunals allow for the provisional arrest of suspects in the absence of a judicial authorisation. However, it emanates from prior abuses, that it is necessary in these situations to provide for a deadline for (i) the Prosecutor to apply for his or her transfer (cf. SCSL RPE) and (ii) in cases of failure to transfer the suspect, to provide for an ultimate deadline after which time the suspect shall be released.

The procedures of a substantial number of tribunals and courts (the *ad hoc* tribunals, the SCSL, and the STL) also envisage the transfer and the provisional detention of suspects at the seat of the tribunal, and set out a number of requirements in considerable detail, offering better protection of the rights of the suspect. Safeguards include (i) the need for judicial authorisation, (ii) a material threshold, (iii) the requirement of a legitimate ground (necessity), (iv) a strict time limitation, (v) the prerequisite of provisional charges and (vi) a summary of evidence on which the Prosecutor relies. However, in general, how this procedural scheme does not prevent that the suspect ends up lingering in detention in the custodial state has been

shown. There is no limitation upon the amount of time the suspect may spend in pre-transfer detention.

This recommendation, of providing strict deadlines, is of particular importance to the STL. It has been noted with much concern how the STL failed to learn from the shortcomings of the *ad hoc* tribunals and the SCSL where its procedural framework reveals the same gaps in the protection of the rights of the suspect. Hence, it is strongly recommended that the two recommendations above (time limitations for the application for the transfer and an ultimate deadline) also apply in this situation.

IV.10. The need to periodically review pre-trial detention

Many of the courts and tribunals (ICC, SPSC, STL) scrutinised make allowance for a *periodic review mechanism* of pre-trial detention (or a review at the occasion of the extension of the pre-trial detention (ECCC)). This review provides the detained person with an effective safeguard against undue prolongation of the detention. It allows any change in the circumstances to be taken into consideration. Where it ensures that release is the rule and detention the exception, its adoption by all international(ised) criminal courts and tribunals is to be recommended.

IV.11. The need for international(ised) criminal courts and tribunals to proprio motu consider the possibility of a summons to appear as an alternative to the issuance of a warrant of arrest

Contrary to the more seasoned tribunals, some newer established courts and tribunals provide for an alternative to arrest and provisional detention, namely the possibility of a summons to appear. Where it forms a viable alternative to the deprivation of liberty, it is submitted that it should always be open for the Judge who authorises an arrest warrant to summon the person to appear before the court, if he or she considers that to be more appropriate (cf. STL). In cases where conditions are imposed on the person, these should relate to the justifications for the deprivation or limitation of liberty provided for by the procedural framework of the tribunal concerned. This set-up is in conformity with the principle of subsidiarity under human rights law. Hence, with regard to the ICC, it is suggested that Article 58 (7) ICC Statute be amended to add that a summons to appear may not only be issued upon the request of the Prosecutor, but may also be issued *proprio motu* by the Pre-Trial Chamber.

IV.12. The need to confirm the obligation of states to receive persons provisionally released and for states to provide for the procedures necessary to receive persons provisionally released by the Court and to ensure the appearance of the person at trial and/or to avoid any interference with victims, witnesses or other persons.

Finally, a major obstacle to provisional release lies in the *de facto* requirement that the host state agrees to allow the accused on its soil and guarantees that the person will appear for trial and will not interfere with witnesses, victims or other persons. In this regard, an obligation to accept detainees who have been provisionally released and to offer necessary guarantees for their appearance at trial follows from the general cooperation obligations of states with the international criminal courts and tribunals. States should have the necessary procedures in place to receive persons provisionally released by the Court and to ensure the appearance of the person at trial and/or to avoid any interference with victims, witnesses or other persons. In that regard, it is recommended that agreements are concluded with states on the acceptance of detainees who have been provisionally released. As far as the ICC is concerned, the ASP should ensure that arrangements are in place to ensure the cooperation of States Parties in relation to provisional release.

SUMMARY

This study focused on the investigation phase in international criminal procedure. At the outset, it was noted that the importance of the investigation phase and of investigative actions for the further proceedings is not yet reflected to the full extent in academic writings on international criminal proceedings. While the number of academic writings on international criminal procedure is growing at a rapid pace, the investigation phase has so far received less attention. Moreover, two investigation phase ‘deficits’ were noted. First, a ‘regulatory deficit’ was observed insofar that the investigation phase in international criminal procedure has been the subject of far less regulation than its trial counterpart. While it was held that different factors may explain this, including the fact that international(ised) courts and tribunals have to rely to a large extent on states in the conduct of investigations, it raises the pertinent question whether or not the investigation phase should be regulated in more detail. Secondly, a ‘jurisprudential deficit’ was noted insofar that on many aspects of the investigation phase, jurisprudence is scarce or non-existent. Many investigative activities seem to have largely taken place outside legal scrutiny.

The present study reviewed the law and practice of the different international(ised) criminal courts and tribunals on the conduct of investigations in order to identify any (emerging) rules of international criminal procedure. It sought to determine whether any procedural rules and/or practices on the conduct of investigations are commonly shared by all international(ised) criminal courts and tribunals. If so, this would prove that these institutions, notwithstanding their nature of ‘self-contained regimes’ adopted certain common approaches. Furthermore, this study also sought an answer to the normative question of what changes to these rules and/or practices are necessary to guarantee the fairness of these investigations?

The relevance of identifying these commonalities primarily lies in the clarification of the content of international criminal procedure. Furthermore, these commonly shared rules may also assist future international(ised) criminal courts and tribunals as well as national legislators regarding the investigation and prosecution of core crimes. Additionally, there is an even more pressing need to identify some core rules on the conduct of investigations. The investigation phase in international criminal procedure is fragmented over several jurisdictions. International criminal(ised) courts and tribunals necessarily have to rely on the

cooperation by states or other international actors in the conduct of investigations. Their cooperation is required because of the important limitations on the tribunals' ability to gather evidence and information autonomously and independently on the territory of states or to effectuate the arrest of suspects or accused persons. If any of the common rules which can be identified correspond to international human rights norms, then they should not only be upheld by the international criminal courts and tribunals, but also by states and/or other international actors involved in the investigation. In other words, these standards should be respected irrespective of the jurisdiction (the international criminal tribunal, national criminal justice system or international actor) which conducts the investigative act. It follows that these human rights norms may to some extent prevent the fragmentation which results from the division of labour between the international and national level to be to the detriment of the suspect or accused person.

The study consisted of four sections which more or less followed a chronological order. **Section I (Chapter 1)** sought to conceptualise and define 'international criminal procedure' and the 'investigation phase'. **Chapter 2**, firstly, addressed the sources of international criminal procedure. It illustrated how some uncertainties still surround these sources. Secondly, the goals international criminal justice and international criminal procedure are intended to serve were reviewed. Lack of clarity persists as to the goals international criminal justice and international criminal procedure are intended to serve. While the international(ised) criminal courts and tribunals proclaim to serve a plethora of goals, their (hierarchical) relationship remains unclear. This takes a great deal away from the normative force of these objectives. A clear ranking order and understanding on the compatibility of different goals is a prerequisite for the tailoring of the courts' procedural set-up to match the most important goals these courts are set to achieve. Thirdly, the positioning of international criminal procedure in relation to the civil law and common law models of criminal justice was addressed. While it is widely acknowledged that blending the features of these two models has led to the development of a '*sui generis*' system, the common law – civil law dichotomy may still be of assistance for a better understanding of international criminal procedure. Additionally, it may assist in discovering 'systemic tensions'. Fourthly, the extent to which international(ised) criminal courts and tribunals are bound by international human rights norms was considered. It was concluded that the jurisdictions reviewed are internally bound by international human rights law. In addition, a number of jurisdictions covered explicitly attribute an interpretative function to these norms. However, uncertainty remains as to the

extent to which human rights norms may be tailored to the specific exigencies and unique characteristics of proceedings before international(ised) criminal tribunals ('contextualised'). While it is generally acknowledged that some adaptation of international human rights norms is necessary, it proved to be much more difficult to determine the level of adaptation or contextualisation that is acceptable. A cautionary approach is called for where the specific characteristics of international criminal proceedings are relied upon to justify the contextualisation of international human rights norms. In most instances where the adaptation has been suggested, this has had the effect of lowering the protection offered by these norms. Risks are involved where international(ised) criminal courts and tribunals can adjust international human rights norms they are bound to respect to suit their own needs and this in the absence of outside scrutiny. It was shown how in general, international human rights norms are flexible enough *not* to require any adjustment or re-orientation. The attention then gradually moved, fifthly, to the investigation phase, the subject-matter of this study. The specific characteristics of investigations conducted by international(ised) criminal tribunals were analysed. Any assessment on what procedure is most fit for international criminal tribunals, should take their 'uniqueness' or their unique characteristics into consideration. Among others, (i) the necessary reliance on cooperation by states and other international actors, (ii) the fragmentation of the investigation over several jurisdictions and (iii) the scope and complexity of the investigations were discussed insofar as they are characteristic of international criminal proceedings.

Overall, Chapter 2 concluded that international criminal procedure lacks a strong theoretical foundation, which takes its specific characteristics and its intended goals into consideration. International criminal procedure is still at a nascent stage. On the basis of this chapter, only one suitable measure for the normative evaluation of international criminal procedure was identified. Since all international(ised) criminal courts and tribunals under review are bound by international human rights norms, they are a suitable tool for the normative evaluation of international criminal procedure. However, one important shortcoming has also been noted regarding the use of international human rights norms as an evaluative framework. Human rights are not sufficiently detailed to determine the manner in which international criminal proceedings ought to be organised and what procedural system should be preferred. Different procedural solutions may be considered that are in conformity with these more abstract minimum rules. This holds equally true for the organisation and structure of the investigation phase.

Chapter 3 further defined and delineated the investigation stage. The existence of a *minimum threshold* for the commencement of investigations could not uniformly be established. In the cases where such minimum threshold is not provided for, it appears that the Prosecutor's authority to rely on the investigative measures at his or her disposal is not limited by any requirement of initial suspicion. In the instances where such minimum threshold is provided for, the investigation proper is preceded by a 'pre-investigation' phase. The procedural frameworks of only some of the tribunals explicitly provide for and regulate such a pre-investigation phase. With the exception of the ECCC, the preliminary investigation is the responsibility of the same court organ that conducts the investigation proper. Overall, the pre-investigation phase at the various courts and tribunals was found to serve the same function; that is, to determine whether the minimum threshold is met for opening a full investigation. In that regard, this preliminary phase will protect the interests of the individuals targeted by the investigation. Moreover, it protects against the spending of scarce resources on investigations that do not stand any chance of resulting in an actual prosecution. With the exception of when the ICC Prosecutor makes use of his or her *proprio motu* powers, there is no judicial control over a positive determination that the minimum threshold for opening a full investigation is met.

Most courts and tribunals under review define the investigation (*sensu stricto*) as 'all investigative activities undertaken by the Prosecutor for the collection of information or evidence'. It was concluded that such a definition is faulty insofar that the more adversarial nature of proceedings before these tribunals requires the Defence to conduct its own investigations. In a similar vein, the statutory documents of these tribunals nowhere explicitly detail the Defence's investigative powers. At most courts and tribunals under review, no strict temporal limitation applies to the investigation insofar that it may, under certain conditions, continue after the commencement of the prosecution phase. Since any continuation of prosecutorial investigations after the confirmation of charges interferes with defence preparations, this should remain exceptional.

It was concluded that only at the ECCC, the Defence is not allowed to undertake its own investigations (with the exception of 'preliminary inquiries'). Rather, further reflecting the civil law style of proceedings at this stage of proceedings, the Defence can (as can the Co-Prosecutors or the civil parties) *request* the Co-Investigating Judges to undertake certain investigative acts.

In the course of international criminal investigations, the judicial role is usually limited. The exceptions are the ECCC, where the investigation is in the hands of the Co-Investigating Judges, and the SPSC, where a judicial authorisation was required to resort to the use of coercive measures during the investigation. Nevertheless, there is a notable trend towards a greater judicial role in the conduct of investigations. At the ICC and the STL, the Pre-Trial Chamber and the Pre-Trial Judge, respectively, possess limited but important powers during the investigation in order to assist the parties in the preparation of their respective cases. Furthermore, the ICC Pre-Trial Chamber confirmed its role in protecting the rights of suspects during the investigation.

Investigations before international criminal tribunals are normally *reactive* in nature. While, on one reading, the ICC's jurisprudence may be interpreted as allowing for investigations into situations to become partly proactive in nature, it was concluded that such interpretation should be rejected. A number of requirements were identified that should apply to the proactive application of investigative measures. Among others, these include (i) the requirement of a judicial purpose of such proactive application of investigative measures, (ii) the need for a precise definition of proactive investigative powers, (iii) the related requirements of proportionality, subsidiarity and judicial approval, where proactive investigative techniques interfere with the right to privacy as well as (iv) the requirement of independent and impartial supervision of proactive investigative efforts. It was shown how most of these requirements would be problematic if the ICC's procedural framework were to be understood as allowing for proactive investigative efforts.

Subsequently, a great deal of attention was paid to the question whether the international Prosecutor is guided by a principle of legality or whether he or she enjoys a certain discretion in selecting cases for investigation and prosecution. This attention was justified where the answer to this question has important consequences for the organisation of the investigation. It was found that the international Prosecutor enjoys considerable discretion in initiating investigations. The statutory documents of several tribunals (SCSL, ECCC, ICTY) include limiting language, requiring the Prosecutor to focus on a specific group or category of persons. Such language offers 'guidance' to the Prosecutor on how to exercise his or her discretion. The holdings of the SCSL Appeals Chamber and of the ECCC Supreme Court Chamber, that such limiting language in their respective statutory documents offers mere guidance and does not encompass a jurisdictional threshold, were criticised. It was illustrated

how several principles further limit prosecutorial discretion. Among others, the related principles of equality and non-discrimination limit discretion. These principles derive from human rights law. Also the principle of prosecutorial independence is important, since it entails that the Prosecutor should not seek or receive instructions from external sources. It was found that none of the tribunals under review made prosecutorial guidelines on the exercise of prosecutorial discretion public. However, it was argued that it is preferable for tribunals to provide for public *ex ante* prosecutorial guidelines. Among others, such guidelines ensure transparency and coherence and ensure the protection of the aforementioned principles of equality and non-discrimination. Besides, they shield the international Prosecutor from outside political pressure. One notable obstacle to the adoption of these guidelines is the need to first determine and rank the goals of international criminal prosecutions, since these influence any guidelines on the exercise of prosecutorial discretion.

Finally, a number of normative principles that are relevant to the conduct of investigations before international(ised) criminal tribunals were discussed. These included (i) the prosecutorial principle of objectivity and (ii) the ethical duty of due diligence incumbent on the parties in international criminal proceedings. It was found that the principle of objectivity, which requires the Prosecutor to investigate incriminating and exonerating evidence or information equally, is not firmly established in international criminal procedural law. It can be found at the ICC, the SPSC and the ECCC. While the Prosecutor of the *ad hoc* tribunals, the SCSL and the STL has been described in the case law as an ‘organ of international criminal justice’ or a ‘minister of justice’, it was concluded that such language means little in the absence of any express obligation to gather exculpatory evidence. It was recommended that a prosecutorial principle of objectivity be adopted by all tribunals under review. In particular, to some extent it may offer a solution regarding the Defence’s difficulties in accessing evidence. In turn, an ethical duty of due diligence is incumbent on the participants in the conduct of investigations.

Section II of this study then discussed the collection of evidence by the parties in the proceedings. An important distinction was drawn between non-coercive and non-custodial coercive investigative measures. Without any claim to exhaustiveness, investigative measures relevant to the collection of evidence were included based on the criterion of their actual relevance according to the practice of the international(ised) criminal courts and tribunals.

First, **Chapter 4** discussed the interrogation of suspects and accused persons. Both the power-conferring rules relevant to this investigative act (sword dimension) as well as the relevant procedural safeguards and rules on the recording procedure (shield dimension) were analysed. Since the investigative measures can be executed by national law enforcement officials, by the Prosecutor him or herself or by a combination thereof, it was addressed how the determination of the applicable procedural regime is important. As far as the shield dimension is concerned, a number of procedural safeguards regarding the interrogation of suspects and accused persons could be identified that are shared by all courts and tribunals. Other procedural rules do not seem to be shared by all jurisdictions under review. While the jurisprudence of the ICC grows every day, it remains to be seen, with regard to a number of procedural rules on the interrogation of suspects and accused outlined in the jurisprudence of the *ad hoc* tribunals and the SCSL, whether the ICC will follow these. Procedural safeguards that are shared by all international(ised) criminal courts and tribunals under review were found to include (i) the right for suspects and accused persons to have the assistance of counsel during interrogation, (ii) the right for the suspect or the accused person to be informed about the right to be assisted by counsel during the interrogation as well as the possibility to waive it, provided that this waiver is given voluntarily, (iii) the right for the suspect or accused person to remain silent during questioning, of which right the suspect or the accused person should be informed prior to the start of the interrogation, (iv) the prohibition of the use of forms of oppressive conduct, including coercion, duress, threats as well as torture or other forms of cruel, inhuman or degrading treatment as well as (v) the right of the *accused person* to be informed in detail about the nature and cause of the charges against him or her, in a language he or she understands, and prior to the start of the interrogation. Lastly, (vi) the suspect or accused person enjoys the right to the free assistance of an interpreter during interrogation, if he or she cannot understand or speak the language used.

Subsequently, and in a similar manner, **Chapter 5** addressed the questioning of witnesses by the parties in the proceedings. Evidently, it was concluded that the procedural framework of all tribunals includes the prosecutorial power to question witnesses. In the absence of an express corresponding power for the Defence to question witnesses, such a power derives from the accused person's right to examine witnesses, the principle of equality of arms, and the right of the accused to have adequate time and facilities for the preparation of his or her defence. Only at the ECCC, the Defence is prohibited from interviewing witnesses and can only undertake preliminary inquiries necessary to exercise its right to request the Co-

Investigating Judges to undertake investigative actions (and interview witnesses). It was found that the *ad hoc* Tribunals and the SCSL can compel witnesses to be interviewed by the Prosecutor or the Defence during the investigation, under certain conditions. In turn, the ICC lacks the power to directly compel the appearance of individuals for questioning in the context of investigations. Also the ECCC and the STL recognise the possibility to compel witnesses to be interviewed by the Co-Investigating Judges (ECCC), or by the Defence, Prosecutor, or Pre-Trial Judge (STL). It was noted with surprise that only the ICC and the ECCC provide for a duty incumbent on the Prosecutor to compile a record of every interview. The ICTY jurisprudence, for instance, dismissed the existence of such an obligation. However, it was explained how such an obligation derives from the disclosure obligations of the Prosecutor and is a prerequisite for the meaningful exercise of defence rights. Furthermore, it was concluded that while none of the procedural frameworks of the tribunals under review require an audio or video recording, the procedural frameworks of the ECCC and the ICC encourage such procedure, especially in relation to vulnerable witnesses. The STL only provides for the audio-visual recording of witness interviews when a deposition is taken by the Pre-Trial Judge or by a national state. It was argued that the importance of an audio or video recording lies where it enhances the transparency of the witness statement recording process and enables *ex post* control over the conduct of the interview. It allows the Court to check what was said during the interview, the manner in which it was said and how it was perceived by the witness. In addition, it allows for any errors in the interpretation of questions and answers to be detected. The significance thereof should be understood in light of existing linguistic, cultural and other barriers in collecting witness evidence by international courts and tribunals. The necessity of detailed procedural rules for taking witness statements was explained. Among others, it was explained how pre-trial witness statements are increasingly allowed in evidence at trial. In light of this evolution, clear, public and standardised guidelines or standard operating procedures should be provided for at all courts and tribunals. They should clearly outline the procedure for the witness statement taking process. These guidelines would enhance the transparency of the questioning and statement-recording processes. They would allow for Judges to *ex post* check whether these guidelines have in fact been upheld by the investigators.

It was found that only the ICC and the ECCC provide for an explicit privilege for the witness against self-incrimination. The status of the person interviewed may change. A person who is interviewed as a witness may later become a suspect. Providing witnesses with a privilege

against self-incrimination takes this situation into account and ensures protection against self-incrimination at the early stages of the investigation. Hence, the model set by the ICC and the ECCC should be followed by other jurisdictions under review.

Finally, **Chapter 6** dealt with non-custodial coercive measures. The first part of Chapter 6 was devoted to the identification of formal and substantial safeguards for the use of non-custodial coercive measures. Firstly, the comparative analysis revealed that no general requirement for the Prosecutor to obtain a judicial authorisation for the initiation of non-custodial coercive measures currently exists in either the law or in the practice of the international criminal courts and tribunals. However, in cases where the ICC Prosecutor directly executes a coercive measure on the territory of a state (failed state scenario), an authorisation by the Pre-Trial Chamber is required. In contrast, the procedural frameworks of the ECCC and the SPSC require a judicial authorisation, normally *ex ante*, for the use of non-custodial coercive measures. Finally, the STL does not make such requirement explicit, with the possible exception of the direct gathering of evidence on the territory of Lebanon. It was explained how in light of the broad and unrestricted coercive powers of the Prosecutor, a requirement to obtain a judicial authorisation from the tribunal or court follows from the application of international human rights norms. Furthermore, it was argued that this judicial authorisation should preferably be sought at the international, rather than at the national level. Only in this manner can *lacunae* in the protection of suspects and accused persons be avoided. Additionally, the requirement to obtain authorisation by a Judge or Chamber of the international criminal court or tribunal guarantees judicial intervention for all scenarios of evidence gathering by the Prosecutor, including the direct and independent evidence gathering by the Prosecutor. It enables the role of the international Judge as guarantor of individual rights and liberties in the course of the investigation. Finally, it was argued that an *ex ante* judicial authorisation, rather than an *ex post* one, should be preferred, because of its potential to prevent the violation of international human rights norms. In cases of urgency, an *ex post* judicial authorisation should suffice.

Secondly, a principle of proportionality in the broad sense, was inferred from the practice of the *ad hoc* tribunals and the ICC. It requires that coercive measures are (1) suitable, (2) necessary and (3) their degree and scope are in a reasonable relationship to the envisaged target. This principle is in line with international human rights law. It is also reflected in the procedural frameworks of the ECCC and the SPSC (reasonableness).

Finally, no specific threshold for the use of non-custodial coercive measures could be discerned. As far as the internationalised criminal tribunals are concerned, only the SPSC required the existence of ‘reasonable grounds’ before coercive measures could be authorised by the Investigating Judge.

The second part of the chapter discussed some individual coercive investigative measures in detail, including search and seizures and the interception of communications. Where any use of coercive powers by an international Prosecutor on the territory of states is a delicate matter, attention was paid to the question of whether and, if so, under what conditions, the international Prosecutor may directly execute coercive measures on the territory of a state. Firstly, the law and practice of the different international criminal courts and tribunals establish the prosecutorial power to initiate search and seizure operations. The RPE of the *ad hoc* tribunals and the SCSL expressly provide for the possibility of urgent requests to national authorities for the seizure of physical evidence. Limitations to the places that can be searched were found to follow from the functional immunity to which members of the defence team are entitled as well as from immunities of property. Unlike the rudimentary regulation of search and seizures in the procedural frameworks of the different international criminal tribunals, the ECCC and the SPSC provide for a detailed set of procedural conditions.

Secondly, it was concluded that substantial differences exist between the international criminal tribunals regarding the possibility to provisionally freeze the accused’s assets in the course of the investigation. While the jurisprudence of the ICTY and the SCSL is in agreement on the existence of such power, the SCSL Trial Chamber ruled that a high threshold should be applied and that such seizure or freezing should be limited to property that has been acquired unlawfully or as a result of criminal conduct. The ICC Statute provides that the Pre-Trial Chamber may, either *proprio motu* or at the request of the Prosecutor or of the victims, seek cooperation from states in taking protective measures for the purposes of forfeiture. The Court’s case law clarified that protective measures for the purposes of eventual reparations of victims are included. Furthermore, the ICC has interpreted its procedural framework as allowing for the freezing or seizure of property and assets to support the execution of arrest warrants. The applicable threshold requires that a warrant of arrest or a summons has already been issued.

Thirdly, while the laws of the different international criminal tribunals do not expressly provide for the power of the Prosecutor to intercept communications (with the exception of the ECCC and the SPSC), it was found that the broad prosecutorial powers to gather evidence do also include this power.

Lastly, it was shown how the suspect or the accused can be subjected to certain tests or be required to provide certain samples in the course of the investigation. No common ground could be identified between the international criminal tribunals. It was noted that the ICTY gave a broad interpretation to the privilege against self-incrimination, where it held that an accused cannot be compelled to provide materials, including a sample of their handwriting or a DNA sample.

Section III of this study dealt with custodial coercive measures. **Chapter 7** explored the issue of the arrest and the transfer of suspects and accused persons. This chapter distinguished arrests pursuant to a warrant of arrest from the arrest in emergency situations. The principle, according to which the issuance of an arrest warrant presupposes a judicial authorisation was found to be firmly established in international criminal procedural law. Furthermore, all tribunals provide for a material threshold for the issuance of an arrest warrant where they make this issuance dependent on the showing either of a '*prima facie* case' (ICTY, ICTR, STL) or of 'reasonable grounds to believe' (ICC, SPSC). The SCSL provides for a lower threshold, which is at odds with human rights law. The ECCC, while not providing for a material threshold for the issuance of an arrest warrant or an arrest and detention order, requires 'well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary submission' for the provisional detention of the charged person. Only some tribunals provide for a requirement of necessity for the issuance of an arrest warrant and provide for legitimate grounds upon which the ordering of the arrest warrant should be based (ICC, STL). The ECCC require the presence of legitimate grounds for the ordering of the provisional detention of the charged person.

A further important distinction was drawn regarding the effectuation of arrests in instances when some urgency is required. The ICC always requires a prior judicial authorisation, while the *ad hoc* tribunals, the Special Court, the STL and the SPSC in this case allow for the deprivation of liberty in the absence of a judicial authorisation. The ICC Statute only allows

for a postponement in the presentation of the request for surrender and the documents supporting it.

Only one requirement was identified regarding the deprivation of liberty in the absence of an arrest warrant at the *ad hoc* tribunals, the SCSL, and the STL ('Rule 40 requests'). There should exist 'reliable information, which tends to show that a person may have committed a crime within the jurisdiction of the court'. The ICTR provides for the additional requirement that an indictment is confirmed within 20 days following the transfer of the suspect to the tribunal. It was concluded that this provision insufficiently protects the rights of the suspect where this requirement does not guarantee the prompt transfer of the suspect to the tribunal. A better solution was found in the RPE of the Special Court, which requires that where a suspect is deprived of his or her liberty following a Rule 40 request, the Prosecutor should apply for his or her transfer within ten days.

Furthermore, it was found that the *ad hoc* tribunals (following the amendment of their RPE), the Special Court and the STL all provide for the transfer and the provisional detention of suspects at the seat of the tribunal ('Rule 40*bis* requests'). In stark contrast to the scarcity of the regulation regarding Rule 40 requests, the transfer and provisional detention of suspects is set out in considerable detail, offering better protection of the rights of the suspect. The prerequisites for this transfer include, among others, (i) the need for a judicial authorisation, (ii) a material threshold (a consistent body of material which tends to show that the suspect may have committed a crime over which the tribunal has jurisdiction) and (iii) the showing of a legitimate ground (necessity requirement). Furthermore, (iv) a strict time limitation (30 days, which can be extended to maximum 90 days) is provided for.

The chapter was highly critical of the fact that the procedural schemes of the *ad hoc* tribunals and the Special Court do not prevent that the suspect ends up lingering in detention in the custodial state. The examples of suspects simply being forgotten about leave important marks on the legacy left behind by the ICTR. Where a Rule 40*bis* order is made, there is no limitation on the amount of time the suspect may spend in pre-transfer detention. Similarly, where a Rule 40 request is made, such limitation is absent. Where a preference was expressed for Rule 40 SCSL RPE (given the time limitation it puts on the time a person can be detained in the custodial state before a request for his or her transfer is made), it should be acknowledged that this provision fails to prevent the person spending an inordinate amount of

time in pre-transfer detention pending his or her transfer to the tribunal pursuant to Rule 40*bis*. It was noted with regret that the STL did not learn from these shortcomings.

The ECCC also provides for the deprivation of liberty without judicial authorisation where a person has been placed in police custody (*garde à vue*). This deprivation of liberty without judicial intervention is, however, limited in time to 48 hours, which may be extended once by another 24 hours; no urgency is required.

The international criminal tribunals have to rely on states for the effectuation of the arrest. While all international criminal tribunals allow for the possibility to address arrest warrants to international organisations, it is regrettable that no express provision is made under the ICC Statute for addressing warrants of arrests to international organisations and other non-state entities. As far as the *ad hoc* tribunals are concerned, a request for the arrest and surrender of a suspect or accused entails an obligation of result for that state. As far as the ICC is concerned, the arrest and surrender cooperation regime is far more detailed than is the case at the *ad hoc* tribunals. Leaving voluntary cooperation aside, there are situations where states not party may also be under an obligation to cooperate with the ICC. While no formal grounds of refusal are included in the ICC Statute, several provisions qualify the obligation of States Parties to immediately arrest and surrender the person in relation to parallel national proceedings.

Some tribunals (ICC, STL, ECCC) provide for an alternative to arrest and provisional detention and foresee the possibility of a summons to appear. Practice has proven that a summons is a viable alternative to the deprivation of liberty. It was argued that it should always be open for the Judge who authorises an arrest warrant to summon the person to appear before the court. This approach fully protects the principles of proportionality and subsidiarity. Conditions imposed upon the person should relate to the justifications for the deprivation or limitation of liberty provided for by the procedural framework of the tribunal concerned.

As far as the shield function of international criminal procedure is concerned, it was noted with surprise that the legal framework of most tribunals do not expressly provide suspects or accused persons with the right to be free from arbitrary or unlawful arrest and detention. However, this right follows from the application of human rights norms. While international

human rights law provides that when an arrest or detention is found to be unlawful, the remedy should be release, the international(ised) criminal tribunals were found to avoid granting this remedy.

Several other procedural safeguards were identified which derive from international human rights law and which should be upheld by all tribunals when persons are deprived of their liberty, as was confirmed by the jurisprudence of these institutions. Among others, these include (i) the right to be promptly informed of the reasons of one's arrest, (ii) the right of every person deprived of liberty to be promptly brought before a judge or a 'judicial officer', irrespective of the status of the person concerned or the place of the deprivation of liberty, and (iii) the right to challenge the lawfulness of detention (*habeas corpus*). This latter right was expressly provided in the TRCP (including a strict time limitation to hear this challenge). Disturbingly, the practice of the ICTR reveals several instances in which *habeas corpus* challenges were not heard. While the picture of the practice is mixed, it was argued that in the context of a *habeas corpus* challenge, the tribunal should also have the possibility to examine the reasonableness of the suspicion on which the original deprivation of liberty was based. The importance of this procedural right lies where it protects the other rights identified. In general, several instances were noted where the respective practice of the international(ised) criminal courts or tribunals regarding these procedural safeguards deviates from international human rights norms.

Chapter 7 also addressed instances of 'irregular' rendition of suspects or accused persons. It was noted that the relevant practice in this regard stems from one tribunal (ICTY). Hence, no general conclusions could be drawn regarding the law of international criminal procedure. The jurisprudence of the ICTY was positively evaluated insofar as it expressed a willingness of the tribunal to review the manner in which the arrest was executed by states or international forces.

It was argued that remedies for violations of the rights of suspects and accused persons related to the deprivation of liberty should be proportionate. Hence, the Judge should *proprio motu* consider all possible remedies. While the statutory frameworks of the *ad hoc* tribunals and the Special Court do not provide so, the practice of these tribunals has acknowledged the existence of an inherent or implied power to provide compensation to persons who have been the victim of unlawful or arbitrary arrest or detention. Contrastly, the ICC Statute, the Statute

of the STL as well as the TRCP explicitly provide for a right to compensation. The STL only provides for a right to *request* compensation for unlawful arrest or detention, and the awarding of this compensation is made dependent upon a showing of a 'serious miscarriage of justice'. The international criminal courts and tribunals have proven their willingness to acknowledge that the right to an effective remedy encompasses a right to financial compensation, provided that no other remedies (*e.g.* the reduction of the sentence) would be effective (where the person is acquitted). Furthermore, a reduction of the sentence can be granted or a simple declaration that the rights of the suspect or the accused have been violated in the course of the arrest or detention.

It was concluded that in exceptional circumstances only, violations of the rights of the suspect or the accused related to the deprivation of liberty may lead the tribunal to refuse to *exercise* jurisdiction. The jurisprudence of the *ad hoc* tribunals embraced the abuse of process doctrine, as part of its inherent powers, where proceeding with the case would contravene the Court's sense of justice. This is the case where in light of serious or egregious violations of the rights of the suspect or accused, exercising jurisdiction would prove detrimental to the court's integrity. This implies that a fair trial is no longer possible, or where in the circumstances of the case, proceeding with the case would contravene the court's sense of justice, due to pre-trial impropriety or misconduct. While the application of the abuse of process doctrine is discretionary in nature, the discretion may in some cases be very limited.

Although the ICC has rejected the application of the abuse of process doctrine, it has confirmed the existence of its power, under Article 21 (3) ICC Statute, to stay or discontinue proceedings where a fair trial is no longer possible as a consequence of violations of the rights of suspects and accused persons by acts of his/her accusers. Whereas the *ad hoc* tribunals and the SCSL consider that, in declining to exercise jurisdiction, it is irrelevant what entity or entities are responsible for the violations, the ICC reserves the remedy of setting aside jurisdiction to violations committed by 'his/her accusers'. It was argued that the jurisprudence of the international criminal tribunals (some decisions to the contrary notwithstanding) should not be understood as reserving the application of the abuse of process doctrine to instances of torture or serious mistreatment. The seriousness of the crimes charged is taken into consideration where the tribunals consider setting jurisdiction aside. Likewise, the level of attribution of the violations to the tribunal or its organs is considered.

Some jurisprudence to the contrary notwithstanding, the *ad hoc* tribunals seemingly accepted the view that shared responsibilities exist between the tribunal and the requested state in the effectuation of the arrest and detention in the requested state. The tribunal is responsible for *some* aspects of the deprivation of liberty at its behest. In this regard, the Prosecutor has a duty of due diligence. Whereas some authors have argued that the international court should take responsibility for *all* violations that have occurred in the context of the case (including all pre-transfer violations of the rights of the suspect or accused person), this stance seems only to be confirmed with regard to the remedy of setting aside jurisdiction. None of the international(ised) courts and tribunals under review proved willing to take responsibility for *all* violations of the person's rights, even where they cannot be attributed to the tribunal, as has been shown. However, this current stance of the jurisprudence was criticised where it is illogical to take responsibility for the violations of third parties where these amount to an abuse of process but to refuse to take this responsibility for lesser violations by third parties. The ICC has, so far, refused to take responsibility for violations that occurred prior to the sending of the cooperation request where there had not been a concerted action. Furthermore, in considering the stay of the proceedings and to decline to exercise jurisdiction, the test formulated by the ICC Appeals Chamber prevents the Court from taking responsibility for violations committed by third parties unrelated to the Court. One Pre-Trial Chamber interpreted this test as always requiring attribution to a Court organ, even after the sending of the cooperation request. In order to prevent gaps in the protection of the suspect or accused, it was argued that the Court should take responsibility for all violations in the context of a case.

Chapter 8 then addressed the issues of provisional detention and release prior to the commencement of the trial. It was found that the *ad hoc* tribunals and the SCSL hold that detention is neither the rule nor the exception and that the particular circumstances of each case should be considered. This approach was critically evaluated in light of international human rights norms, which clearly require that release is the norm and detention the exception. The other institutions under review proclaim that pre-trial liberty is the rule and pre-trial detention the exception. However, the practice does not confirm this picture. Therefore, rather than taking such pronouncements for granted, a number of 'features' were discussed which can be reflective of a system where pre-trial release is the rule. These factors included: (i) the absence of discretion for the Judges in decisions on provisional detention/interim release, (ii) the requirement that one or more legitimate grounds are present for the ordering of provisional detention, (iii) the fact that the burden of proof in decisions on

provisional detention/interim release is on the Prosecutor, (iv) the presence of a periodic review mechanism regarding pre-trial detention, (v) strict time limitations for provisional detention and (vi) the possibility for the Judges to order conditional release.

With regard to the first of these ‘features’, a distinction was drawn. It was concluded that the practice of the *ad hoc* tribunals and the SCSL leaves discretion to the Judges to deny provisional release where all conditions have been fulfilled. Other tribunals under review were found to reject the idea of such judicial discretion in decisions on provisional detention/interim release. The removal of judicial discretion is a remarkable improvement where the analysis of international human rights norms clearly depicts that the accused should be released where no ‘genuine requirement of public interest’ is present, which outweighs the person’s right to personal liberty. Since not only the ICC, but also the internationalised criminal courts and tribunals discussed do not leave any discretion with the Judges in provisional detention/release cases, it was concluded that there is a tendency to remove judicial discretion in provisional release/detention matters.

As far as the requirement of legitimate grounds is concerned, the *ad hoc* tribunals and the SCSL provide for a regime of automatic pre-trial detention, absent any showing of the necessity thereof. The ICC as well as the internationalised criminal tribunals discussed require that pre-trial detention is necessary for one or more *legitimate purpose(s)*. It was argued that the requirement of a legitimate purpose brings the provisional detention/interim release regime in line with international human rights norms. It follows from the jurisprudence of the ECtHR that the persistence of a reasonable suspicion is a *conditio sine qua non* for the lawfulness of the continued detention. However, after a certain amount of time, the persistence of a reasonable suspicion can no longer suffice. A ‘genuine requirement of public interest’ should exist for continued detention, which, notwithstanding the presumption of innocence, outweighs the person’s right to personal liberty.

With regard to the *burden of proof*, it was shown that the *ad hoc* tribunals and the SCSL clearly put the burden of proof on the accused. The other international(ised) criminal tribunals scrutinised put the burden of proof on the Prosecutor. It was concluded that such an approach stands to be preferred, since the former approach violates human rights law. Putting the burden on the Prosecutor is characteristic of a system which considers pre-trial detention to be the exception and release to be the rule. However, it was noted with concern that even in those

systems which purport that the burden of proof is on the Prosecutor, in practice this burden is often shifted to the accused. Notably, on many occasions, Pre-Trial Chambers of the ICC effectively shifted the burden to the accused when they took the *ex parte* decision on the warrant of arrest as their point of departure for the consideration of a request for provisional release.

Most tribunals were found to make allowance for a *periodic review mechanism* of pre-trial detention, or a review at the occasion of the extension of the pre-trial detention (ICC, SPSC, STL and ECCC). Such a review mechanism provides the detained person with an effective safeguard against the undue prolongation of the detention. It follows from international human rights norms that pre-trial detention should be limited in time and that the person has a right to be tried within a reasonable time or to be (conditionally) released. Furthermore, this mechanism allows the taking into consideration of any changed circumstances.

It was also addressed that none of the international criminal tribunals and only some internationalised criminal tribunals (ECCC, SPSC) provide for strict time limitations of any provisional detention. The international criminal tribunals in particular would benefit from such time limitations where accused persons usually spend a very long time in pre-trial detention. However, as a general rule, all tribunals acknowledge that persons should not be detained for an unreasonable period in pre-trial detention.

Finally, all tribunals scrutinised provide for the possibility of conditional release. It was argued that conditions imposed should serve to negate or mitigate the risks which allow for pre-trial detention. This ensures that substitute restrictive measures are ordered in accordance with the principle of subsidiarity. It was argued that, unlike at the ICC, the ordering of conditional release should not be discretionary. In order to fully comply with the principle of subsidiarity, conditional release should be ordered where the conditions imposed suffice to safeguard the legitimate grounds for provisional detention under Article 58 (1) (b) ICC Statute.

Some further commonalities were identified. Among others, while not strictly required under human rights law, all international(ised) criminal tribunals seem to allow for interlocutory appeals against provisional detention/release decisions. It was noted with concern that at

several tribunals scrutinised (ICC, ECCC) substantive delays exist before a decision on appeal is rendered.

Furthermore, it was found that a major obstacle to provisional release lays in the *de facto* requirement that the host state agrees to allow the suspect or accused person on its soil and guarantees that the person will appear for trial and will not interfere with witnesses, victims or other persons. Tellingly, the ICC Appeals Chamber refused the conditional release of Bemba, where no state had been identified that was able to impose the conditional release. It was argued in Chapter 8 that States Parties are under an obligation to receive persons provisionally released. Arrangements should be made to ensure the state cooperation with regard to conditional release.

Finally, the concluding **Section IV**, which consists of one chapter (**Chapter 9**), set out the main findings of the study and made some recommendations. The many differences in the procedural constellations of the jurisdictions covered notwithstanding, a substantial number of similarities could be identified through the comparative analysis of the procedural frameworks. Furthermore, many of the rules so identified reflect or confirm (or occasionally even surpass) international human rights norms. These commonly shared rules and practices included procedural safeguards (shield dimension of international criminal procedure), a number of power-conferring rules (sword dimension of international criminal procedure), as well as a number of commonly shared rules on the structure, organisation and nature of the investigation phase, the obligations incumbent on the parties in international criminal investigations, and on arrest and detention.

Furthermore, it was concluded that the investigation phase of proceedings suffers from ‘under regulation’. The law of international criminal procedure relevant to the investigation phase lacks the detail to sufficiently safeguard the fairness of these investigations *vis-à-vis* the persons targeted thereby. While a tendency towards more detailed regulation can be noted (consider e.g. Article 59 ICC Statute on arrest proceedings in the custodial state), further regulation is required to ensure the fairness of proceedings. This is best felt with regard to the investigative powers of the international Prosecutor, which, in many instances, are generic at best.

Moreover, it was concluded that the fragmentation of investigations over different jurisdictions may, on many occasions, lead to a reduction in the legal protection of the persons affected and to *lacunae* in their protection. This will be the case if international(ised) criminal courts and tribunals decline responsibility for acts carried out by states at the tribunal's request or for other external events from which they benefit. To address these potential reductive effects, it is important that the shared responsibility of the courts and tribunals and the states whose cooperation is sought in protecting the human rights of the individual(s) concerned is accepted. Consequently, both the court or tribunal and the requested state have the responsibility to protect the rights of the individual(s) concerned where cooperation is sought from states or other international actors.

Finally, in order to answer the second part of the central research question, a number of general and more specific recommendations were formulated that are necessary to ensure the fairness of investigations.

SAMENVATTING

Deze studie had het vooronderzoek in het internationaal strafprocesrecht tot voorwerp. Het belang van het vooronderzoek en van strafvorderlijke handelingen gesteld tijdens deze fase van het onderzoek voor het verdere verloop van de strafprocedure wordt onvoldoende onderkend in de academische literatuur aangaande het internationaal strafprocesrecht. Hoewel het aantal academische publicaties aangaande het internationaal strafprocesrecht snel groeit, kon het vooronderzoek dusver op aanzienlijk minder belangstelling rekenen. Daarnaast kunnen twee ‘hiaten’ worden vastgesteld met betrekking tot het vooronderzoek. Vooreerst dient een hiaat te worden vastgesteld betreffende de regulering van het vooronderzoek. Er werd veel minder werk gemaakt van de regulering van deze fase van de strafprocedure in vergelijking met het onderzoek ter terechtzitting. Ten tweede is een ‘jurisprudentieel hiaat’ waarneembaar. Met betrekking tot vele aspecten van het vooronderzoek is de rechtspraak schaars of onbestaande. Veel strafvorderlijke handelingen vinden schijnbaar plaats buiten enige rechterlijke controle om.

Dit onderzoek stelde zich tot doel om de processuele regels alsook de rechtspraktijk van de verschillende internationale (en ‘geïnternationaliseerde’) straftribunalen te analyseren met het oog op de identificatie van enige (ontluikende) regels van internationaal strafprocesrecht. Meer bepaald werd een antwoord gezocht op de vraag of bepaalde regelingen en/of strafvorderlijke praktijken betreffende het vooronderzoek gedeeld worden door alle internationale (en ‘geïnternationaliseerde’) straftribunalen. Indien dit het geval zou zijn, ondersteunt dit de visie dat deze instellingen, niettegenstaande het feit dat het op zichzelf staande regimes betreft, gelijklopende oplossingen hebben aangenomen. Bovendien stelde dit onderzoek zich tot doel om een antwoord te formuleren op de vraag welke wijzigingen deze regels en praktijken van internationaal strafprocesrecht behoeven, teneinde de het eerlijk karakter van de internationale strafrechtspleging te garanderen?

Het belang van het identificeren van deze gemeenschappelijke regels ligt vooreerst in het verhelderen van de inhoud van het internationaal strafprocesrecht. Bovendien kunnen deze gemeenschappelijke regels dienstig zijn voor toekomstige internationale of ‘geïnternationaliseerde’ straftribunalen en voor de nationale wetgever voor wat het onderzoek naar en de berechting van zeer ernstige misdrijven betreft.

Er bestaat een additionele en nog dwingendere noodzaak tot het identificeren van een kern van internationaal strafprocesrecht met betrekking tot het vooronderzoek. Het vooronderzoek in het internationaal strafprocesrecht wordt gekenmerkt door de opsplitsing ervan over verschillende jurisdicties. Internationale en 'geïnternationaliseerde' straftribunalen zijn afhankelijk van de medewerking van staten of andere internationale actoren tijdens het vooronderzoek. Deze afhankelijkheid is een gevolg van de beperkte mate waarin deze tribunalen zelfstandig en onafhankelijk bewijsmateriaal en informatie kunnen verzamelen op het grondgebied van staten of waarin zij zelfstandig verdachten of beschuldigen kunnen aanhouden.

In zoverre dat de gemeenschappelijke regels die geïdentificeerd worden in overeenstemming zijn met mensenrechtelijke normen, dienen deze niet enkel te worden nageleefd door de internationale straftribunalen, maar ook door staten en/of andere internationale actoren die bij het vooronderzoek betrokken zijn. Met andere woorden, deze regels dienen te worden gerespecteerd, onafhankelijk van de jurisdictie (het internationaal straftribunaal, de nationale jurisdictie of de internationale actor) die verantwoordelijk is voor de onderzoeksdaad. Bijgevolg kunnen deze mensenrechtelijke normen tot op zekere hoogte verhinderen dat de opsplitsing van het vooronderzoek tussen het internationale en nationale niveau de verdachte of de beschuldigde benadeelt.

Deze studie omvat vier delen dewelke min of meer een chronologische volgorde aanhouden. **Deel 1** poogde vooreerst om 'het internationaal strafprocesrecht' en het 'vooronderzoek' te conceptualiseren en te definiëren. In **hoofdstuk 2** werden daartoe vooreerst de bronnen van het internationaal strafprocesrecht besproken. Aangetoond werd hoe bepaalde onzekerheden blijven voortbestaan met betrekking tot deze bronnen. Vervolgens werden de doelstellingen van de internationale berechting van internationale misdrijven en van het internationaal strafprocesrecht nader behandeld. Het blijft onduidelijk welke doelstellingen deze precies nastreven. Hoewel de internationale (en 'geïnternationaliseerde') straftribunalen voorhouden dat zij een groot aantal doelstellingen nastreven, blijft hun onderlinge (hiërarchische) relatie onduidelijk. Deze onduidelijkheid beperkt in grote mate de normatieve waarde van deze doelstellingen. Een duidelijke prioritering en een goed begrip betreffende de al dan niet onderlinge verenigbaarheid van verschillende doelstellingen is immers een voorwaarde opdat de procedures bij deze tribunalen toegesneden kunnen worden op de belangrijkste doelen die deze instellingen nastreven.

Vervolgens werd aandacht besteed aan de positionering van het internationaal strafprocesrecht ten aanzien van de *civil law* en *common law* strafrechtssystemen. Hoewel algemeen erkend wordt dat ten gevolge van het vermengen van elementen van beide modellen een systeem met een ‘*sui generis*’ karakter is ontstaan, is de *civil law* – *common law* dichotomie dienstig voor een beter begrip van het internationaal strafprocesrecht. Daarenboven is deze dichotomie nuttig ten behoeve van het opsporen van ‘systemische spanningen’. Ook de mate waarin internationale (en ‘geïnternationaliseerde’) straftribunalen gebonden zijn door internationale mensenrechtennormen werd uitvoerig behandeld. Vastgesteld werd dat de jurisdicties die onderzocht werden in deze studie intern gebonden zijn door deze internationale mensenrechten. Bovendien kennen een aantal van deze jurisdicties een interpretatieve functie toe aan deze normen. Vastgesteld werd echter ook dat onzekerheid heerst met betrekking tot de vraag in hoeverre deze mensenrechtelijke normen aangepast kunnen worden aan de specifieke noodwendigheden en unieke karakteristieken van de strafrechtprocedures van deze internationale (en ‘geïnternationaliseerde’) straftribunalen. Hoewel bevonden werd dat een zekere contextualisering noodzakelijk is, blijkt het veel moeilijker om de grenzen te bepalen waarbinnen een dergelijke aanpassing aanvaardbaar is. Een terughoudende houding dient te worden aangenomen wanneer een beroep wordt gedaan op de specifieke karakteristieken van de internationale strafprocedure om een contextualisering van de mensenrechtelijke normen te rechtvaardigen. In de meeste gevallen waarin een dergelijke aanpassing gesuggereerd werd, leidde dit *de facto* tot het verminderen van de bescherming die door deze normen wordt geboden. De mogelijkheid dat internationale (of ‘geïnternationaliseerde’) straftribunalen mensenrechtelijke normen aanpassen aan hun eigen noodwendigheden, in de afwezigheid van enig extern toezicht hierop, houdt bepaalde risico’s in. Aangetoond werd hoe, algemeen gesproken, mensenrechtelijke normen voldoende flexibel zijn opdat *geen* aanpassing of heroriëntatie noodzakelijk is. Hierna verplaatste de aandacht zich geleidelijk naar de fase van het vooronderzoek binnen de strafprocedure, het eigenlijke onderwerp van deze studie. De specifieke kenmerken van onderzoeken door internationale (en ‘geïnternationaliseerde’) straftribunalen werden geanalyseerd. Elke evaluatie betreffende de meest geschikte procedure voor internationale straftribunalen dient immers met deze unieke kenmerken rekening te houden. Onder meer (i) de afhankelijkheid van staten en internationale actoren, (ii) de verdeling van het vooronderzoek over verschillende jurisdicties en (iii) de omvang en de complexiteit van deze onderzoeken werden aangeduid als kenmerkend voor deze internationale strafprocedures.

Hoofdstuk 2 besloot met de algemene vaststelling dat het internationaal strafprocesrecht niet over een overtuigend theoretisch kader beschikt, dat rekening houdt met haar specifieke kenmerken en de doelstellingen die het nastreeft. Aan de hand van hoofdstuk 2 kon slechts één geschikte maatstaf geïdentificeerd worden voor de normatieve evaluatie van het internationaal strafprocesrecht. Aangezien alle internationale (en ‘geïnternationaliseerde’) straftribunalen gebonden zijn door internationale mensenrechtelijke normen, vormen deze een geschikt toetsingskader. Desalniettemin dient een belangrijke tekortkoming te worden opgemerkt wat betreft de bruikbaarheid van deze mensenrechtelijke normen als toetsingskader. Deze normen zijn onvoldoende gedetailleerd om louter aan de hand daarvan te bepalen op welke manier de internationale strafprocedure georganiseerd dient te worden en welk strafprocesrechtelijk model de voorkeur dient weg te dragen. Verscheidene strafprocesrechtelijke oplossingen zijn in overeenstemming met deze meer abstracte minimumnormen. Hetzelfde geldt voor de organisatie en de structuur van het vooronderzoek.

In **hoofdstuk 3** werd het vooronderzoek verder afgebakend en gedefinieerd. De vereiste inzake het bestaan van een minimumdrempel voor de aanvang van het vooronderzoek kon niet bij alle tribunalen worden vastgesteld. In de gevallen waar een dergelijke minimumdrempel niet is voorzien, worden de bevoegdheden van de aanklager schijnbaar niet beperkt door enige vereiste van ‘initiële verdenking’. In de gevallen waar een dergelijke minimumdrempel wel voorzien is, wordt het eigenlijke vooronderzoek voorafgegaan door een ‘preliminair onderzoek’. Dit ‘preliminair onderzoek’ wordt slechts gereguleerd door een aantal van de onderzochte straftribunalen. Met uitzondering van de Buitengewone Kamers in de Rechtbanken van Cambodja (ECCC), is deze fase van de procedure de verantwoordelijkheid van hetzelfde orgaan van het tribunaal dat instaat voor het vooronderzoek. Vastgesteld kon worden dat deze ‘preliminaire onderzoeksfase’ bij de verschillende straftribunalen waar deze geïdentificeerd kon worden, dezelfde functie dient: nagaan of aan de minimumdrempel die het openen van het eigenlijke vooronderzoek rechtvaardigt, is voldaan. Op die manier beschermt deze fase de belangen van de individuen die geïndiceerd worden door het onderzoek. Daarnaast verhindert deze fase dat de schaarse middelen worden gespenseerd aan onderzoeken waar geen enkele kans bestaat dat deze daadwerkelijk zullen resulteren in een berechting. Met uitzondering van de situatie waarin de aanklager van het Internationaal Strafhof (ICC) gebruik maakt van zijn of haar *proprio motu* bevoegdheden, is de vaststelling dat aan de minimumdrempel voor het openen van een strafonderzoek is voldaan, niet onderworpen aan een rechterlijke toetsing.

De meeste straftribunalen die besproken werden, definiëren het vooronderzoek (*sensu stricto*) als ‘alle onderzoeksdaden die worden ondernomen door de aanklager met het oog op het verzamelen van informatie en bewijsmateriaal’. Geconcludeerd werd dat een dergelijke definitie ontoereikend is, in de mate dat het meer accusatoir karakter van de strafprocedure bij de straftribunalen vereist dat de verdediging haar eigen onderzoek voert. Daarnaast voorzien de statuten van deze straftribunalen nergens expliciet de onderzoeksbevoegdheden van de verdediging. De meeste straftribunalen voorzien evenmin in een strikte temporele afbakening van de fase van het vooronderzoek, in zoverre dit vooronderzoek onder bepaalde voorwaarden kan voortduren na de aanvang van de fase van het onderzoek ter terechtzitting. Aangezien elke voortzetting van het onderzoek door de aanklager na de bevestiging van de tenlastegelegde feiten interfereert met de voorbereidingen van de verdediging, moet dit de uitzondering blijven.

Vastgesteld werd ook dat enkel bij het ECCC het de verdediging niet is toegestaan om eigen onderzoeksdaden te stellen (met de uitzondering van ‘*preliminary inquiries*’). Eerder, en in overeenstemming met het *civil law* model, kan de verdediging (net als de co-procureurs of de burgerlijke partijen), de co-onderzoekersrechtters er om *verzoeken* bepaalde onderzoeksdaden te stellen. De rechterlijke rol tijdens het vooronderzoek is traditioneel beperkt. De uitzonderingen zijn het ECCC, waar het onderzoek in handen is van de co-onderzoekersrechtters, en het Tribunaal van Oost-Timor (SPSC) waar een rechterlijke toestemming noodzakelijk was voor het aanwenden van dwangmiddelen tijdens het vooronderzoek. Desalniettemin is er een duidelijke trend merkbaar in de richting van een grotere rechterlijke rol tijdens het vooronderzoek. De Kamer van Vooronderzoek van het ICC en de Rechter van Vooronderzoek bij het Libanon-tribunaal (STL) beschikken over beperkte maar belangrijke bevoegdheden tijdens het vooronderzoek om de procespartijen bij te staan bij de voorbereiding van hun zaken. Bovendien heeft de Kamer van Vooronderzoek van het ICC haar rol bevestigd inzake de bescherming van de rechten van verdachten tijdens het vooronderzoek.

Onderzoeken door internationale straftribunalen zijn normaal *reactief* van aard. Hoewel volgens één interpretatie van de rechtspraak van het ICC het onderzoek met betrekking tot ‘situaties’ deels *proactief* zou kunnen worden, werd geconcludeerd dat deze interpretatie niet kan worden bijgetreden. Een aantal vereisten werden geïdentificeerd voor de proactieve aanwending van onderzoeksbevoegdheden. Deze omvatten onder meer (i) de vereiste van een

gerechtelijke finaliteit, (ii) de vereiste van een nauwkeurige omschrijving van de proactieve onderzoeksbevoegdheden, (iii) de met elkaar gelieerde vereisten van proportionaliteit, subsidiariteit en rechterlijke toetsing, in zoverre dat proactieve strafvorderlijke handelingen interfereren met het recht op privacy en (iv) de verplichting van een onafhankelijk en onpartijdige supervisie over de proactieve handelingen. Geconcludeerd werd dat de meeste van deze verplichtingen problematisch zijn indien het procedureel kader van het ICC wordt geïnterpreteerd als zou het proactieve recherche mogelijk maken.

Vervolgens werd heel wat aandacht besteed aan de vraag of de selectie van zaken voor onderzoek en vervolging door de aanklager gekenmerkt wordt door een principe van legaliteit of door een principe van opportuniteit. Deze aandacht was gerechtvaardigd aangezien het antwoord op deze vraag belangrijke consequenties heeft voor de organisatie van het vooronderzoek. Geconcludeerd werd dat de internationale aanklager over een aanzienlijke discretie beschikt bij het openen van een onderzoek. De statuten van verschillende straftribunalen (het Speciale Hof voor Sierra-Leone (SCSL), het ECCC, en het Joegoslavië-tribunaal (ICTY)) bevatten ‘*limiting language*’, die de aanklager er toe verplichten om zich te focussen op een bepaalde groep of categorie van individuen. De interpretatie door de Beroepskamer van het SCSL en door de Beroepskamer van het ECCC, dat deze *limiting language* in hun respectievelijke statuten enkel een richtlijn vormen en geen jurisdictionele beperking impliceren, werd bekritiseerd. Aangetoond werd hoe bepaalde beginselen de discretionaire bevoegdheid in hoofde van de aanklager verder inperken, zoals de met elkaar gelieerde beginselen van gelijkheid en non-discriminatie. Deze beginselen vinden hun oorsprong in de mensenrechten. Ook het principe van de onafhankelijkheid van de aanklager is belangrijk, in zoverre dat de aanklager niet om instructies mag verzoeken of geen instructies mag ontvangen van externe bronnen. Aangetoond werd verder hoe geen enkele van de onderzochte straftribunalen richtlijnen publiek maakten inzake de uitoefening door de aanklager van haar discretie inzake het al dan niet openen van een onderzoek. Evenwel werd beargumenteerd dat *ex ante* en publiek toegankelijke richtlijnen te prefereren zijn. Dergelijke richtlijnen garanderen onder meer transparantie en coherentie en de bescherming van voornoemde principes van gelijkheid en non-discriminatie. Bovendien beschermen deze de aanklager tegen externe politieke druk. Eén belangrijk obstakel dat de aanname van dergelijke richtlijnen in de weg staat is de noodzaak om eerst de verschillende doelstellingen van internationale strafvervolgingen te bepalen en te prioriteren, aangezien deze ontegensprekelijk elke richtlijn inzake het uitoefenen van discretie door de aanklager beïnvloeden.

Tot slot werden een aantal normatieve principes besproken die relevant zijn met betrekking tot het vooronderzoek bij internationale (en ‘geïnternationaliseerde’) straftribunalen. Deze omvatten (i) het principe van de objectiviteit van de aanklager en (ii) de ethische verplichting van *due diligence* in hoofde van de procespartijen in de internationale strafprocedures. Geconcludeerd werd dat het principe van objectiviteit, hetwelke de aanklager verplicht om het onderzoek zowel *à charge* als *à décharge* te voeren, niet duidelijk verankerd is in het internationaal strafprocesrecht. Dit principe werd geïdentificeerd bij het ICC, de SPSC en het ECCC. Hoewel de aanklagers van de *ad hoc* tribunalen, het SCSL en het STL in de rechtspraak omschreven worden als een ‘orgaan van internationale gerechtigheid’ of als een ‘*minister of justice*’, werd geconcludeerd dat dergelijke omschrijvingen weinig betekenen in de afwezigheid van een uitdrukkelijke verplichting om bewijs *à décharge* te verzamelen. Het werd aanbevolen dat een principe van objectiviteit in hoofde van de aanklager zou aangenomen worden door alle internationale straftribunalen. In het bijzonder kan dit tot op zekere hoogte een oplossing bieden voor de moeilijkheden die de verdediging ondervindt inzake de toegang tot bewijsmateriaal. Daarnaast werd besloten dat een ethische verplichting van *due diligence* rust op alle procespartijen tijdens het vooronderzoek.

Deel II van deze studie behandelde vervolgens de bewijsgaring door de procespartijen. Een belangrijk onderscheid werd gemaakt tussen niet-dwangmiddelen en de niet-vrijheidsberovende dwangmiddelen. Zonder enige aanspraak te maken op de exhaustieve behandeling ervan, werden onderzoeksdaden besproken op basis van het criterium van hun actuele relevantie in de rechtspraktijk van de verschillende internationale (en ‘geïnternationaliseerde’) straftribunalen.

Vooreerst behandelde **hoofdstuk 4** het verhoor van de verdachte en de beschuldigde. Zowel de processuele regels die bevoegdheden toekennen (*sword dimension*) als de relevante procedurele waarborgen en procedurele regels inzake de registratie van het verhoor (*shield dimension*) werden behandeld. Aangezien onderzoeksdaden desgevallend uitgevoerd kunnen worden door de bevoegde nationale wethandhavingsinstanties, door de internationale aanklager of door een combinatie van beiden, is het belangrijk te bepalen door welke procedurele regels de strafvervolgingshandeling gereguleerd wordt. Inzake de *shield function*, konden een aantal procedurele waarborgen worden onderscheiden, die gedeeld worden door alle onderzochte straftribunalen. Andere procedurele waarborgen worden schijnbaar niet gedeeld door alle straftribunalen. Hoewel de rechtspraak van het ICC groeit, blijft het onzeker

of het ICC een aantal procedurele regels inzake het verhoor van verdachten en beschuldigen die werden geïdentificeerd in de rechtspraak van de *ad hoc* tribunalen en het SCSL zal volgen.

Procedurele waarborgen die gedeeld worden door alle internationale (en ‘geïnternationaliseerde’) straftribunalen omvatten: (i) het recht voor verdachten en beschuldigen op bijstand door een advocaat tijdens het verhoor, (ii) het recht voor verdachten en beschuldigen om geïnformeerd te worden omtrent het recht op bijstand door een advocaat tijdens het verhoor en het recht om daar afstand van te doen, op voorwaarde dat deze afstand vrijwillig wordt gedaan, (iii) het zwijgrecht in hoofde van de verdachte of de beschuldigde tijdens het verhoor, van welk recht deze in kennis dient te worden gesteld voor de aanvang van het verhoor, (iv) het verbod van ongeoorloofde druk, met inbegrip van dwang, intimidatie of bedreigingen, alsook foltering en andere vormen van wrede, onmenselijke of vernederende behandeling en (v) het recht voor de *beschuldigde* om in kennis te worden gesteld van de aard en de reden van de tenlasteleggingen in een taal die hij of zij begrijpt, en alvorens te worden ondervraagd. Ten slotte, (vi) geniet de verdachte of beschuldigde het recht op de kosteloze bijstand van een tolk gedurende het verhoor, indien hij of zij de taal van de ondervraging niet begrijpt of spreekt.

Vervolgens, en op een gelijkaardige manier, behandelde **hoofdstuk 5** het getuigenverhoor. Vanzelfsprekend werd bevonden dat de procedures van alle straftribunalen die werden onderzocht voorzien in de bevoegdheid van de aanklager om getuigen te verhoren. Waar de corresponderende bevoegdheid voor de verdediging om getuigen te ondervragen niet uitdrukkelijk is voorzien, volgt deze uit de rechten van de beschuldigde om getuigen te ondervragen, het *equality of arms* – beginsel en het recht van de beschuldigde om te beschikken over voldoende tijd en faciliteiten voor de voorbereiding van zijn of haar verdediging. Enkel bij het ECCC is het de verdediging verboden getuigen te ondervragen en kan het verdedigingsteam enkel ‘*preliminary inquiries*’ ondernemen die noodzakelijk zijn om het recht van de verdediging uit te oefenen teneinde de co-onderzoekers te verzoeken om bepaalde onderzoeksdaden te stellen (en getuigen te verhoren). Bevonden werd dat de *ad hoc* tribunalen en het SCSL onder bepaalde voorwaarden getuigen kunnen verplichten om verhoord te worden door de aanklager of de verdediging tijdens het vooronderzoek. Het ICC ontbeert dergelijke bevoegdheid om getuigen te verplichten om te verschijnen met het oog op hun ondervraging tijdens het vooronderzoek. Ook het ECCC en STL erkennen de

mogelijkheid om getuigen te verplichten om te verhoord te worden door de co-onderzoekersrechters (ECCC) of door de verdediging, de aanklager of de Rechter van Vooronderzoek (STL). Bovendien werd met verbazing vastgesteld dat enkel het ICC en het ECCC voorzien in een verplichting voor de aanklager om elk getuigenverhoor te registreren. Zo heeft de rechtspraak van het ICTY bijvoorbeeld het bestaan van een dergelijke vereiste verworpen. Evenwel werd geargumenteed dat een dergelijke vereiste volgt uit de *disclosure* verplichtingen in hoofde van de aanklager en dat een dergelijke vereiste een voorwaarde is voor het betekenisvol uitoefenen van de rechten van de verdediging. Bovendien werd vastgesteld dat, niettegenstaande het ontbreken van een verplichting tot audiovisuele registratie van getuigenverhoren in de procedures bij de verschillende straftribunalen, het ECCC en het ICC dergelijke procedure aanmoedigen, in het bijzonder met betrekking tot kwetsbare getuigen. Het STL voorziet enkel in de audiovisuele registratie van getuigenverhoren indien een schriftelijke getuigenverklaring wordt afgenomen door de Rechter van Vooronderzoek of door een nationale staat. Aangetoond werd dat het belang van een audiovisuele registratie van het getuigenverhoor ligt in de transparantie van de registratie en de mogelijkheid van *ex post* controle over het verloop van het verhoor. Het stelt het straftribunaal in staat om na te gaan wat gezegd werd tijdens het verhoor, op welke wijze het gezegd werd en hoe het geïnterpreteerd werd door de getuige. Daarnaast maakt deze registratie het opsporen van fouten in de vertaling van de vragen en antwoorden mogelijk. Het belang hiervan moet begrepen worden in het licht van de bestaande linguïstieke, culturele en andere obstakels inzake de bewijsgaring bij internationale straftribunalen. De noodzaak van een meer gedetailleerde regulering van het getuigenverhoor werd verdedigd. Er werd onder andere gewezen op de toenemende mate waarin op schrift gestelde getuigenverklaringen tot het bewijs worden toegelaten ter terechtzitting. In het licht van deze evolutie, is er nood aan duidelijke, publiek toegankelijke en gestandaardiseerde richtlijnen of *standard operating procedures* ('SOP's) voor alle internationale (en 'geïnternationaliseerde') straftribunalen. Deze dienen duidelijk de procedure voor het getuigenverhoor uiteen te zetten. Dergelijke richtlijnen zouden de transparantie van het verhoor en de registratie van de getuigenverklaring vergroten. Deze zouden tevens de rechters in staat stellen om *ex post* na te gaan of deze richtlijnen daadwerkelijk werden gerespecteerd tijdens het onderzoek.

Geconcludeerd werd ook dat enkel het ICC en het ECCC expliciet voorzien in een waarborg voor getuigen tegen zelf-incriminatie. De status van de persoon die verhoord wordt kan nochtans veranderen. Een individu die ondervraagd wordt als getuige kan later een verdachte

worden. Het beschermen van getuigen tegen zelf-incriminatie houdt rekening met deze mogelijkheid en garandeert een bescherming tegen zelf-incriminatie vanaf het begin van het onderzoek. Daarom moet dit model gevolgd worden door de andere straftribunalen.

Tot slot behandelde **hoofdstuk 6** de niet-vrijheidsberovende dwangmiddelen. In het eerste deel kwamen de formele en materiële vereisten voor het aanwenden van deze dwangmiddelen aan bod. In de eerste plaats bracht de vergelijkende studie aan het licht dat geen algemene formele vereiste van een rechterlijke machtiging voor het aanwenden van dwangmiddelen aantoonbaar is in de procesrechtelijke regels of in de rechtspraak van de internationale straftribunalen. Desalniettemin is een rechterlijke machtiging door de Kamer van Vooronderzoek vereist indien de aanklager van het ICC direct dwangmiddelen wenst te verrichten op het grondgebied van een staat (scenario van een ‘falende staat’). Daarentegen voorziet het procedurele kader van het ECCC en de SPSC in de vereiste van een rechterlijke machtiging, in principe *ex ante*, voor het aanwenden van niet-vrijheidsberovende dwangmiddelen. Tot slot voorziet ook het STL niet expliciet in een dergelijke vereiste, met de mogelijke uitzondering van de directe bewijsgaring op het grondgebied van Libanon. Besproken werd hoe in het licht van de brede en onbegrensde dwangbevoegdheden van de aanklager, een vereiste inzake rechterlijke machtiging volgt uit de toepassing van mensenrechtennormen. Daarenboven werd de voorkeur uitgesproken voor een vereiste van rechterlijke machtiging op het internationale, eerder dan op het nationale niveau. Enkel op deze wijze kunnen *lacunae* in de bescherming van verdachten en beschuldigen vermeden worden. Daarenboven garandeert de vereiste om een rechterlijke machtiging te verkrijgen van een rechter of een kamer van het internationale straftribunaal een rechterlijke tussenkomst in alle mogelijke scenario’s van bewijsgaring, met inbegrip van de directe bewijsgaring door de aanklager. Op deze manier kan de internationale rechter zijn of haar rol inzake de vrijwaring van de individuele rechten en vrijheden van de verdachte tijdens het vooronderzoek waarmaken. Tot slot werd de voorkeur uitgesproken voor een voorafgaandelijke rechterlijke machtiging, in plaats van een machtiging *ex post*, gezien de mogelijkheid om op deze wijze de schending van internationale mensenrechtennormen te voorkomen. Enkel in gevallen van hoogdringendheid kan een *ex post* rechterlijke machtiging volstaan.

Ten tweede kon een proportionaliteitsbeginsel in brede zin afgeleid worden uit de rechtspraak van de *ad hoc* tribunalen en het ICC. Dit beginsel veronderstelt dat dwangmiddelen (1) adequaat zijn, (2) noodzakelijk zijn en (3) dat hun intensiteit en omvang

in een redelijke verhouding staan tot het nagestreefde doel. Deze invulling van het beginsel strookt met de mensenrechten. Ook de procedures bij het ECCC en de SPSC weerspiegelen dit beginsel (redelijkheid).

Tot slot kon geen duidelijke drempel voor de toepassing van niet-vrijheidsberovende dwangmiddelen onderscheiden worden. Wat de ‘geïnternationaliseerde’ straftribunalen betreft, vereiste enkel de SPSC de aanwezigheid van ‘*reasonable grounds*’ vooraleer de onderzoeksrechter machtiging kon verlenen voor de toepassing van dwangmiddelen.

Het tweede deel ging verder in op een aantal specifieke strafvorderlijke dwangmiddelen en behandelde onder meer de huiszoeking en inbeslagneming, alsook het afluisteren van communicaties. Aangezien elke directe uitvoering van dwangmiddelen door een internationale aanklager op het grondgebied van staten een delicate kwestie is, werd de nodige aandacht besteed aan de vraag of, en indien dit het geval is, onder welke voorwaarden de internationale aanklager direct dwangmiddelen kan verrichten op het grondgebied van een staat.

Vooreerst voorzien de procedurele regels en de rechtspraktijk van de verschillende internationale straftribunalen in de bevoegdheid van de aanklager om huiszoekingen en inbeslagnemingen te verrichten. De Regels van Procedure en Bewijs van de *ad hoc* tribunalen en het SCSL voorzien uitdrukkelijk in de mogelijkheid om bij hoogdringendheid een verzoek aan de nationale overheden te richten voor de inbeslagneming van fysiek bewijsmateriaal. Bevonden werd dat beperkingen inzake de locaties die kunnen worden doorzocht, volgen uit de functionele immuniteit van de leden het verdedigingsteam als ook uit immuniteiten inzake eigendom. In tegenstelling tot de rudimentaire regulering van huiszoekingen en inbeslagnemingen in de procedures van de verschillende internationale straftribunalen, voorzien de procedures bij het ECCC en de SPSC in gedetailleerde procedurele vereisten.

Ten tweede werd besloten dat belangrijke verschillen bestaan tussen de internationale straftribunalen met betrekking tot de mogelijkheid om provisoir vermogensbestanddelen van de beschuldigde te bevriezen tijdens het vooronderzoek. Ofschoon de rechtspraak van het ICTY en het SCSL in overeenstemming is over het bestaan van deze bevoegdheid, houdt de rechtspraak van het SCSL voor dat een hoge drempel vereist is en dat een dergelijke inbeslagneming of bevroering beperkt moet blijven tot vermogensvoordelen die illegaal

verworven werden of ingevolge criminele handelingen. Het ICC Statuut voorziet dat de Kamer van Vooronderzoek, *proprio motu* of op verzoek van de aanklager of van de slachtoffers, rechtshulp aan staten kan vragen om beschermende maatregelen te nemen met het oog op verbeurdverklaring. De rechtspraak van het Hof verduidelijkte dat beschermende maatregelen met als doel eventuele herstelbetalingen aan slachtoffers, hieronder vallen. Bovendien heeft het Hof haar processuele regels zo geïnterpreteerd dat deze de bevrozing of inbeslagneming van goederen en vermogensbestanddelen toestaan ter ondersteuning van de tenuitvoerlegging van een bevel tot aanhouding. Een bevel tot aanhouding of een oproep tot verschijnen moet weliswaar reeds zijn uitgevaardigd.

Ten derde, hoewel de procedures bij de verschillende internationale (en ‘geïnternationaliseerde’) straftribunalen niet expliciet voorzien in de bevoegdheid van de aanklager om communicaties af te luisteren (met uitzondering van het ECCC en de SPSC), werd geconcludeerd dat de ruime bevoegdheden van de aanklager om bewijsmiddelen te vergaren ook deze bevoegdheid omvat.

Tenslotte werd aangetoond hoe de verdachte of beschuldigde onderworpen kan worden aan bepaalde tests of verplicht kan worden om bepaalde stalen af te staan tijdens het vooronderzoek. Geen overeenkomsten konden worden geïdentificeerd tussen de procedures van de verschillende straftribunalen die onderzocht werden. Opgemerkt werd dat het ICTY een brede invulling gaf aan het recht om niet gedwongen te worden een voor zichzelf belastende verklaring af te leggen, waar het stelde dat een beschuldigde niet verplicht kan worden materialen af te staan, met inbegrip van een DNA staal of een staal voor schriftonderzoek.

Het **derde deel** van deze studie had de vrijheidsberovende dwangmiddelen tot voorwerp. **Hoofdstuk 7** behandelde de aanhouding en de overbrenging van verdachten en beschuldigten. Dit hoofdstuk maakte een onderscheid tussen de aanhouding ingevolge een bevel tot aanhouding en de aanhouding in situaties van hoogdringendheid. Het beginsel, volgens hetwelk de uitvaardiging van een bevel tot aanhouding een rechterlijke machtiging vereist, is duidelijk verankerd in het internationaal strafprocesrecht.

Daarnaast voorzien alle tribunalen in een minimumdrempel voor het uitvaardigen van een bevel tot aanhouding in zoverre ze deze uitvaardiging afhankelijk maken van het aantonen

van ofwel een ‘*prima facie case*’ (ICTY, ICTR, STL) of ‘redelijke gronden om aan te nemen’ dat de betrokkene een misdrijf heeft gepleegd binnen de jurisdictie van het straftribunaal (ICC, SPSC). Het SCSL voorziet in een lagere drempel, die op gespannen voet staat met mensenrechtelijke normen. Hoewel het ECCC niet voorziet in een materiële drempel voor het uitvaardigen van een bevel tot aanhouding of een bevel tot aanhouding en voorlopige hechtenis, zijn ‘gegronde redenen om aan te nemen dat de persoon het misdrijf of de misdrijven als uiteengezet in de inleidende of bijkomende vordering zou hebben gepleegd’ vereist voor de voorlopige hechtenis van de in verdenking gestelde.

Slechts een aantal straftribunalen voorziet in de grondvoorwaarde van noodzakelijkheid voor het verlenen van een aanhoudingsbevel en voorziet in legitieme gronden voor het uitvaardigen van een bevel tot aanhouding (ICC, STL). Het ECCC vereist de aanwezigheid van legitieme gronden voor de voorlopige hechtenis van een in verdenking gestelde.

Een belangrijk bijkomend onderscheid werd gemaakt inzake de tenuitvoerlegging van een bevel tot aanhouding in hoogdringende gevallen. Het ICC vereist steeds een voorafgaandelijke rechterlijke machtiging, terwijl de *ad hoc* tribunalen, het SCSL, het STL en de SPSC in deze gevallen voorzien in de mogelijkheid van een vrijheidsberoving in de afwezigheid van een rechterlijke tussenkomst. Het ICC Statuut laat enkel een uitstel toe inzake de presentatie van het bevel tot overbrenging en van de documenten die dit verzoek ondersteunen.

Slechts één grondvoorwaarde kon worden geïdentificeerd voor de vrijheidsberoving in de afwezigheid van een bevel tot aanhouding bij de *ad hoc* tribunalen, het SCSL en het STL (‘Regel 40 verzoeken’). ‘Betrouwbare informatie, die schijnbaar aantoont dat de persoon een misdrijf heeft begaan dat valt binnen de jurisdictie van het tribunaal’ is vereist. Het ICTR voorziet in een additionele voorwaarde dat de tenlasteleggingen bevestigd dienen te worden binnen 20 dagen volgend op de overbrenging van de verdachte naar het tribunaal. Een betere oplossing wordt geboden door de Regels van Procedure en Bewijs van het SCSL, dewelke vereisen dat indien een verdachte van zijn of haar vrijheid wordt beroofd ingevolge een ‘Regel 40 verzoek’, de aanklager om zijn of haar overbrenging dient te verzoeken binnen 10 dagen.

Bovendien voorzien de *ad hoc* tribunalen (ingevolge de amendering van het Regels van Procedure en Bewijs), het SCSL en het STL in de mogelijkheid voor de overbrenging en voorlopige hechtenis van verdachten bij de zetel van het tribunaal ('Regel 40bis bevel'). In tegenstelling tot het gebrek aan regulering inzake 'Regel 40 verzoeken' wordt de overbrenging en voorlopige hechtenis van verdachten in detail gereguleerd, wat de bescherming van de rechten van verdachten waarborgt. De voorwaarden voor deze overbrenging zijn (i) een rechterlijke machtiging, (ii) een materiële drempel (een consistente hoeveelheid aan bewijs die schijnbaar aantoonst dat de verdachte een misdrijf kan hebben gepleegd waarover het tribunaal jurisdictie heeft) en (iii) een legitieme grond (noodzakelijkheidsvereiste). Bovendien (iv) is een strikt tijds kader voor de vrijheidsberoving voorzien (maximum 30 dagen, verlengbaar tot maximum 90 dagen).

Dit hoofdstuk was uiterst kritisch voor de procedurele constellaties van de *ad hoc* tribunalen en het SCSL in zoverre deze niet verhinderen dat verdachten aan hun lot worden overgelaten in detentie in de staat van bewaring. De voorbeelden van verdachten die eenvoudigweg vergeten werden vormen belangrijke schandvlekken op de nalatenschap van het ICTR. Indien een 'Regel 40bis bevel' werd geformuleerd, bestaat er geen beperking in tijd dat de verdachte doorbrengt in detentie vóór zijn of haar overbrenging. Op dezelfde manier is er geen beperking in tijd voorzien indien een 'Regel 40 verzoek' wordt geformuleerd. Waar een voorkeur werd uitgesproken voor Regel 40 van de Regels van Procedure en Bewijs van het SCSL (gezien deze bepaling voorziet in een maximum termijn voor de voorlopige hechtenis van de persoon in de staat van bewaring, vooraleer een verzoek tot overbrenging wordt geformuleerd), diende te worden vastgesteld dat deze bepaling niet kan verhinderen dat de verdachte zich gedurende een buitensporig lange periode in voorlopige hechtenis bevindt vóór zijn of haar overbrenging naar het tribunaal (ingevolge Regel 40bis). Het is teleurstellend dat het STL geen lessen heeft getrokken uit deze tekortkomingen.

Ook het ECCC voorziet in de mogelijkheid van vrijheidsberoving zonder rechterlijke machtiging indien een persoon zich in politiedetentie (*garde à vue*) bevindt. Deze vrijheidsberoving zonder rechterlijke tussenkomst is echter beperkt tot maximaal 48 uren, welke termijn eenmaal verlengd kan worden met 24 uren. Hoogdringendheid is niet vereist.

De internationale straftribunalen zijn afhankelijk van staten voor het bewerkstelligen van de aanhouding. Hoewel alle internationale straftribunalen voorzien in de mogelijkheid om een

verzoek tot aanhouding te richten aan internationale organisaties, valt het te betreuren dat de mogelijkheid om dergelijke verzoeken te richten aan internationale organisaties en andere niet-statelijke entiteiten niet expliciet voorzien wordt door het ICC Statuut. Wat betreft de *ad hoc* tribunalen impliceert een verzoek tot aanhouding en overdracht een resultaatsverbintenis in hoofde van de aangezochte staat. Het samenwerkingsregime van het ICC inzake aanhouding en overdracht is veel gedetailleerder dan het geval is bij de *ad hoc* tribunalen. Abstractie makend van de mogelijkheid van vrijwillige samenwerking, zijn er situaties waarin staten die geen partij zijn bij het ICC toch een samenwerkingsverplichting hebben jegens het Hof. Hoewel geen formele weigeringsgronden te vinden zijn in het ICC statuut, kwalificeren verschillende bepalingen de verplichting van staten om onmiddellijk de persoon aan te houden en over te dragen, in het licht van gelijklopende nationale strafprocedures.

Sommige straftribunalen (ICC, STL, ECCC) voorzien in een alternatief voor de aanhouding en voorlopige hechtenis, in de vorm van een oproep tot verschijnen. De praktijk heeft uitgewezen dat dit een valabel alternatief vormt voor vrijheidsberoving. Beargumenteerd werd dat het steeds mogelijk dient te zijn voor de rechter die verzocht wordt om een bevel tot aanhouding uit te vaardigen om in de plaats een oproep tot verschijnen af te leveren. Deze benaderingswijze garandeert de effectieve realisatie van de beginselen van proportionaliteit en subsidiariteit. Voorwaarden die worden gekoppeld aan de invrijheidstelling, moeten verband houden met de rechtvaardigingsgronden voor de vrijheidsberoving of de inperking van deze vrijheid zoals voorzien in de procedurele constellatie van het betreffende straftribunaal.

Wat de rechtsbeschermende kant (*shield function*) van het internationaal strafprocesrecht betreft, werd met verwondering vastgesteld dat het procedurele kader van de meeste straftribunalen die onderzocht werden verdachten en beschuldigen niet expliciet voorzien van het recht om niet onderworpen te worden aan willekeurige of onrechtmatige aanhouding of vrijheidsberoving. Dit recht volgt echter uit de toepassing van internationale mensenrechtennormen. Hoewel internationale mensenrechtennormen voorzien dat indien een aanhouding of vrijheidsberoving onrechtmatig is, de persoon in vrijheid dient te worden gesteld, vermijden de internationale (en de 'geïnternationaliseerde') straftribunalen om deze remedie toe te kennen.

Verschillende andere procedurele waarborgen werden geïdentificeerd, die volgen uit de mensenrechten en die gerespecteerd dienen te worden door alle tribunalen indien personen

van hun vrijheid beroofd zijn, zoals werd bevestigd door de rechtspraak van deze instellingen. Deze waarborgen omvatten onder meer (i) het recht om onverwijld op de hoogte te worden gesteld van de redenen voor de aanhouding, (ii) het recht van eenieder die van zijn of haar vrijheid is beroofd om onverwijld voor een rechter of een andere autoriteit die bevoegd is verklaard om de rechterlijke macht uit te oefenen te worden geleid en dit ongeacht de status van de betrokken persoon of de plaats van de vrijheidsberoving en (iii) het recht om voorziening te vragen voor de rechter om de rechtmatigheid van de vrijheidsberoving te betwisten (*habeas corpus*). Het laatstgenoemde recht werd expliciet vermeld in de procedureregels van de SPSC, evenals een strikt tijds kader waarbinnen de rechter deze voorziening diende te horen. Verontrustend is het feit dat uit de rechtspraak van het ICTR blijkt dat het tribunaal verschillende malen een *habeas corpus* verzoek niet hoorde. Hoewel de rechtspraak op dit punt niet eenduidig is, werd geargumenteed dat inzake *habeas corpus* verzoeken het straftribunaal ook de mogelijkheid dient te hebben om de redelijkheid van het vermoeden te controleren waarop de oorspronkelijke vrijheidsberoving gefundeerd was. Het belang van deze procedurele waarborg ligt waar het de andere geïdentificeerde waarborgen beschermt. Algemeen gesproken konden verschillende voorbeelden worden aangeduid waar de respectievelijke praktijk van de internationale (en de ‘geïnternationaliseerde’) straftribunalen met betrekking tot deze waarborgen afwijkt van internationale mensenrechtennormen.

Hoofdstuk 7 behandelde ook gevallen van ‘onregelmatige’ aanhoudingen van verdachten en beschuldigen. Opgemerkt werd dat de relevante rechtspraak in dit opzicht afkomstig is van één straftribunaal (ICTY). Om die reden konden geen algemene conclusies worden getrokken met betrekking tot het internationaal strafprocesrecht. De rechtspraak van het ICTY werd positief bejegend in zoverre het een bereidwilligheid aantoonde om controle uit te oefenen over de wijze waarop de aanhouding werd uitgevoerd door staten of internationale actoren.

Beargumenteed werd dat remedies voor schendingen van de rechten van verdachten en beschuldigen betreffende de vrijheidsberoving proportioneel dienen te zijn. Bijgevolg dient de rechter *proprio motu* met alle mogelijke remedies rekening te houden. Niettegenstaande het stilzwijgen op dit punt van de statuten van de *ad hoc* tribunalen en het SCSL, heeft de relevante rechtspraak van deze straftribunalen het bestaan aanvaard van een inherente of impliciete bevoegdheid om compensatie te voorzien voor slachtoffers van een onrechtmatige of arbitraire aanhouding of vrijheidsberoving.

De statuten van het ICC, het STL alsook de TRCP voorzien expliciet in een recht op compensatie. Het STL voorziet enkel in de mogelijkheid om om compensatie te *verzoeken* in geval van onrechtmatige aanhouding of vrijheidsberoving en maakt het toekennen van deze compensatie afhankelijk van het aantonen van een ‘ernstige rechterlijke dwaling’. De internationale straftribunalen hebben hun bereidheid aangetoond om te aanvaarden dat het recht op een effectieve remedie ook een recht op een financiële compensatie inhoudt, op voorwaarde dat geen andere remedies (bv. strafvermindering) effectief zijn (indien de persoon is vrijgesproken). Bovendien kan een strafvermindering worden toegekend of beperken de internationale straftribunalen zich tot een eenvoudige verklaring dat de rechten van de verdachte of de beschuldigde geschonden werden tijdens de aanhouding of de vrijheidsberoving.

Geconcludeerd werd dat enkel in uitzonderlijke gevallen schendingen van de rechten van de verdachte of de beschuldigde er toe kunnen leiden dat het straftribunaal weigert om jurisdictie *uit te oefenen*. De rechtspraak van de *ad hoc* tribunalen omarmde de *abuse of process* doctrine als deel van haar inherente bevoegdheden, indien het verderzetten van de procedure zou ingaan tegen het rechtsvaardigheidsgevoel van het tribunaal. Dit is het geval indien de verderzetting van de strafvervolging nefast zou zijn voor de integriteit van het straftribunaal omwille van ernstige of flagrante schendingen van de rechten van de verdachte of de beschuldigde. Dit impliceert dat een eerlijk proces niet langer mogelijk is of dat het verderzetten van de procedure in strijd zou zijn met het rechtvaardigheidsgevoel van het tribunaal of hof, omwille van onfatsoenlijkheden of misdragingen. Hoewel de toepassing van de *abuse of process* doctrine discretionair is, is de discretie in sommige gevallen erg beperkt.

Hoewel het ICC de *abuse of process* doctrine verworpen heeft, bevestigde haar rechtspraak het bestaan van de bevoegdheid, onder Artikel 21 (3) van het ICC statuut, om de procedure op te schorten indien een eerlijk proces niet langer mogelijk is ingevolge schendingen van de rechten van verdachten of beschuldigten door handelingen van ‘*his/her accusers*’. Niettegenstaande de vaststelling dat de *ad hoc* tribunalen en het SCSL voorhouden dat het, inzake de beslissing om geen jurisdictie uit te oefenen, irrelevant is welke entiteit(en) verantwoordelijk zijn voor de schendingen, reserveert het ICC deze mogelijkheid om jurisdictie te weigeren tot schendingen door ‘*his/her accusers*’. Beargumenteerd werd dat de rechtspraak van de internationale straftribunalen (niettegenstaande sommige tegenstrijdige beslissingen) niet moet begrepen worden als zou deze de toepassing van de *abuse of process*

doctrine beperken tot gevallen van foltering of ernstige mishandeling. Rekening wordt gehouden met de ernst van de tenlastegelegde misdrijven indien de tribunalen het weigeren van de uitoefening van jurisdictie overwegen. Evenzeer wordt rekening gehouden met de mate waarin de schendingen aan het tribunaal of haar organen kan worden toegerekend.

Niettegenstaande sommige afwijkende rechtspraak, hebben de *ad hoc* tribunalen schijnbaar de gedeelde verantwoordelijkheid van het straftribunaal en de aangezochte staat aanvaard in het bewerkstelligen van de aanhouding en de detentie in de bewarende staat. Het straftribunaal is verantwoordelijk voor *sommige* aspecten van de vrijheidsberoving in diens opdracht. In dit opzicht rust een *due diligence* verplichting op de aanklager. Hoewel sommige auteurs hebben geargumenteed dat het internationaal straftribunaal verantwoordelijkheid moet aanvaarden voor *alle* schendingen die voorvallen in de context van een zaak (met inbegrip van alle schendingen van de rechten van de verdachte of beschuldigde vóór de overbrenging), lijkt dit standpunt enkel aanvaard met betrekking tot de remedie van de weigering om jurisdictie uit te oefenen. Deze studie leverde kritiek op deze huidige stand van zaken, aangezien het niet logisch is om verantwoordelijkheid te nemen voor schendingen begaan door derden indien deze een *abuse of process* uitmaken maar te weigeren verantwoordelijkheid te nemen voor minder ernstige schendingen door derden. Aangetoond werd dat geen enkele van de internationale en ‘geïnternationaliseerde’ straftribunalen die werden behandeld in deze studie bereid is verantwoordelijkheid te nemen voor *alle* schendingen van de rechten van individuen, ook indien deze niet toegerekend kunnen worden aan het straftribunaal.

Het ICC heeft tot dusver geweigerd verantwoordelijkheid op te nemen voor schendingen die werden gepleegd vóórdat het verzoek tot aanhouding en overdracht werd verstuurd, indien er geen sprake was van een ‘*concerted action*’. Bovendien, waar het opschorten van de procedure en de weigering om jurisdictie uit te oefenen worden overwogen, verhindert de test zoals deze werd geformuleerd door de Kamer van Beroep van het ICC dat het Hof verantwoordelijkheid opneemt voor schendingen die werden begaan door derde partijen die niet gerelateerd zijn aan het Hof. Eén Kamer van Vooronderzoek heeft deze test zo geïnterpreteerd dat deze steeds toerekening aan een orgaan van het Hof vereist, ook na het versturen van het verzoek tot aanhouding en overdracht. Om hiaten in de bescherming van de verdachte of de beschuldigde te voorkomen, werd geargumenteed dat het Hof verantwoordelijkheid moet opnemen voor alle gebeurlijke schendingen in de context van een zaak.

Hoofdstuk 8 behandelde vervolgens de gerelateerde onderwerpen van voorlopige hechtenis en voorlopige invrijheidstelling tijdens het vooronderzoek. Bevonden werd dat hoewel de meeste straftribunalen voorhouden dat voorlopige invrijheidstelling de regel is en voorlopige hechtenis de uitzondering, de *ad hoc* tribunalen en het SCSL voorhouden dat voorlopige hechtenis noch de regel noch de uitzondering is en dat de omstandigheden van elke zaak bekeken dienen te worden. Deze zienswijze werd kritisch geëvalueerd in het licht van de internationale mensenrechtelijke normen, dewelke duidelijk vereisen dat invrijheidstelling de regel is en detentie de uitzondering. De andere instellingen die werden behandeld stellen dat voorlopige invrijheidstelling de regel is en voorlopige hechtenis de uitzondering. Desalniettemin bevestigt de praktijk dit beeld niet. Daarom werden een aantal elementen besproken die typerend zijn voor een systeem waar invrijheidstelling de regel is, eerder dan dergelijke uitspraken voor waar aan te nemen. Deze elementen omvatten: (i) de afwezigheid van discretie in hoofde van de rechters in beslissingen inzake voorlopige hechtenis/voorlopige invrijheidstelling, (ii) de verplichting dat één of meerdere legitieme gronden worden aangeduid voor de voorlopige hechtenis, (iii) het feit dat de bewijslast in beslissingen inzake voorlopige hechtenis/voorlopige invrijheidstelling bij de aanklager ligt, (iv) de aanwezigheid van een procedure voor de periodieke herziening van de voorlopige hechtenis, (v) een strikte maximumduur voor de voorlopige hechtenis en (vi) de mogelijkheid voor de rechters om de voorwaardelijke invrijheidstelling te bevelen.

Wat het eerste van deze elementen betreft werd een verder onderscheid gemaakt. Geconcludeerd werd dat de rechtspraak van de *ad hoc* tribunalen en het SCSL discretie laat aan de rechters om voorlopige invrijheidstelling te weigeren ook al is aan alle voorwaarden voldaan. Andere straftribunalen verwerpen het idee van rechterlijke discretie in beslissingen inzake voorlopige hechtenis/invrijheidstelling. Het verwijderen van rechterlijke discretie is een opmerkelijke stap vooruit aangezien de analyse van de mensenrechtelijke normen duidelijk aantoonde dat de beschuldigde in vrijheid dient te worden gesteld indien er geen sprake is van een '*genuine requirement of public interest*', die zwaarder doorweegt dan het recht op individuele vrijheid. Aangezien niet enkel het ICC, maar ook de geïnternationaliseerde straftribunalen die werden behandeld de rechters geen discretie laten in beslissingen inzake voorlopige hechtenis/invrijheidstelling, werd besloten dat er een tendens is om geen ruimte te laten voor rechterlijke discretie in beslissingen inzake voorlopige hechtenis/invrijheidstelling.

Wat de vereiste van legitieme gronden voor de vrijheidsberoving betreft, werd vastgesteld dat de *ad hoc* tribunalen en het SCSL in een regime van automatische voorlopige hechtenis voorzien, in de afwezigheid van enige vereiste om de noodzaak daarvan aan te tonen. Het ICC en de geïnternationaliseerde straftribunalen vereisen dat voorlopige hechtenis noodzakelijk is voor één of meerdere legitieme doelen. Beargumenteerd werd dat deze voorwaarde het regime van voorlopige hechtenis/invrijheidstelling in lijn brengt met internationale mensenrechtelijke normen. Uit de rechtspraak van het EHRM volgt dat het voortbestaan van een redelijk vermoeden een *conditio sine qua non* is voor de rechtmatigheid van de voortdurende hechtenis. Desalniettemin zal, na verloop van tijd, het voortbestaan van een redelijk vermoeden niet langer volstaan. Een *genuine requirement of public interest* is dan vereist voor de hechtenis, dewelke, niettegenstaande het vermoeden van onschuld, zwaarder doorweegt dan het recht op vrijheid van de betrokken person.

Verder werd aangetoond dat de *ad hoc* tribunalen en het SCSL de bewijslast duidelijk bij de beschuldigde leggen. De andere internationale en geïnternationaliseerde straftribunalen leggen de bewijslast bij de aanklager. Bevonden werd dat deze laatste zienswijze de voorkeur dient weg te dragen, aangezien de eerste in strijd is met mensenrechtennormen. Het plaatsen van de bewijslast bij de aanklager is kenmerkend voor een systeem waarbij voorlopige hechtenis de uitzondering is en voorlopige invrijheidstelling de regel. Evenwel werd opgemerkt dat bij de straftribunalen die voorhouden dat de bewijslast bij de aanklager ligt, deze bewijslast in praktijk vaak verschuift naar de beschuldigde. Meer bepaald legden verschillende Kamers van Vooronderzoek van het ICC de bewijslast effectief bij de beschuldigde wanneer deze de *ex parte* beslissing inzake het bevel tot aanhouding als uitgangspunt namen voor de beschouwing van een verzoek tot voorlopige invrijheidstelling.

Bevonden werd dat de meeste straftribunalen voorzien in een systeem voor de periodieke herziening van de voorlopige hechtenis, of een herziening op het ogenblik dat de voorlopige hechtenis wordt verlengd (ICC, SPSC, STL en ECCC). Een dergelijk systeem voor periodieke herziening biedt de gedetineerde een effectieve bescherming tegen een te lange voorlopige hechtenis. Uit internationale mensenrechtelijke normen volgt dat de voorlopige hechtenis in tijd beperkt dient te zijn en dat de persoon recht heeft om berecht te worden binnen een redelijke termijn of om (voorwaardelijk) in vrijheid te worden gesteld. Bovendien maakt dit mechanisme het mogelijk om gewijzigde omstandigheden mee in overweging te nemen.

Opgemerkt werd ook dat geen van de internationale straftribunalen en slechts sommige 'geïnternationaliseerde' straftribunalen (ECCC, SPSC) voorzien in een strikte maximumduur voor de voorlopige hechtenis. De internationale straftribunalen in het bijzonder zouden gebaat zijn bij een maximumduur waar de beschuldigen vaak een erg lange periode in voorlopige hechtenis verblijven voor de start van het proces ter terechtzitting. Evenwel erkennen de internationale straftribunalen dat personen niet gedurende een onredelijke periode in voorhechtenis mogen verblijven.

Tot slot voorzien alle straftribunalen die werden onderzocht in de mogelijkheid van voorwaardelijke invrijheidstelling. Beargumenteerd werd dat de voorwaarden die worden opgelegd tot doel moeten hebben om de risico's die voorlopige hechtenis noodzakelijk maken te verminderen of weg te werken. Dit garandeert dat vrijheidsbeperkende maatregelen worden opgelegd in overeenstemming met het subsidiariteitsbeginsel. Beargumenteerd werd verder dat, in tegenstelling tot wat het geval is bij het ICC, de voorwaardelijke invrijheidstelling niet tot de discretionaire bevoegdheid mag behoren. Om het subsidiariteitsbeginsel volledig te garanderen is het noodzakelijk dat voorwaardelijke invrijheidstelling bevolen wordt indien de opgelegde voorwaarden volstaan om de legitieme gronden voor de voorlopige hechtenis onder Artikel 58 (1) (b) ICC statuut te vrijwaren.

Een aantal bijkomende gelijkenissen werden geïdentificeerd. Onder meer voorzien alle internationale (en 'geïnternationaliseerde') straftribunalen schijnbaar in de mogelijkheid van hoger beroep tegen beslissingen tot voorlopige hechtenis/invrijheidstelling, hoewel dit strikt gesproken niet vereist is door de internationale mensenrechtennormen. Verontrustend zijn de substantiële vertragingen bij verschillende straftribunalen (ICC, ECCC) vooraleer de beslissing in beroep wordt uitgesproken.

Daarnaast werd geconcludeerd dat een belangrijk obstakel met betrekking tot de voorlopige invrijheidstelling volgt uit *de facto* verplichting dat een gastland akkoord moet gaan om de verdachte of beschuldigde op haar grondgebied toe te laten en zich garant stelt dat de persoon zal verschijnen ter terechtzitting en geen getuigen, slachtoffers of andere personen in gevaar zal brengen. Zo weigerde de Kamer van Beroep van het ICC om Bemba voorwaardelijk in vrijheid te stellen, aangezien geen staat geïdentificeerd kon worden die bereid was om er voor te zorgen dat de voorwaarden van de voorlopige invrijheidstelling werden nageleefd. Beargumenteerd werd in hoofdstuk 8 dat staten die partij zijn bij het ICC verplicht zijn om

personen die voorlopig in vrijheid zijn gesteld op te vangen. Daarom dienen afspraken te worden gemaakt betreffende rechtshulp inzake voorwaardelijke invrijheidstelling.

Tot slot werden in **Deel 4**, dat bestaat uit één hoofdstuk (**hoofdstuk 9**) de belangrijke bevindingen van deze studie toegelicht en werd een aantal aanbevelingen geformuleerd. Ondanks de belangrijke verschillen in de procedurele constellaties van de verschillende jurisdicties die behandeld werden, konden toch een aanzienlijk aantal gelijkenissen vastgesteld worden door de vergelijkende analyse van hun respectievelijke procesrechtelijke kaders.

Bovendien weerspiegelen of bevestigen (of overtreffen in sommige gevallen) vele van de geïdentificeerde regels internationale mensenrechtennormen. Deze uniform gedeelde regels en praktijken omvatten zowel procedurele waarborgen (rechtbeschermende kant van het internationaal strafprocesrecht (*shield dimension*)), een aantal regels die bevoegdheden toekennen (repressieve kant van het internationaal strafprocesrecht (*sword dimension*)) alsook een aantal uniform gedeelde regels inzake de structuur, organisatie en aard van het vooronderzoek, de verplichtingen in hoofde van de verschillende procespartijen in het onderzoek en inzake de aanhouding en detentie.

Daarnaast werd bevonden dat het vooronderzoek lijdt onder ‘onderregulering’. Het vooronderzoek in het internationaal strafproces is onvoldoende gereguleerd om de eerlijkheid van het vooronderzoek in hoofde van de personen die er door geïndiceerd worden te garanderen. Hoewel een tendens naar meer regulering kon worden vastgesteld (zie bv. Artikel 59 van het ICC statuut betreffende de aanhoudingsprocedure in de bewarende staat), blijft een verdere regulering noodzakelijk om de eerlijkheid van deze fase van het onderzoek te garanderen. Dit is zeker het geval voor de bevoegdheden van de internationale aanklager, die erg ruim geconcipieerd zijn.

Bovendien werd geconcludeerd dat het feit dat het vooronderzoek verdeeld is over verschillende jurisdicties in verschillende opzichten kan leiden tot een reductie van de juridische bescherming van personen die door dat onderzoek geïndiceerd worden en tot *lacunae* in hun bescherming. Dit is het geval indien de internationale (en ‘geïnternationaliseerde’) straftribunalen verantwoordelijkheid weigeren voor strafvorderlijke handelingen die werden gesteld door staten op verzoek van het straftribunaal en waar het tribunaal baat bij had. Om

aan deze potentieel beperkende invloeden te verhelpen, is het noodzakelijk dat de gedeelde verantwoordelijkheid van de straftribunalen en de staten om wiens medewerking wordt verzocht, aanvaard wordt. Bijgevolg hebben zowel het straftribunaal als de aangezochte staat de verantwoordelijkheid om de rechten van de betrokken individuen te beschermen indien om de samenwerking van staten of andere internationale actoren wordt verzocht.

Tenslotte, in antwoord op het tweede deel van de onderzoeksvraag, werden een aantal algemene en meer specifieke aanbevelingen geformuleerd om de eerlijkheid van het vooronderzoek in de strafrechtspleging te garanderen.

BIBLIOGRAPHY

Books

ABELS, D., *Prisoners of the International Community: The Legal Position of Persons Detained at International Criminal Tribunals*, The Hague, T.M.C. Asser Press, 2012, 847p.

ARENDT, H., *Eichmann in Jerusalem: A Report on the Banality of Evil*, London, Penguin Books, 1994, 312p.

ASHWORTH, A. and REDMAYNE, M., *The Criminal Process*, Oxford, Oxford University Press, 2005, 415p.

BASSIOUNI, M.C., *International Extradition, United States Law And Practice* (5th ed.), Oxford, Oxford University Press, 2007, 1166p.

BATES, A., *Transitional Justice in Cambodia, Analytical Report*, 2010, 102p. (available at: http://projetatlas.univ-paris1.fr/IMG/pdf/ATLAS_Cambodia_Report_FINAL_EDITS_Feb2011.pdf, last visited 10 February 2014).

BERGSMO, M., HELVIG, K., UTMELIDZE, I. and ŽAGOVEC, G., *The Backlog of Core International Crimes Cases in Bosnia and Herzegovina* (2nd ed.), Torkel Opsahl Academic EPublisher, Oslo, 2010, 218p.

BOAS, G., BISCHOFF, J.L., REID, N.L. and DON TAYLOR III, B., *International Criminal Law Practitioner Library, Vol. III: International Criminal Procedure*, Cambridge, Cambridge University Press, 2011, 486p.

BOAS, G., *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings*, Cambridge, Cambridge University Press, 2007, 306p.

BOCKSTAELE, M. et al., *De zoeking onderzocht*, Antwerpen, Maklu, 2009, 403p.

BOHLANDER, M., BOED, R. and WILSON, R.J. (eds.), *Defense in International Criminal Proceedings: Cases, Materials and Commentary*, Ardsley, Transnational Publishers, 2006, 899p.

BOHLANDER, M., *Principles of German Criminal Procedure*, Oxford and Portland, Hart Publishing, 2012, 306p.

BOISTER N. and CRYER, R., *The Tokyo International Military Tribunal: A Reappraisal*, Oxford, Oxford University Press, 2008, 358p.

BOSSUYT, M., *Guide to the Travaux Préparatoires of the ICCPR*, Dordrecht, Nijhoff Publishers, 1987, 841p.

BOURDOUX, G., DE RAEDT, E., DE MESMAEKER, M. and LINERS, A., *De wet op het politieambt. Handboek van de politiefunctie*, Brussel, Politeia, 2010, 781p.

BUISMAN, C., *Ascertainment of the Truth in International Criminal Justice*, 2012, 393p (available at: <http://bura.brunel.ac.uk/handle/2438/6555>, last visited 18 November 2013).

CAPE, E., HODGSON, J., PRAKKEN, T. and SPRONKEN, T. (eds.), *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, Oxford, Intersentia, 2007, 280p.

CARTER, L. and POCAR, F. (eds.), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, Cheltenham, Edward Elgar Publishing, 2013, 246p.

CASSESE, A., *Five Masters of International Law: Conversations with R.-J. Dupuy, E. Jiménez de Aréchaga, R. Jennings, L. Henkin and O. Schachter*, Oxford, Hart Publishing, 2011, 286p.

CASSESE, A., *International Criminal Law (2nd Ed.)*, Oxford, Oxford University Press, 2008, 455p.

CASSESE, A., *The Tokyo Trial and Beyond: Reflections of a Peacemonger*, Polity Press, Cambridge, 1993, 143p.

CIORCIARI, J.D. and HEINDEL, A., *Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal*, June 2013, 77p (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2269925, last visited 10 February 2014).

COMBS, N.A., *Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge, Cambridge University Press, 2010, 420p.

CORSTENS, C.J.M., *Het Nederlands Strafprocesrecht*, Deventer, Kluwer, 2008, 964p.

CRYER, R., FRIMAN, H., ROBINSON, D. and WILMSHURST, E., *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2010, 618p.

CRYER, R., *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge, Cambridge University Press, 2005, 360p.

DAMAŠKA, M.R., *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, New Haven and London, Yale University Press, 1986, 242p.

DE SMET, B., *Internationale samenwerking in strafzaken tussen Angelsaksische en continentale landen*, Intersentia, Antwerpen – Groningen, 1999, 226p.

DE VLAMING, F., *De Aanklager: Het Joegoslavië-tribunaal en de selectie van verdachten*, Den Haag, Boom Juridische Uitgevers, 2010, 272p.

DENZA, E., *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations (3rd Edition)*, Oxford, Oxford University Press, 2008, 556p.

DRUMBL, M., *Atrocity, Punishment, and International Law*, Cambridge, Cambridge University Press, 2007, 298p.

EL ZEIDY, M.M., *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, Leiden – Boston, Martinus Nijhoff Publishers, 2008, 366p.

FEDOROVA, M., *The Principle of Equality of Arms in International Criminal Proceedings*, Antwerp, Intersentia, 2012, (non-commercial edition), 529p.

GINSBURGS, G. and KUDRIAVTSEV, V.N., *The Nuremberg Trial and International Law*, Dordrecht – Boston – London, Martinus Nijhoff Publishers, 1990, 288p.

HARRIS, D.J., O'BOYLE, M. and WARBRICK, C., *Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2009, 902p.

HAUCK, P., *Judicial Decisions in the Pre-Trial Phase of Criminal Proceedings in France, Germany and England: a Comparative Analysis Responding to the Law of the International Criminal Court*, Baden-Baden, Nomos Verlagsgesellschaft, 2008, 82p.

HIRSCH BALLIN, M.F.H., *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, 683p.

JACKSON, J.D. and SUMMERS, S.J., *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*, Cambridge, Cambridge University Press, 2012, 405p.

JURDI, N.J., *The International Criminal Court and National Courts*, Farnham, Ashgate Publishing Limited, 2011, 303p.

KAZAZI, M., *Burden of Proof and Related Issues: A Study of Evidence Before International Tribunals*, The Hague – London – Boston, Kluwer Law International, 1996, 406p.

KLAMBERG, M., *Evidence in International Criminal Procedure: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Stockholm, Stockholm University, 502p.

KLEFFNER, J., *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford, Oxford University Press, 2008, 385p.

KNOOPS, G.-J.A., *Surrendering to the International Criminal Court: Contemporary Practice and Procedures*, Ardsley, Transnational Publishers, 2005, 382p.

KNOOPS, G.-J.A., *Theory and Practice of International and Internationalized Criminal Proceedings*, The Hague, Kluwer Law International, 2005, 358p.

MACDONALD, G.K. and SWAAK-GOLDMAN, O.Q., (eds.), *Substantive and Procedural Aspects of International Criminal Law: the Experience of International and National Courts*, Vol. I, The Hague, Kluwer Law International, 2000, 702p.

MALANCZUK, P., *Akehurst's Modern Introduction in International Law* (7th revised ed.), London and New York, Routledge, 1997, 449p.

MAY, R. and WIERDA, M., *International Criminal Evidence*, Ardsley, Transnational Publishers, 2002, 369p.

MCCONVILLE, M., HODGSON, J., BRIDGES, L. and PAVLOVIC, A., *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain*, Oxford, Clarendon Press, 1994, 332p.

MCCONVILLE, M., SANDERS, A. and LENG, R., *The Case for the Prosecution*, London, Routledge, 1991, 227p.

McGONIGLE LEYH, B., *Procedural Justice? Victim Participation in International Criminal Proceedings*, Antwerp, Intersentia, 2011, 452p.

MORRIS, V. and SCHARF, M.P., *An Insider Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis (Vol. I)*, Ardsley, Transnational Publishers, 1995, 1192p.

NOWAK, M., *U.N. Covenant on Civil and Political Rights: CCPR commentary (2nd edition)*, Kehl am Rein, Engel, 2005, 1277p.

O'CONNOR, V. and RAUSCH, C., (eds.), *Model Codes for Post-Conflict Criminal Justice (Vol. II)*, Washington D.C., United States Institute of Peace Press, 2008, 554p.

OLÁSOLO, H., *The Triggering Procedure of the International Criminal Court*, Leiden – Boston, Martinus Nijhoff Publishers, 2005, 400p.

ONSEA, I., *De bestrijding van georganiseerde misdaad: de grens tussen waarheidsvinding en grondrechten*, Antwerpen, Intersentia, 2008, 533p.

PAULUSSEN, C., *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, Antwerp, Intersentia, 2010, 1195p.

PESKIN, V., *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, Cambridge, Cambridge University Press, 2008, 272p.

RAIMONDO, F.O., *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, Leiden, Martinus Nijhoff Publishers, 2008, 212p.

RAZESBERGER, F., *The International Criminal Court: The Principle of Complementarity*, Frankfurt am Main, Peter Lang, 2006, 201p.

REYDAMS, L., WOUTERS, J. and RYNGAERT, C. (eds.), *International Prosecutors*, Oxford, Oxford University Press, 2012, 968p.

SAFFERLING, C., *International Criminal Procedure*, Oxford, Oxford University Press, 2012, 602p.

SAFFERLING, C.J.M., *Towards an International Criminal Procedure*, Oxford, Oxford University Press, 2001, 395p.

SCHABAS, W.A., *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2007, 548p.

SCHABAS, W.A., *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, 1259p.

SCHABAS, W.A., *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge, Cambridge University Press, 2006, 711p.

SCHUON, C., *International Criminal Procedure: A Clash of Legal Cultures*, The Hague, T.M.C. Asser Press, 2010, 365p.

SHAW, N., *International Law* (6th Edition), Cambridge, Cambridge University Press, 2008, 1542p.

SHELTON, D., *Remedies in International Human Rights Law* (2nd ed.), Oxford, Oxford University Press, 2005, 502p.

SLUITER, G., *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, Antwerp, Intersentia, 2002, 441p.

STEGMILLER, I., *The Pre-Investigation Stage of the ICC*, Berlin, Duncker & Humblot GmbH, 2011, 624p.

SULLIVAN, E.T. and FRASE, R.S., *Proportionality Principles in American Law: Controlling Excessive Government Actions*, Oxford, Oxford University Press, 2009, 284p.

SUMMERS, S.J., *Fair Trials: the European Criminal Procedural Tradition and the European Court of Human Rights*, Oxford, Hart Publishing, 2007, 188p.

TAK, P.J.P., VAN EIKEMA HOMMES, G.A., MANUNZA, E.R. and MULDER, C.F., *De normering van bijzondere opsporingsmethoden in buitenlandse rechtsstelsels*, Den Haag, Ministerie van Justitie, 1996, 361p.

TOCHILOVSKY, V., *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence*, Leiden – Boston, Martinus Nijhoff Publishers, 2008, 912p.

TRECHSEL, S., *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, 611p.

TUINSTRA, J.T., *Defence Counsel in International Criminal Law*, The Hague, T.M.C. Asser Press, 2009, 323p.

VAN DEN WYNGAERT, C., *Criminal Procedures in the European Community*, Brussels, Butterworths, 1993, 408p.

VAN DEN WYNGAERT, C., *Strafrecht en strafprocesrecht*, Maklu, Antwerpen-Apeldoorn, 2009, 1286p.

VAN SLIEDREGT, E., SJÖCRONA, J.M., ORIE, A.M.M., *Handboek Internationaal Strafrecht, Schets van het Europese en Internationale Strafrecht*, Deventer, Kluwer, 2008, 411p.

VAN TRAA, M., *Enquête Opsporingsmethoden: Eindrapport*, 1996, 484p.

VASILIEV, S., *Fairness and its Metric in International Criminal Procedure*, 2013, 66p (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2253177, last visited 14 February 2014).

VERREST, P.A.M, *Raison d'être: een onderzoek naar de rol van de rechter-commissaris in ons strafproces*, Den Haag, Boom Juridische Uitgevers, 2011, 377p.

VERSTRAETEN, R., *Handboek Strafvordering*, Antwerpen – Apeldoorn, Maklu, 2003, 895p.

VOGLER, R., *A World View of Criminal Justice*, Aldershot, Ashgate, 2005, 330p.

WEI, W., *Die Rolle des Anklägers eines internationalen Strafgerichtshofs*, Frankfurt am Main, Peter Lang, 2007, 348p.

WEXLER, S. (ed.), *Observations on the Consolidated ICC Text before the Final Session of the Preparatory Committee*, Toulouse, Association Internationale de droit pénal, Érès, 1998, 249p.

X, *ICTY Manual on Developed Practices*, Turin, UNICRI Publisher, 2009, 228p.

ZAHAR, A. and SLUITER, G., *International Criminal Law: A Critical Introduction*, Oxford, Oxford University Press, 2008, 530p.

ZAPPALÀ, S., *Human rights in International Criminal Proceedings*, Oxford, Oxford University Press, 2003, 280p.

ZUCKERMAN, A.A.S., *The Principles of Criminal Evidence*, Oxford, Oxford University Press, 1989, 378p.

Journal Articles

ACQUAVIVA, G., *Human Rights Violations before International Tribunals: Reflections on Responsibility of International Organizations*, in «*Leiden Journal of International Law*», Vol. 20, 2007, pp. 613 – 636.

ACQUAVIVA, G., *New Paths in International Criminal Justice: The Internal Rules of the Cambodian Extraordinary Chambers*, in «*Journal of International Criminal Justice*», Vol. 6, 2008, pp. 129 – 151.

AFFOLDER, N.A., *Tadić, the Anonymous Witness and the Sources of International Procedural Law*, in «*Michigan Journal of International Law*», Vol. 19, 1998, pp. 445 – 495.

AKANDE, D., International Law and the International Criminal Court, in «American Journal of International Law», Vol. 98, 2004, pp. 407 – 433.

AKANDE, D., The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 333 – 352.

AKHAVAN, P., Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?, in «American Journal of International Law», Vol. 95, 2001, pp. 7 – 31.

AMBOS, K., Confidential Investigations (Article 54 (3)(e) ICC Statute) vs. Disclosure Obligations: the Lubanga Case and National Law, in «New Criminal Law Review», Vol. 12, 2009, pp. 543 – 568.

AMBOS, K., International Criminal Procedure: “Adversarial”, “Inquisitorial” or Mixed?, in «International Criminal Law Review», Vol. 3, 2003, pp. 1-37.

AMBOS, K., Judicial Creativity at the Special Tribunal for Lebanon: Is there a Crime of Terrorism under International Law?, in «Leiden Journal of International Law», Vol. 24, 2011, pp. 655 – 675.

AMBOS, K., The First Judgment of the International Criminal Court (*Prosecutor v. Lubanga*): A Comprehensive Analysis of the Legal Issues, in «Journal of International Criminal Justice», Vol. 12, 2012, pp. 115 – 153.

AMBOS, K., The Right of Non-Self-Incrimination of Witnesses Before the ICC, in «Leiden Journal of International Law», Vol. 15, 2002, pp. 155 – 177.

AMBOS, K., The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports, in «European Journal of Crime, Criminal Law and Criminal Justice», Vol. 8/2, 2000, pp. 98 – 118.

ARBOUR, L., Progress and Challenges in International Criminal Justice, in «Fordham International Law Journal», Vol. 21, 1997-1998, pp. 531 – 540.

ARBOUR, L., The Crucial Years, in «Journal of International Criminal Justice», Vol. 2, 2004, pp. 396 – 402.

ARSANJANI, H. and REISMAN, W.M., The Law-in-Action of the International Criminal Court, in «American Journal of International Law», Vol. 99, 2005, pp. 385 – 403.

BAIR, J.P., From the Numbers who Died to Those who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia, in «University of Hawai'i Law Review», Vol. 31, 2009, pp. 507 – 552.

BANK, R., Cooperation with the International Criminal Tribunal for the Former Yugoslavia in the Production of Evidence, in «Max Planck Yearbook of United Nations Law», Vol. 4, 2000, pp. 233 – 269.

BÁRD, K., The Difficulties of Writing the Past Through Law – Historical Trials Revisited at the European Court of Human Rights, in «International Review of Penal Law», Vol. 81, 2010, pp. 27 – 44.

BASSIOUNI, C., Human Rights in the Context of International Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions, in «Duke Journal of Comparative and International Law», Vol. 3, 1993, pp. 235 – 293.

BAYLIS, E., Outsourcing Investigations, in «UCLA Journal of International Law & Foreign Affairs», Vol. 14, 2009, pp. 121 – 147.

BENSOUDA, F., The ICC Statute – An Insider’s Perspective on a Sui Generis System for Global Justice, in «North-Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2010 - 2011, pp. 277 – 286.

BERESFORD, S., Redressing the Wrongs of the International Criminal Justice System: Compensation for Persons Erroneously Detained, Prosecuted or Convicted by the Ad Hoc Tribunals, in «The American Journal of International Law», Vol. 96, 2002, pp. 628 – 645.

BERGER, M., The Right To Silence in The Hague International Criminal Courts, in «University of San Francisco School of Law Review», Vol. 47, 2012, pp. 1-54.

BERKMOES, H. and LYBAERT, D., Proactieve politie bevoegdheden en (bijzondere) middelen in de strijd tegen de georganiseerde criminaliteit, in «Custodes», 1999 (1), pp. 33 – 52.

BIBAS, S. and BURKE-WHITE, W.W., International Idealism Meets Domestic-Criminal-Procedure Realism, in «Duke Law Journal», Vol. 59, 2010, pp. 637 – 704.

BOAS, G., Creating Laws of Evidence for International Criminal Law: the ICTY and the Principle of Flexibility, in «Criminal Law Forum», Vol. 12, 2001, pp. 41 – 90.

BOAS, G., Developments in the Law of Procedure and Evidence at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court, in «Criminal Law Forum», Vol. 12, 2001, pp. 167 – 183.

BONOMY, I., The Reality of Conducting a War Crimes Trial, in «Journal of International Criminal Justice», Vol. 5, 2007, pp. 348 – 359.

BOS, A., 1948-1998: The Universal Declaration of Human Rights and the Statute of the International Criminal Court, in «Fordham International Law Journal», Vol. 22, 1998-1999, pp. 229 – 235.

BOSCO, D., The International Criminal Court and Crime Prevention: Byproduct or Conscious Goal, in «Michigan State Journal of International Law», Vol. 19, 2011, pp. 163 – 200.

BOURGON, S., Procedural Problems Hindering Expeditious and Fair Justice, in «Journal of International Criminal Justice», Vol. 2, 2004, pp. 526 – 532.

BRAMMERTZ, S., La recherche proactive en droit comparé et dans les instruments internationaux, in «Custodes», 1999 (1), pp. 127 – 143.

BRANTS, C. and FIELD, S., Les méthodes d'enquête proactive et le contrôle des risques, in «Déviance et Société», Vol. 21, 1997, pp. 401 - 414.

BRESLER, K., Pretty Phrases: The Prosecutor as Minister of Justice and Administration of Justice, in «Georgetown Journal of Legal Ethics», Vol. 9, 1995-1996, pp. 1301 – 1334.

BRONITT, S., The Law in Undercover Policing: A Comparative Study of Entrapment and Covert Interviewing in Australia, Canada and Europe, in «Common Law World Review», Vol. 33, 2004, pp. 35 – 80.

BROWN, C., The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals, in «Loyola of Los Angeles International and Comparative Law Review», Vol. 30, 2008, pp. 219 – 245.

BRUBACHER, M.R., Prosecutorial Discretion in the International Criminal Court, in «Journal of International Criminal Justice», Vol. 2, 2004, pp. 71 – 95.

BUISMAN, C., Delegating Investigations: Lessons to be Learned from the Lubanga Judgment, in «Northwestern University Journal of International Human Rights», Vol. 11, 2013, pp. 30 – 82.

BURKE-WHITE, W.W., Implementing a Policy of Positive Complementarity in the Rome System of Justice, in «Criminal Law Forum», Vol. 19, 2008, pp. 59 – 85.

BUZZARD, L., Comments: Holding an Arsonist's Feet to the Fire? – The Legality and Enforceability of the ICC's Arrest Warrant for Sudanese President Omar Al-Bashir, in «American University International Law Review», Vol. 24, 2008 – 2009, pp. 897 – 941.

CAIANIELLO, M., First Decisions on the Admission of Evidence at ICC Trials: A Blending of Accusatorial and Inquisitorial Models?, in «Journal of International Criminal Justice», Vol. 9, 2011, pp. 385 – 410.

CAIANIELLO, M., Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models, in «North Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2011, pp. 287 – 318.

CARCANO, A., The ICTY Appeals Chamber's *Nikolić* Decision on Legality of Arrest: Can an International Criminal Court Assert Jurisdiction over Illegally Seized Offenders?, in «Italian Yearbook of International Law», Vol. 13, 2003, pp. 77 – 93.

CASSESE, A., Is the ICC Still Having Teething Problems?, in «Journal of International Criminal Justice», Vol. 4, 2006, pp. 434 – 441.

CASSESE, A., On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law, in «European Journal of International Law», Vol. 9, 1998, pp. 2 – 17.

CASSESE, A., The ICTY, a Living and Vital Reality, in «Journal of International Criminal Justice», Vol. 2, 2004, pp. 585 – 597.

CERONE, C., The Special Court for Sierra Leone: Establishing a New Approach to International Criminal Justice, in «ILSA Journal of International and Comparative Law», Vol. 8, 2001-2002, pp. 379 – 388.

CHATZIVASSILIOU, D., The Guarantees of Judicial Control with Respect to Deprivation of Liberty under Article 5 of the European Convention on Human Rights, in «ERA Forum», Vol. 5, 2004, pp. 499 – 519.

CLAUSSEN, K., Up to the Bar? Designing the Hybrid Khmer Rouge Tribunal in Cambodia, in «Yale Journal of International Law», Vol. 33, 2008, pp. 253 – 258.

COGAN, J.K., International Criminal Courts and Fair Trials: Difficulties and Prospects, in «Yale Journal of International Law», Vol. 27, 2002, pp. 111 – 140.

COHEN, D., Indifference and Accountability: The United Nations and the Politics of Justice in East-Timor, in «East-West Center Special Reports», Nr. 9, 2006, 135p.

CÔTÉ, L., International Criminal Justice : Tightening Up the Rules of the Game, in «International Review of the Red Cross», Vol. 88, 2006, 133 – 144.

CÔTÉ, L., Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law, in «Journal of International Criminal Justice», Vol. 3, 2005, pp. 162 – 186.

CRANE, D.M., White Man's Justice: Applying International Justice After Regional Third World Conflicts, in «Cardozo Law Review», Vol. 27, 2005-2006, pp. 1683 – 1688.

CRYER, R., A “Special Court” for Sierra Leone? , in «International and Comparative Law Quarterly», Vol. 50, 2001, pp. 435 – 446.

CRYER, R., Witness Evidence before International Criminal Tribunals, in «The Law and Practice of International Courts and Tribunals», Vol. 3, 2003, pp. 411 – 439.

CURRIE, R.J., Abducted Fugitives before the International Criminal Court: Problems and Prospects, in «Criminal Law Forum», Vol. 18, 2007, pp. 343 – 393.

DAMAŠKA, M., Reflections on Fairness in International Criminal Justice, in «Journal of International Criminal Justice», Vol. 10, 2012, pp. 611 – 620.

DAMAŠKA, M., The Competing Visions of Fairness: The Basic Choices for International Criminal Tribunals, in «North Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2010 – 2011, pp. 365 – 388.

DAMAŠKA, M., The International Criminal Court between Aspiration and Achievement, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, pp. 19 – 35.

DAMAŠKA, M., The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments, in «The American Journal of Comparative Law», Vol. 45, 1997, pp. 839 – 852.

DAMAŠKA, M., What is the Point of International Criminal Justice, in «Chicago-Kent Law Review», Vol. 83, 2008, pp. 329 – 365.

DANNER, A.M., Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, in «American Journal of International Law», Vol. 97, 2003, pp. 510 – 552.

DANNER, A.M., Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel, in «Stanford Law Review», Vol. 55, 2003, pp. 1633 – 1665.

DAVIDSON, C., May it Please the Court? The Role of Public Confidence, Public Order, and Public Opinion in Bail for International Criminal Defendants, in «Columbia Human Rights Law Review», Vol. 43, 2012, pp. 349 – 413.

DAVIDSON, C.L., No Shortcuts on Human Rights: Bail and the International Criminal Trial, in «American University Law Review», Vol. 60, 2010, pp. 1-70.

DAVIES, T.E., How the Rome Statute Weakens the International Prohibition on Incitement to Genocide, in «Harvard Human Rights Journal», Vol. 22, 2009, pp. 245 – 270.

DE BUSSE, E., Examples and Assumptions: Transatlantic Data Protection in Criminal Matters, in «Journal of Internet Law», Vol. 15, 2012, pp. 3 – 18.

DE HERT, P. and KORENICA, F., The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights, in «German Law Journal», Vol. 13, 2012, pp. 874 – 895.

DE VOS, C.M., Case Note, Prosecutor v. Lubanga, 'Someone who Comes Between one Person and Another': *Lubanga*, Local Cooperation and the Right to a Fair Trial, in «Melbourne Journal of International Law», Vol. 12, 2011, pp. 217 – 236.

DE YCAZA, C., Victor's Justice in War Crimes Tribunals: A Study of the International Criminal Tribunal in Rwanda, in «New York International Law Review», Vol. 23, 2010, pp. 53 - 81.

DECAUX, E., The Place of Human Rights Courts and International Criminal Courts in the International System, in «Journal of International Criminal Justice», Vol. 9, 2011, pp. 597 – 608.

DEFRANCIA, C., Due Process in International Criminal Courts, in «Virginia Law Review», Vol. 87, 2001, pp. 1381 – 1439.

DEFRANK, M.M., Commentary: ICTY Provisional Release: Current Practice, a Dissenting Voice, and the Case for a Rule Change, in «Texas Law Review», Vol. 80, 2001 – 2002, pp. 1429 – 1463.

DEGUZMAN, M.M., Choosing to Prosecute: Expressive Selection at the International Criminal Court, in «Michigan Journal of International Law», Vol. 33, 2012, pp. 265 – 320.

DEGUZMAN, M.M., Gravity and the Legitimacy of the International Criminal Court, in «Fordham International Law Journal», Vol. 32, 2009, pp. 1400 – 1465.

DEL PONTE, C., Investigation and Prosecution of Large-Scale Crimes at the International Level: the Experience of the ICTY, in «Journal of International Criminal Justice», Vol. 4, 2006, pp. 539 – 558.

DELMAS-MARTY, M., Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC, in «Journal of International Criminal Justice», Vol. 4, 2006, pp. 2 – 11.

DEMIRDJIAN, A., Armless Giants: Cooperation, State Responsibility and Suggestions for the ICC Review Conference, in «International Criminal Law Review», Vol. 10, 2010, pp. 181 – 208.

DEPREZ, C., Extent of Applicability of Human Rights Standards to Proceedings before the International Criminal Court: On Possible Reductive Factors, in «International Criminal Law Review», Vol. 12, 2012, pp. 721 -741.

DIXON, R., Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals, in «Transitional Law & Contemporary Problems», Vol. 7, 1997, pp. 81 – 102.

DONG, J., Prosecutorial Discretion at the International Criminal Court: A Comparative Study, in «Journal of Politics and Law», Vol. 2, 2009, pp. 109 -114.

DORAN, K., Provisional Release in Human Rights Law and International Criminal Law, in «International Criminal Law Review», Vol. 11, 2011, pp. 707 – 743.

DUBBER, M.D., Common Civility: The Culture of Alegality in International Criminal Law, in «Leiden Journal of International Law», Vol. 24, 2011, pp. 923 – 936.

EDWARDS, G.E., International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy, in «The Yale Journal of International Law», Vol. 26, 2001, pp. 323 – 412.

EL ZEIDY, M.M., Critical Thoughts on Article 59(2) of the ICC Statute, in «Journal of International Criminal Justice», Vol. 4, 2006, pp. 448 – 465.

EL ZEIDY, M.M., Some Remarks on the Question of Admissibility of a Case During Arrest Warrant Proceedings before the International Criminal Court, in «Leiden Journal of International Law», Vol. 19, 2006, pp. 741 – 751.

FAIRLIE, M.A., Due Process Erosion: The Diminution of Live Testimony at the ICTY, in «California Western International Law Journal», Vol. 34, 2003, pp. 47 – 83.

FAIRLIE, M.A., The Marriage of Common and Continental Law at the ICTY, in «International Criminal Law Review», Vol. 4, 2004, pp. 243 – 316.

FAIRLIE, M.A., The Precedent of Pre-Trial Release at the ICTY: A Road Better Left less Travelled, in «Fordham International Law Journal», Vol. 33, 2009 – 2010, pp. 1101 – 1177.

FEDOROVA, M. and SLUITER, G., Human Rights as *Minimum* Standards in International Criminal Proceedings, in «Human rights & International Legal Discourse», Vol. 3, 2009, pp. 9-56.

FEICHTNER, I., Realizing Utopia through the Practice of International Law, in «European Journal of International Law», Vol. 23, 2012, pp. 1143 – 1147.

FIELD, S. and WEST, A., Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pre-Trial Criminal Law Process, in «Criminal Law Forum», Vol. 14, 2003, pp. 261 – 316.

FIELD, S., Fair Trials and Procedural Tradition in Europe, in «Oxford Journal of Legal Studies», Vol. 29, 2009, pp. 365 -387.

FIGÀ-TALAMANCA, N., The Role of NATO in the Peace Agreement for Bosnia and Herzegovina, in «European Journal of International Law», Vol. 7, 1996, pp. 164 – 175.

FINDLAY, M., Synthesis in Trial Procedures? The Experience of International Criminal Tribunals, in «International and Comparative Law Quarterly», Vol. 50, 2001, pp. 26 – 51.

FRASE, S. and WEIGEND, T., German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?, in «Boston College International and Comparative Law Review», Vol. 18, 1995, pp. 317 – 360.

FRIMAN, H., Inspiration from the International Criminal Tribunals when Developing Law on Evidence for the International Criminal Court, in «The Law and Practice of International Courts and Tribunals», Vol. 2, 2003, pp. 373 – 400.

FURUYA, S., Rule 61 Proceedings in the International Criminal Tribunal for the Former Yugoslavia, A Lesson for the ICC, in «Leiden Journal of International Law», Vol. 12, 1999, pp. 635 – 669.

GAETA, P., Does President Al Bashir Enjoy Immunity from Arrest?, in «Journal of International Criminal Justice», Vol. 7, 2009, pp. 315 – 332.

GAETA, P., Is NATO Authorized or Obligated to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia?, in «European Journal of International Law», Vol. 9, 1998, pp. 174 – 181.

GAETA, P., Is the Practice of ‘Self-Referrals’ a Sound Start for the ICC?, in «Journal of International Criminal Justice», Vol. 2, 2004, pp. 949 – 952.

GALBRAITH, J., The Pace of International Criminal Justice, in «Michigan Journal of International Law», Vol. 31, 2009, pp. 79 – 143.

GALLANT, K.S., Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition, in «Criminal Law Forum», Vol. 5, 1994, pp. 557 – 588.

GAMARRA, Y. and VICENTE, A., United Nations Member States' Obligations Towards the ICTY: Arresting and Transferring Lukic, Gotovina and Zelenovic, in «International Criminal Law Review», Vol. 8, 2008, pp. 627 – 653.

GILLETT, M. and SCHUSTER, M., The Special Tribunal for Lebanon Swiftly Adopts its Rules of Procedure and Evidence, in «Journal of International Criminal Justice», Vol. 7, 2009, pp. 885 -909.

GODINHO, J.A.F., The Surrender Agreements between the US and the ICTY and ICTR: A Critical View, in «Journal of International Criminal Justice», Vol. 1, 2003, pp. 502 – 516.

GOLDSTON, R., More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court, in «Journal of International Criminal Justice», Vol. 8, 2010, pp. 383 – 406.

GOLDSTONE, R., A View from the Prosecution, in «Journal of International Criminal Justice», Vol. 2, 2004, pp. 380 – 384.

GOLDSTONE, R., Prosecuting Rape as a War Crime, in «Case Western Reserve Journal of International Law», Vol. 34, 2002, pp. 277 – 285.

GOLDSTONE, R.J. and FRITZ, N., 'In the Interests of Justice' and Independent Referral: The ICC Prosecutor's Unprecedented Powers, in «Leiden Journal of International Law», Vol. 13, 2000, pp. 655 -667.

GRADONI, L., International Criminal Courts and Tribunals: Bound by Human Rights Norms...or Tied Down?, in «Leiden Journal of International Law», Vol. 19, 2006, pp. 847 - 873.

GRANDE, E., Dances of Justice: Tango and Rumba in Comparative Criminal Procedure, in «International Commentary on Evidence», Vol. 9/4, 2009, 20p.

GRANDISON, C., Update from the International and Internationalized Criminal Tribunals, in «Human Rights Brief», Vol. 19, 2012, pp. 49 – 50.

GREEN, B.A. and ZACHARIAS, F.C., Prosecutorial Neutrality, in «Wisconsin Law Review», 2004, pp. 837 – 904.

GREENAWALT, A.K.A., Justice Without Politics? Prosecutorial Discretion and the International Criminal Court, in «NYU Journal of International Law & Politics», Vol. 39, 2007, pp. 583 – 673.

GROOME, D.M., Re-Evaluating the Theoretical Basis and Methodology of International Criminal Trials, in «Pennsylvania State International Law Review», Vol. 25, 2007, pp. 791 – 802.

GUGGISBERG, S., The Nada Case before the ECtHR: A New Milestone in the European Debate on Security Council Targeted Sanctions, in «Croatian Yearbook of European Law and Policy», Vol. 8, 2012, pp. 411 – 435.

HAFNER, G. and BINDER, C., The Interpretation of Article 21 (3) ICC Statute: Opinion Reviewed, in «Austrian Review of International and European Law», Vol. 9, 2004, pp. 163 – 190.

HANSEN, T.O., A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity, in «Melbourne Journal of International Law», Vol. 13, 2012, pp. 217 – 234.

HARMON, M.B. and GAYNOR, F., Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings, in «Journal of International Criminal Justice», Vol. 2, 2004, pp. 403 – 426.

HARRIS, K.J. and KUSHEN, R., Surrender of Fugitives to the War Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations with the U.S. Constitution, in «Criminal Law Forum», Vol. 7, 1996, pp. 561 -604.

HASKELL, L. and WALDORF, L., The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences, in «Hastings International and Comparative Law Review», Vol. 34, 2011, pp. 49 – 85.

HENZELIN, M., HEISKANEN, V. and METTRAUX, G., Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes, in «Criminal Law Forum», Vol. 17, 2005, pp. 281 – 344.

HOFFMEISTER, F., Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland in «American Journal of International Law», Vol. 100, 2006, pp. 442 – 449.

HORTON, L.F., Prosecutorial Discretion Before International Criminal Courts and Perceptions of Justice: How Expanded Prosecutorial Independence Can Increase the Accountability of International Actors, in «Eyes on the ICC», Vol. 7, 2010-2011, pp. 5 - 57.

JACKSON, J. and M'BOGE, Y., Integrating a Socio-Legal Approach to Evidence in the International Criminal Tribunals, in «Leiden Journal of International Law», Vol. 26, 2013, pp. 933 – 935.

JACKSON, J. and M'BOGE, Y., The effect of Legal Culture on the Development of International Evidentiary Practice: From the “Robing Room” to the “Melting Pot”, in «Leiden Journal of International Law», Vol. 26, 2013, pp. 947 – 970.

JACKSON, J., Finding the Best Epistemic Fit for International Criminal Tribunals, in «Journal of International Criminal Justice», Vol. 7, 2009, pp. 17 – 39.

JACKSON, J., Re-Conceptualizing the Right of Silence as an Effective Fair Trial Standard, in «International and Comparative Law Quarterly», Vol. 58, 2009, pp. 835 - 861.

JACKSON, J., The Ethical Implications of the Enhanced Role of the Public Prosecutor, in «Legal Ethics», Vol. 9, 2006, pp. 35 – 55.

JAIN, N., Between the Scylla and Charybdis of Prosecution and Reconciliation: the Khmer Rouge Trials and the Promise of International Criminal Justice, in «Duke Journal of Comparative & International Law», Vol. 20, 2010, p. 247 – 290.

JAIN, N., Conceptualising Internationalisation in Hybrid Criminal Courts, in «Singapore Year Book of International Law », Vol. 12, 2008, pp. 86 -96.

JALLOH, C.C., Special Court for Sierra Leone: Achieving Justice?, in «Michigan Journal of International Law», Vol. 32, 2011, pp. 395 – 460.

JALLOH, C.C., Prosecuting those Bearing “Greatest Responsibility”: The Lessons of the Special Court for Sierra Leone, in «Marquette Law Review», Vol. 96, 2013, pp. 863 – 911.

JALLOW, H.B., Prosecutorial Discretion and International Criminal Justice, in «Journal of International Criminal Justice», Vol. 3, 2005, pp. 145 – 161.

JOHNSON, L.D., Ten Years Later: Reflections on the Drafting, in «Journal of International Criminal Justice», Vol. 2, 2004, pp. 368 – 379.

JONES, J.R.W.D., CARLTON-HANCILES, C., KAH-JALLOW, H. and YILLAH, I., The Special Court for Sierra Leone: a Defence Perspective, in «Journal of International Criminal Justice», Vol. 2, 2004, pp. 211 – 230.

JONES, J.R.W.D., The Implications of the Peace Agreement for the International Criminal Tribunal for the Former Yugoslavia, in «European Journal of International Law», Vol. 7, 1996, pp. 226 – 244.

JOYCE, D., The Historical Function of International Criminal Trials, in «Nordic Journal of International Law», Vol. 73, 2004, pp. 461-484.

KAREMAKER, R., DON TAYLOR III, B. and PITTMAN, T.W., Witness Proofing in International Criminal Tribunals, in «Leiden Journal of International Law», Vol. 21, 2008, pp. 917 – 923.

KATZENSTEIN, S., Hybrid Tribunals: Searching for Justice in East Timor, in «Harvard Human Rights Journal», Vol. 16, 2003, pp. 245 – 278.

KATZMAN, R., The Non-Disclosure of Confidential Exculpatory Evidence and the *Lubanga* Proceedings: How the ICC Defense System Affects the Accused’s Right to a Fair Trial, in «Northwestern Journal of International Human Rights», Vol. 8, 2009, pp. 77 – 101.

KAUL, H.-P. and KRESS, C., Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises, in «Yearbook of International Humanitarian Law», Vol. 2, 1999, pp. 143 – 175.

KAY, S., The Move from Oral Evidence to Written Evidence, in «Journal of International Criminal Justice», Vol. 2, 2004, pp. 495 – 502.

KEEN, P.C., Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals, in «Leiden Journal of International Law», Vol. 17, 2004, pp. 767 – 814.

KERR, K., Fair Trials at International Tribunals, Examining the Parameters of the International Right to Counsel, in «Georgetown Journal of International Law», Vol. 36, 2005, pp. 1227-1254.

KLAMBERG, M., What are the Objectives of International Criminal Procedure? – Reflections on the Fragmentation of a Legal Regime, in «Nordic Journal of International Law», Vol. 79, 2010, pp. 279 – 302.

KLIP, A.H., The Decrease of Protection under Human Rights Treaties in International Criminal Law, in «International Review of Penal Law», Vol. 68, 1997, pp. 291-310.

KNOOPS, G.-J., The Duality of State Cooperation Within International and National Criminal Cases, in «Fordham International Law Journal», Vol. 30, 2007, pp. 260 – 295.

KNOOPS, G.-J.A., Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective, in «Criminal Law Forum», Vol. 15, 2005, pp. 365 – 390.

KNOWLES, P., The Power to Prosecute: the Special Court for Sierra Leone from a Defence Perspective, in «International Criminal Law Review», Vol. 6, 2006, pp. 387 - 417.

KODAMA, Y., For Judicial Justice and Reconciliation in Cambodia: Reflections upon the Establishment of the Khmer Rouge Trials and the Trials' Procedural Rules, in «The Law and Practice of International Courts and Tribunals», Vol. 9, 2010, pp. 37 – 113.

KOLLER, D.S., The Faith of the International Criminal Lawyer, in «International Law and Politics», Vol. 40, 2008, pp. 1019 – 1069.

KRESS, C., 'Self-Referrals' and 'Waivers of Complementarity': Some Considerations in Law and Policy, in «Journal of International Criminal Justice», Vol. 2, 2004, pp. 944 - 948.

KRESS, C., The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise, in «Journal of International Criminal Justice», Vol. 1, 2003, pp. 603 – 617.

KUSHEN, R. and HARRIS, K.J., Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda, in «The American Journal of International Law», Vol. 90, 1996, pp. 510 – 518.

KUSHEN, R., The Surrender Agreements between the US and the ICTY and ICTR: The American View, in «Journal of International Criminal Justice», Vol. 1, 2003, pp. 517 – 519.

LA ROSA, A.-M., A Tremendous Challenge for the International Criminal Tribunals: Reconciling the Requirements of International Humanitarian Law with those of Fair Trial, in «International Review of the Red Cross», No. 321, 1997, pp. 635 - 650.

LAMB, S., The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, in «The British Yearbook of International Law», Vol. 70, 2000, pp. 165 – 244.

LANGER, M. and DOHERTY, J.W., Managerial Judging Goes International, but its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms, in «Yale Journal of International Law», Vol. 36, 2011, pp. 241 – 305.

LANGER, M., The Rise of Managerial Judging in International Criminal Law, in «American Journal of Comparative Law», Vol. 53, 2005, pp. 835 - 909.

LEPARD, B.D., How Should the ICC Prosecutor Exercise his or her Discretion? The Role of Fundamental Ethical Principles, in «John Marshall Law Review», Vol. 43, 2010, pp. 553 – 567.

LINTON, S. and REIGER, C., The Evolving Jurisprudence and Practice of East Timor's Special Panels for Serious Crimes on Admissions of Guilt, Duress and Superior Orders, in «Yearbook of International Humanitarian Law», Vol. 4, 2001, pp. 167 – 212.

LINTON, S., Cambodia, East Timor and Sierra Leone: Experiments in International Criminal Justice, in «Criminal Law Forum», Vol. 12, 2001, pp. 185 – 246.

LINTON, S., Prosecuting Atrocities at the District Court of Dili, in «Melbourne Journal of International Law», Vol. 2, 2001, pp. 414 – 458.

LINTON, S., Rising from the Ashes: The Creation of a viable Criminal Justice System in East Timor, in «Melbourne University Law Review», Vol. 25, 2001, pp. 122 – 180.

LITTLE, R.K., Proportionality as an Ethical Precept for Prosecutors in their Investigative Role, in «Fordham Law Review», Vol. 68, 1999, pp. 723 – 770.

LUZZATI, S., On the Admissibility of Statements Made by the Defendant Prior to Trial: Remarks on the ICTY Appeals Chamber's Decisions in *Halilović* and *Prlić et al.*, in «Journal of International Criminal Justice», Vol. 8, 2010, pp. 221 – 236.

MA, Y., Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany and Italy: A Comparative Perspective, in «International Criminal Justice Review», Vol. 12, pp. 22 – 52.

MAGUIRE, M. and JOHN, T., Covert and Exceptive Policing in England and Wales : Issues of Regulation and Practice, in «European Journal of Crime, Criminal Law and Criminal Justice», Vol. 4, 1996, pp. 316 – 334.

MAHONEY, P., Right to a Fair Trial in Criminal Matters under Article 6 E.C.H.R., in «Judicial Studies Institute Journal», Vol. 4, 2004, pp. 107 – 129.

MALLESONS, S.J., The OTP v. Thomas Lubanga Dyilo: The Challenges of Using “Intermediaries” in the International Criminal Court, in «Humanitarian Law Perspectives», 2011, 19p (available at: http://www.redcross.org.au/files/2011_-_the_otp_v_thomas_lubanga_dyilo_the_challenge_of_using_intermediaries_in_the_international_criminal_court.pdf, last visited 30 August 2013).

MAOGOTO, J. N., A Giant Without Limbs: The International Criminal Court’s State-Centric Cooperation Regime, in «University of Queensland Law Journal», Vol. 102, 2004, pp. 102 - 133.

MARKOVIC, M., The ICC Prosecutor’s Missing Code of Conduct, in «Texas International Law Journal», Vol. 47, 2011 – 2012, pp. 201 – 236.

MARSHALL, A., Prevention and Complementarity in the International Criminal Court: A Positive Approach, in «Human Rights Brief», Vol. 17, 2010, pp. 21 – 26.

MAY, L., Habeas Corpus and the Normative Jurisprudence of International Law, in «Leiden Journal of International Law», Vol. 23, 2010, pp. 291 – 310.

MCAULIFFE, P., The Limits of Co-operation and Judicial Independence: Resolving the Question of How Long do you Go: The Khmer Rouge Trials’ Bicephalous Prosecution, in «University of Tasmania Law Review», Vol. 29, 2010, pp. 111- 141.

MCCLELLAND, G.A., A Non-Adversary Approach to International Criminal Tribunals, in «Suffolk Transnational Law Review», Vol. 26, 2002, pp. 5 – 38.

MCDERMOTT, Y., The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis, in «Leiden Journal of International Law», Vol. 26, 2013, pp. 971 – 989.

MCINTYRE, G., Equality of Arms – Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, in «Leiden Journal of International Law», Vol. 16, 2003, pp. 269 – 320.

MÉGRET, F., Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, pp. 37 – 76.

MÉGRET, F., The Legacy of the ICTY as Seen Through Some of its Actors and Observers, in «Goettingen Journal of International Law», Vol. 3, 2011, pp. 1011 – 1052.

MEIJERS, I.G.M., Over Lüdi tegen Zwitserland, EHRM 15 juni 1992, in «Delikt and Delinkwent» 1994, pp. 272 – 277.

METTRAUX, G., The Internationalization of Domestic Jurisdictions by International Tribunals: The Special Tribunal for Lebanon Renders its First Decisions, in «Journal of International Criminal Justice», Vol. 7, 2009, pp. 911 – 926.

MICHELS, J.D., Compensating Acquitted Defendants before International Criminal Courts, in «Journal of International Criminal Justice», Vol. 8, 2010, pp. 407 – 424.

MILANOVIĆ, M., State Responsibility for Genocide: A Follow-up, in «European Journal of International Law», Vol. 18, pp. 669- 694.

MIRAGLIA, M., Admissibility of Evidence, Standard of Proof, and Nature of the Decision in the ICC Confirmation of Charges in *Lubanga*, in «Journal of International Criminal Justice», Vol. 6, 2008, pp. 489 – 503.

MIRAGLIA, M., The First Decision of the ICC Pre-Trial Chamber: International Criminal Procedure under Construction, in «Journal of International Criminal Justice», Vol. 4, 2006, pp. 188 – 195.

MIRALDI, M., Overcoming Obstacles of Justice: The Special Court of Sierra Leone, in «New York Law School Journal of Human Rights», 2003, pp. 849 – 858.

MOHAN, M., Schisms in Humanitarianism, - The Khmer Rouge Tribunal's First Hearing, in «Asian Journal of Comparative Law», Vol. 4, 2009, pp. 1 – 29.

MOMENI, M., Why Barayagwiza is Boycotting his Trial at the ICTR: Lessons in Balancing Due Process Rights and Politics, in «ILSA Journal of International and Comparative Law», Vol. 7, 2000 – 2001, pp. 315 – 328.

MORANCHEK, L., Protecting National Security Evidence while Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY, in «Yale Journal of International Law», Vol. 31, 2006, pp. 477 – 501.

MORRISON, S., Extraordinary Language in the Courts of Cambodia: Interpreting the Limiting Language and Personal Jurisdiction of the Cambodian Tribunal, in «Capital University Law Review», Vol. 37, 2009, pp. 583 – 617.

MÜLLER, C.A., The Law of Interim Release in the Jurisprudence of the International Criminal Tribunals, in «International Criminal Law Review», Vol. 8, 2008, pp. 589 - 626.

MUNDIS, D.A., From 'Common Law' Towards 'Civil Law': The Evolution of the ICTY Rules of Procedure and Evidence, in «Leiden Journal of International Law», Vol. 14, 2001, pp. 367 – 382.

MUNDIS, D.A., The Judicial Effects of the “Completion Strategies” on the *Ad Hoc* International Criminal Tribunals, in «American Journal of International Law», Vol. 99, 2005, pp. 142 – 158.

MURPHY, R., Gravity Issues and the International Criminal Court, in «Criminal Law Forum», Vol. 33, 2006, pp. 281 – 315.

NAYMARK, D., Violations of Rights of the Accused at International Criminal Tribunals: The Problem of Remedy, in «Journal of International Law and International Relations», Vol. 4, 2008, pp. 1 – 18.

NEUNER, M., The Security Council and the ICC: Assessing the first ten Years of Coexistence, in «New England Journal of International and Comparative Law», Vol. 18, 2012, pp. 283 – 310.

NGANE, S.N., Witnesses before the International Criminal Court, in «The International Law and Practice of International Courts and Tribunals», Vol. 8, 2009, pp. 431 – 457.

NSEREKO, D.D.N., Prosecutorial Discretion before National Courts and International Tribunals, in «Journal of International Criminal Justice», Vol. 3, 2005, pp. 124 – 144.

NTANDA NSEREKO, D.D., Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, in «Criminal Law Forum», Vol. 5, 1994, pp. 507 – 555.

NYAMUYA MAOGOTO, J., A Giant Without Limbs: The International Criminal Court's State-Centric Cooperation Regime, in «The University of Queensland Law Journal», Vol. 23, 2004, pp. 102 – 133.

O'SULLIVAN, E. and MONTGOMERY, D., The Erosion of the Right to Confrontation under the Cloak of Fairness at the ICTY, in «Journal of International Criminal Justice», Vol. 8, 2010, pp. 511 – 538.

OHLIN, J. D., A Meta-Theory of International Criminal Procedure, Vindicating the Rule of Law, in «UCLA Journal of International Law and Foreign Affairs», Vol. 14, 2009, pp. 77 – 120.

OLÁSOLO, H., The Prosecutor of the ICC before the Initiation of Investigations, in «International Criminal Law Review», Vol. 3, 2003, pp. 87 – 150.

OOSTERVELD, M., PERRY, M. and MCMANUS, J., The Cooperation of States with the International Criminal Court, in «Fordham International Law Journal», Vol. 25, 2001 – 2002, pp. 767 – 839.

PACKER, H.L., Two Models of the Criminal Process, in «University of Pennsylvania Law Review», Vol. 113, 1964, pp. 1 - 68.

PAPILLON, S., Has the United Nations Security Council Implicitly Removed Al Bashir's Immunity?, in «International Criminal Law Review», Vol. 10, 2010, pp. 175 – 288.

PAUST, J.J., The Freeing of Ntakirutimana in the United States and 'Extradition' to the ICTR' in «Yearbook of International Humanitarian Law», Vol. 1, 1998, pp. 205 – 209.

PETERS, A., Realizing Utopia as a Scholarly Undertaking, in «American Journal of International Law», Vol. 24, 2013, pp. 533 – 552.

PETIT, R. and AHMED, A., A Review of the Jurisprudence of the Khmer Rouge Tribunal, in «Northwestern Journal of International Human Rights», Vol. 8, 2010, pp. 155 – 189.

PHELPS, J., Reflections on Bosphorus and Human Rights in Europe, in «Tulane Law Review», Vol. 81, 2006, pp. 252 – 279.

PHILIPS, N.L. and SMITH, S., Reinterpreting the Ethical Duties of a Prosecutor: Y-STR as a Model Investigative Tool in «The Georgetown Journal of Legal Ethics», Vol. 22, 2009, pp. 1073 – 1093.

PIZZI, W., Overcoming Logistical and Structural Barriers to Fair Trials at International Tribunals, in «International Commentary on Evidence», Vol. 4/1, 2006, 5p.

PRADEL, J., De l'enquête pénale proactive: Suggestions pour un statut légal, in «Recueil Dalloz», 1998, pp. 57 – 60.

RASTAN, R., Comment on Victor's Justice & the Viability of Ex ante Standards, in «John Marshall Law Review», Vol. 43, 2010, pp. 569 – 602.

RASTAN, R., Testing Co-operation: The International Criminal Court and National Authorities, in «Leiden Journal of International Law», Vol. 21, 2008, pp. 431 – 456.

RASTAN, R., The Jurisdictional Scope of Situations before the International Criminal Court, in «Criminal Law Forum», Vol. 23, 2012, pp. 1 – 24.

RASTAN, R., What is a 'Case' for the Purpose of the Rome Statute?, in «Criminal Law Forum», Vol. 19, 2008, pp. 435 - 448.

RATNER, S. and SLAUGHTER, A.-M., Appraising the Methods of International Law: A Prospectus for Readers, in «American Journal of International Law», Vol. 93, 1999, pp. 291 – 302.

REARICK, D.J., Innocent Until Alleged Guilty, Provisional Release at the ICTR, in «Harvard International Law Journal», Vol. 44, 2003, pp. 577 – 595.

REYDAMS, L., The ICTR ten Years on: Back to the Nuremberg Paradigm?, in «Journal of International Criminal Justice», Vol. 3, 2005, pp. 977 – 988.

ROBERTS, P., Comparative Criminal Justice Goes Global, in «Oxford Journal of Legal Studies», Vol. 28, 2008, pp. 369 – 391.

ROBINSON, D., Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court, in «European Journal of International Law», Vol. 14, 2003, pp. 481 – 505.

ROBINSON, D., The Mysterious Mysteriousness of Complementarity, in «Criminal Law Forum», Vol. 21, 2010, pp. 67 - 102.

ROBINSON, P.L., Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia, in «European Journal of European Law», Vol. 11, 2000, pp. 569 – 589.

ROBINSON, P.L., Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY, in «Journal of International Criminal Justice», Vol. 3, 2005, pp. 1037 - 1058.

ROSS, J.E., The Place of Covert Surveillance in Democratic Societies: a Comparative Study of the United States and Germany, in «American Journal of Comparative Law», Vol. 55, 2007, pp. 493 – 579.

ROTH, R. and TULKENS, F., Symposium, The Influence of the European Court of Human Rights' Case Law on (International) Criminal Law: Introduction, in «Journal of International Criminal Justice», Vol. 9, 2011, pp. 571 – 575.

RUSELL-BROWN, S.L., Poisoned Chalice?: The Rights of Criminal Defendants Under International Law, During the Pre-Trial Phase, in «UCLA Journal of International Law and Foreign Affairs», Vol. 8, 2003, pp. 127 – 164.

RYNGAERT, C., The Doctrine of Abuse of Process: A Comment on the Cambodia Tribunal's Decisions in the Case against Duch (2007), in «Leiden Journal of International Law», Vol. 21, 2008, pp. 719 – 737.

RYNGAERT, C., The European Court of Human Rights' Approach to the Responsibility of Member States in Connection with Acts of International Organizations, in «International & Comparative Law Quarterly», Vol. 60, 2011, pp. 997 – 1016.

SADAT, L.N., Custom, Codification and some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute, in «DePaul Law Review», Vol. 49, 1999 – 2000, pp. 909 – 924.

SAFFERLING, C., The Rights and Interests of the Defence in the Pre-Trial Phase, in «Journal of International Criminal Justice», Vol. 9, 2011, pp. 651 – 667.

SAUNDERS, K.W., The Mythic Difficulty in Proving a Negative, in «Seton Hall Law Review», Vol. 15, 1984 -1985, pp. 276 – 289.

SCHABAS, W., Barayagwiza v. Prosecutor in «The American Journal of International Law», Vol. 94, 2000, pp. 563 – 571.

SCHABAS, W.A., Common Law, «Civil Law», et droit pénal international: tango (le dernier?) à La Haye, in «Revue québécoise de droit international» Vol. 13, 2000, pp. 287 – 307.

SCHABAS, W.A., Complementarity in Practice: Some Uncomplimentary Thoughts, in «Criminal Law Forum», Vol. 19, 2007, pp. 5 – 33.

SCHABAS, W.A., Prosecutorial Discretion v. Judicial Activism at the ICC, in «Journal of International Criminal Justice», Vol. 6, 2008, pp. 731 – 761.

SCHABAS, W.A., Sentencing by International Tribunals: A Human Rights Approach, in «Duke Journal of Comparative and International Law», Vol. 7, 1997, pp. 461 – 517.

SCHABAS, W.A., Synergy or Fragmentation, International Criminal Law and the European Convention on Human Rights, in «Journal of International Criminal Justice», Vol. 9, 2011, pp. 609 – 632.

SCHABAS, W.A., Victor's Justice: Selecting "Situations" at the International Criminal Court, in «John Marshall Law Review», Vol. 43, 2010, pp. 535 – 552.

SCHARF, M.P., The *Prosecutor v. Slavko Dokmanović*: Irregular Rendition and the ICTY, in «Leiden Journal of International Law», Vol. 11, 1998, pp. 369 – 382.

SCHARF, M.P., The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal, in «DePaul Law Review», Vol. 49, 2000, pp. 925 – 979.

SCHEURMANS, F., Impliciete dwangbevoegdheden bij de uitvoering van de huiszoeking, in «Tijdschrift voor Strafrecht», 2011-12, pp. 106 – 115.

SCHOMBURG, W., The Role of International Criminal Tribunals in Promoting Respect for Fair Trials, in «Northwestern Journal of International Human Rights», Vol. 8, 2009, pp. 1- 29.

SCHRAG, M., Lessons Learned from ICTY Experience, in «Journal of International Criminal Justice», Vol. 2, 2004, pp. 427 – 434.

SCHRAG, M., The Yugoslav Crimes Tribunal: A Prosecutor's View, in «Duke Journal of Comparative and International Law», Vol. 6, 1995-1996, pp. 187 – 195.

SCHWARZENBERGER, G., The Problem of an International Criminal Law, in «Current Legal Problems », Vol. 3, 1950, pp. 263 – 296.

SCHWARZENBERGER, G., The Province of International Judicial Law, in «Notre Dame International Law Journal», Vol. 21, 1983, pp. 21-32.

SHAFFER, G. and GINSBURG, T., The Empirical Turn in International Legal Scholarship, in «American Journal of International Law», Vol. 106, 2012, pp. 1 – 46.

SHAHABUDEEN, M., Teething Phase of the ECCC, in «Chinese Journal of International Law», Vol. 10, 2011, pp. 469 – 502.

SHANY, Y., Assessing the Effectiveness of International Courts: A Goal-Based Approach, in «American Journal of International Law», Vol. 106, 2012, pp. 225 – 270.

SHEPPARD, D., The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21 (3) of the Rome Statute, in «Journal of International Criminal Justice», Vol. 10, 2010, pp. 43 – 71.

SHERMAN, A., Sympathy for the Devil: Examining a Defendant's Right to Confront Before the International War Crimes Tribunal, in «Emory International Law Review», Vol. 10, 1996, pp. 833 – 878.

SIMMA, B. and PAULUS, A.L., The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View, in «American Journal of International Law», Vol. 93, 1999, pp. 302 – 317.

SKILBECK, R., *Frankenstein's Monster: Creating a New International Procedure*, in «Journal of International Criminal Justice», Vol. 8, 2010, pp. 451 – 462.

SLOAN, J., *Prosecutor v. Dragan Nikolić: Decision on Defence Motion on Illegal Capture*, in «Leiden Journal of International Law», Vol. 16, 2003, pp. 541 – 552.

SLOAN, J., *Prosecutor v. Todorović: Illegal Capture as an Obstacle to the Exercise of International Criminal Jurisdiction*, in «Leiden Journal of International Law», Vol. 16, 2003, pp. 85 – 113.

SLOBOGIN, S., *An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation*, in «Michigan Journal of International Law», Vol. 22, 2001, pp. 423 – 456.

SLUITER, G., *“I Beg You, Please Come Testify” – The Problematic Absence of Subpoena Powers at the ICC*, in «New Criminal Law Review», Vol. 12, 2009, pp. 590 – 608.

SLUITER, G., *Atrocity Crimes Litigation: Some Human Rights Concerns Occasioned by Selected 2009 Case Law*, in «Northwestern Journal of International Human Rights», Vol. 8, 2010, pp. 248 – 268.

SLUITER, G., *Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers*, in «Journal of International Criminal Justice», Vol. 4, 2006, pp. 314 – 326.

SLUITER, G., *International Criminal Proceedings and the Protection of Human Rights*, in «New England Law Review», Vol. 37, 2002 – 2003, pp. 935 – 948.

SLUITER, G., *Obtaining Cooperation from Sudan – Where is the Law?*, in «Journal of International Criminal Justice», Vol. 6, 2008, pp. 871 – 884.

SLUITER, G., *Recht op aanwezigheid van raadsman tijdens politieverhoor absoluut vereiste voor toelating bewijs, noot*, in «NJCM-Bulletin», Vol. 23, 1998, pp. 86-87.

SLUITER, G., *Surrender of War Criminals to the ICC*, in «The Loyola of Los Angeles International and Comparative Law Review», Vol. 25, 2003, pp. 605 – 652.

SLUITER, G., *The Law of International Criminal Procedure and Domestic War Crimes Trials*, in «International Criminal Law Review», Vol. 6, 2006, pp. 605 – 635.

SLUITER, G., *The Surrender of Ntakirutimana Revisited*, in «Leiden Journal of International Law», Vol. 13, 2000, pp. 459 – 466.

SLUITER, G., *To Cooperate or not to Cooperate?: The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal*, in «Leiden Journal of International Law», Vol. 11, 2008, pp. 383 – 395.

SRIDHAR, A., *Note: The International Criminal Tribunal for the Former Yugoslavia's Response to the Problem of Transnational Abduction*, in «Stanford Journal of International Law», Vol. 42, 2006, pp. 343 – 364.

STAHN, C., Between 'Faith' and 'Facts': By what Standards Should we Assess International Criminal Justice?, in «Leiden Journal of International Law», Vol. 25, 2012, pp. 251 -282.

STAHN, C., Complementarity: A Tale of Two Notions, in «Criminal Law Forum», Vol. 19, 2008, pp. 87 – 113.

STAHN, C., The Ambiguities of Security Council Resolution 1422, in «European Journal of International Law», Vol. 14, 2003, pp. 85-104.

STARR, S.B., Rethinking “Effective Remedies”: Remedial Deterrence in International Courts, in «New York University Law Review», Vol. 83, 2008, pp. 693 – 768.

STARYGIN, S., ECCC in Pre-Trial Action: Was there Good Reason to Order Pre-Trial Detention of the ECCC Defendants, in «Human Rights in the Post-Conflict Context», Vol. 9, 2011, pp. 9 – 14.

STARYGIN, S., Judicial Discretion in ECCC Decisions on Pre-Trial Detention against the Backdrop of the Case-law of the International Criminal Tribunals, in «International Criminal Law Review», Vol. 11, 2011, pp. 315 – 358.

STEPHEN, C., International Criminal Law: Wielding the Sword of Universal Criminal Justice, in «International Criminal Law Quarterly», Vol. 61, 2012 , pp. 55 – 89.

SUNGA, L.S., How can UN Human Rights Special Procedures Sharpen ICC Fact-Finding?, in «The International Journal of Human Rights», Vol. 15, 2011, pp. 187 – 205.

SWART, B., Cooperation Challenges for the Special Tribunal for Lebanon, in «Journal of International Criminal Justice», Vol. 5, 2007, pp. 1153 – 1163.

SWOBODA, S., The ICC Disclosure Regime – A Defence Perspective, in «Criminal Law Forum», Vol. 19, 2008, pp. 449 – 472.

SZNAJDER, R., Provisional Release at the ICTY: Rights of the Accused and the Debate that Amended a Rule, in «Northwestern University Journal of International Human Rights», Vol. 11, 2013, pp. 109 – 145.

TAKEMURA, H. Big Fish and Small Fish Debate – An Examination of the Prosecutorial Discretion, in «International Criminal Law Review», Vol. 7, 2007, pp. 677 – 685.

TAKEMURA, H., Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court, in «Amsterdam Law Forum», Vol. 4, 2012, pp. 3 -15.

TOCHILOVSKY, V., International Criminal Justice: “Strangers in the Foreign System”, in «Criminal Law Forum», Vol. 15, 2004, pp. 319 – 344.

TOCHILOVSKY, V., Special Commentary: International Criminal Justice: Some Flaws and Misperceptions, in «Criminal Law Forum», Vol. 22, 2011, pp. 593 – 607.

- TOCHILOVSKY, V., Trial in International Criminal Jurisdictions: Battle or Scrutiny?, in «European Journal of Crime, Criminal Law and Criminal Justice», Vol. 6/1, 1998, pp. 55 – 59.
- TROTTER, A., Pre-Conviction Detention in International Criminal Trials, in «Journal of International Criminal Justice», Vol. 11, 2013, pp. 351 – 377.
- TULKENS, F., The paradoxical Relationship between Criminal Law and Human Rights, in «Journal of International Criminal Justice», Vol. 9, 2011, pp. 577 – 595.
- TURNER, J.I., Defense Perspectives on Law and Politics in International Criminal Trials, in «Virginia Journal of International Law», Vol. 48, 2008, pp. 529 – 594.
- TURNER, J.I., Commentary: Decision on Civil Party Participation in Provisional Detention Appeals, in «American Journal of International Law», Vol. 103, 2009, pp. 121- 122.
- TURNER, J.I., Policing International Prosecutors, in «International Law and Politics», Vol. 45, 2013, pp. 175 – 258.
- ÜLGEN, Ö., The ICTY and Irregular Rendition of Suspects, in «The Law and Practice of International Courts and Tribunals», Vol. 3, pp. 441 – 466.
- V. RÖBEN, The Procedure of the ICC: Status and Function of the Prosecutor, in «Max Planck United Nations Yearbook», Vol. 7, 2003, pp. 513 – 548.
- VAN DER WILT, H., Boekbespreking (bespreking van: H. Olásolo, The Role of the International Criminal Court in Preventing Atrocity Crimes Through Timely Intervention: From the Humanitarian Intervention Doctrine and Ex Post Facto Judicial Institutions to the Notion of Responsibility to Protect and the Preventative Role of the International Criminal Court (Oratie Utrecht)), in «Delikt en Delinkwent», 2011, pp. 1158 - 1164.
- VAN DER WILT, H., Het Joegoslavië Tribunaal en het beginsel *male captus, bene judicatus*, in «Delikt & Delinkwent», Vol. 18, 2004, pp. 274 – 285.
- VANGEEBERGEN, B. and VAN DAELE, D., De uitholling van de proactieve recherche, in «Nullum Crimen», Vol. 3, 2008, pp. 327 – 342.
- VASILIEV, S., Proofing the Ban on ‘Witness Proofing’: Did the ICC get it right?, in «Criminal Law Forum», Vol. 20, 2009, pp. 193 – 261.
- VENTURA, M.J., The ‘Reasonable Basis to Proceed’ Threshold in the Kenya and Côte d’Ivoire *Proprio Motu* Investigation Decisions: The International Criminal Court’s Lowest Evidentiary Standard?, in «The Law and Practice of International Courts and Tribunals», Vol. 12, 2013, pp. 49 – 80.
- VERHOEVEN, J., Article 21 of the Rome Statute and the Ambiguities of Applicable Law in «Netherlands Yearbook of International Law», Vol. 33, 2002, pp. 3 – 22.
- VERVAELE, J.A.E., Mesures de procédure spéciales et respect des droits de l’homme – Rapport général, in «Utrecht Law Review», Vol. 5, 2009, pp. 110 – 152.

VERVAELE, J.A.E., Special Procedural Measures and the Protection of Human Rights, in «Utrecht Law Review», Vol. 5, 2009, pp. 66 – 103.

WADE, M.L., United Kingdom: England and Wales, in «Revue internationale de droit pénal», Vol. 80, 2009, pp. 323 – 339.

WALD, P., Dealing with Witnesses in War Crimes Trials, in «Yale Human Rights and Development Law Journal», Vol. 5, 2002, pp. 171 – 184.

WALD, P., To “Establish Incredible Events by Credible Evidence”: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings, in «Harvard International Law Journal», Vol. 42, 2001, pp. 535 – 553.

WALDORF, L., “A mere Pretense of Justice”: Complementarity, Sham Trials, and Victor’s Justice at the Rwanda Tribunal, in «Fordham International Law Journal», Vol. 33, 2010, pp. 1221 – 1277.

WARBRICK, C., International Criminal Courts and Fair Trial, in «Journal of Conflict and Security Law», Vol. 3, 1998, pp. 45 – 64.

WEBB, P., The ICC Prosecutor’s Discretion not to Proceed in the “Interests of Justice”, in «Criminal Law Quarterly», Vol. 50, 2005, pp. 305 – 348.

WEISBORD, N. and SMITH, M.A., The Reason Behind the Rules: From Description to Normativity in International Criminal Procedure, in «North-Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2010 - 2011, pp. 255 – 276.

WHITING, A., In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered, in «Harvard International Law Journal», Vol. 50, 2009, pp. 323 – 364.

WILLIAMS, S. and SHERIF, L., The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court, in «Journal of Conflict & Security Law», Vol. 14, 2009, pp. 71 – 92.

WILSON, R.A., Judging History: The Historical Record of the International Tribunal for the Former Yugoslavia, in «Human Rights Quarterly», Vol. 27, 2005, pp. 908 – 942.

WOUTERS, J., VERHOEVEN, S. and DEMEYERE, B., The International Criminal Court’s Office of the Prosecutor: Navigating between Independence and Accountability?, in «International Criminal Law Review», Vol. 8, 2008, pp. 273 - 318.

X, Judicial Control of Illegal Search and Seizure, in «Yale Law Journal», Vol. 58, 1948, pp. 144 – 164.

X, Special Procedural Measures and Protection of Human Rights: Resolution, in «Revue Internationale de Droit Pénal», Vol. 80, 2009/3, pp. 547 – 552.

X, The Promises of International Prosecution, in «Harvard Law Review», Vol. 114, 2001, pp. 1957 – 1982.

YOUNG, R., 'Internationally Recognized Human Rights' Before the International Criminal Court, in «International and Comparative Law Quarterly», Vol. 60, 2011, pp. 189 – 208.

ZACHARIAS, C., Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics, in «Notre Dame Law Review», Vol. 69, 1993, pp. 223 – 309.

ZAHAR, A., International Court and Private Citizen, in «New Criminal Law Review», Vol. 12, 2009, pp. 569 - 589.

ZHOU, H-R., The Enforcement of Arrest Warrants by International Forces: From the ICTY to the ICC, in «Journal of International Criminal Justice», Vol. 4, 2006, pp. 202 – 218.

Contributions

ACQUAVIVA, G., Written and Oral Evidence, in L. CARTER and F. POCAR (eds.), International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems, Cheltenham, Edward Elgar Publishing, 2013, pp. 99 – 124.

AHMED, A. and DAY, M., Prosecution Criteria at the Khmer Rouge Tribunal, in M. BERGSMO (ed.), Criteria for Prioritizing and Selecting Core International Crimes Cases, Oslo, Torkel Opsahl Academic EPublisher, 2010, pp. 107 – 116.

AKANDE, D., Sources of International Criminal Law, in A. CASSESE (ed.), The Oxford Companion to International Criminal Justice, Oxford, Oxford University Press, 2009, pp. 41 - 53.

ALAMUDDIN, A., Collection of Evidence, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), Principles of Evidence in International Criminal Justice, Oxford, Oxford University Press, 2010, pp. 231 – 305.

AMBOS, K. and BOCK, S., Procedural Regimes, in L. REYDAMS, J. WOUTERS and C. RYNGAERT (eds.), International Prosecutors, Oxford, Oxford University Press, 2012, pp. 488 – 541.

AMBOS, K., From Ad Hoc Imposition to a Treaty-Based Universal System, in C. STAHN and L. VAN DEN HERIK (eds.), Future Perspectives on International Criminal Justice, Cambridge, Cambridge University Press, 2010, pp. 161 – 177.

ANGERMAIER, C., Case Selection and Prioritization Criteria in the Work of the International Criminal Tribunal for the Former Yugoslavia, in M. BERGSMO (ed.), Criteria for Prioritizing and Selecting Core International Crimes Cases, Oslo, Torkel Opsahl Academic EPublisher, 2010, pp. 27 - 44.

ARANBURU, X.A., Gravity of Crimes and Responsibility of the Suspect, in M. BERGSMO (ed.), Criteria for Prioritizing and Selecting Core International Crimes Cases, Oslo, Torkel Opsahl Academic EPublisher, 2010, pp. 205 – 236.

ARANBURU, X.A., Methodology for the Criminal Investigation of International Crimes, in A. SMEULERS, *Collective Violence and International Criminal Justice*, Antwerp, Intersentia, 2010, pp. 355 -381.

BERGSMO, M. and KEEGAN, M.J., Case Preparation for the International Criminal Tribunal for the Former Yugoslavia, in *Manual on Human Rights Monitoring: An Introduction for Human Rights Field Officers*, Oslo, Norwegian Centre for Human Rights, 2008, 19p.

BERGSMO, M. and KRUGER, P., Article 53, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1065 – 1076.

BERGSMO, M. and KRUGER, P., Article 54, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1077 – 1087.

BERGSMO, M. and PEJIĆ, J., Article 15, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 581 – 593.

BERGSMO, M. and WILEY, W.H., Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes, in S. SKÅRE, I. BURKEY and H. MØRK (eds.), *Manual on Human Rights Monitoring: An Introduction for Human Rights Field Officers*, Oslo, Norwegian Centre for Human Rights, 2010, 28p.

BERGSMO, M., CISSÉ, C. and STAKER, C., The Prosecutors of the International Tribunals: The Case of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared, in L. ARBOUR, A. ESER, K. AMBOS and A. SANDERS (eds.), *The Prosecutor of an International Criminal Court: International Workshop in Co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, Freiburg im Breisgau, Max-Planck Institut für ausländisches und internationales Strafrecht, 2000, pp. 121 – 154.

BITTI, G., Article 21 of the Statute of the ICC and the Treatment of Sources of Law in the Jurisprudence of the ICC, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, pp. 285 - 304.

BITTI, G., Compensation to an Arrested or Convicted Person, in R.S. LEE (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, Transnational Publishers, 2001, pp. 623 – 636.

BLOM, T., Privacy, EVRM en (straf)rechtshandhaving, in C.H. BRANTS, P.A.M. MEVIS and E. PRAKKEN (eds.), *Legitieme strafvordering, Rechten van de mens als inspiratie in de 21e eeuw*, Groningen – Antwerpen, Intersentia, 2001, pp. 119 – 137.

BOHLANDER, M., The Defence, in G. BOAS and W.A. SCHABAS (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Leiden-Boston, Martinus Nijhoff Publishers, 2003, pp. 35 – 74.

BRADLEY, C.M., United States, in C.M. BRADLEY, *Criminal Procedure: A Worldwide Study*, Durham, Carolina Academic Press, 1999, pp. 519 – 548.

BRADY, H. and JENNINGS, M., Appeal and Revision, in S. LEE (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, The Hague, Kluwer Law International, 1999, pp. 294 – 304.

CAPE, E. and HODGSON, J., The Investigative Stage of the Criminal Process in England and Wales, in E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN (eds.), *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, Oxford, Intersentia, 2007, pp. 59 – 78.

CAPE, E., HODGSON, J., PRAKKEN, T. and SPRONKEN, T., Procedural Rights at the Investigative Stage: Towards a Real Commitment to Minimum Standards, in E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN (eds.), *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, Oxford, Intersentia, 2007, pp. 1 – 28.

CASSESE, A., Introduction, in A. CASSESE (ed.), *Realizing Utopia: The Future of International Law*, Oxford, Oxford University Press, 2012, pp. xvii – xxii.

CASSESE, A., The Contribution of the International Criminal Tribunal for the Former Yugoslavia to the Ascertainment of General Principles of Law Recognized by the Community of Nations, in S. YEE and W. TIEYA (eds.), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, London and New York, Routledge, 2001, pp. 43-55.

CASSESE, A., The Influence of the European Court of Human Rights on International Criminal Tribunals – Some Methodological Remarks, in M. BERGSMO, *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide*, Leiden, Martinus Nijhoff Publishers, 2003, pp. 19 – 52.

CÉDRAS, J., National Report on France, in L. ARBOUR, A. ESER, K. AMBOS and A. SANDERS (eds.), *The Prosecutor of an International Criminal Court: International Workshop in Co-Operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, Freiburg im Breisgau, Max-Planck Institut für ausländisches und internationales Strafrecht, 2000, pp. 324 – 332.

CIAMPI, A., The Obligation to Cooperate, in A. CASSESE et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, pp. 1607 – 1638.

CORACINI, C., Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the Special Panels for Serious Crimes 2003 – 2006*, Vol. XVI, Antwerp, Intersentia, 2009, pp. 199 – 204.

DAMAŠKA, M., Problematic Features of International Criminal Procedure, in A. CASSESE (ed.), *The Oxford Companion to International Criminal Justice*, Oxford, Oxford University Press, 2009, pp. 175 – 186.

DAMAŠKA, M., Should National and International Justice be Subjected to the same Evaluative Framework?, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, pp. 1418 – 1422.

DE GURMENDI, S.A.F., International Criminal Law Procedures, the Process of Negotiations, in S. LEE (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, The Hague, Kluwer Law International, 1999, pp. 217 – 227.

DE GURMENDI, S.A.F., The Role of the International Prosecutor, in R.S. LEE (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, The Hague, Kluwer Law International, 1999, pp. 175 – 188.

DE HOOG, A., Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: Timor Leste – The Special Panels for Serious Crimes 2001 – 2003*, Vol. XIII, 2008, pp. 85 – 95.

DE MEESTER, K., Coercive Measures, Privacy Rights and Judicial Supervision in International Criminal Investigations: in Need of Further Regulation?, in G. SLUITER and S. VASILIEV (eds.), *London, Cameron May*, 2009, pp. 273 – 309.

DE MEESTER, K., Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 29 February 2005 – 16 November 2005*, Vol. XXVII, Antwerp, Intersentia, 2011, pp. 143 – 149.

DE MEESTER, K., PITCHER, K., RASTAN, R. and SLUITER, G., Investigation, Coercive Measures, Arrest and Surrender, in H. FRIMAN, S. LINTON, G. SLUITER, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, pp. 171 – 380.

DEEN-RACSMÁNY, Z. and KOK, E., Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2004*, Vol. XX, Antwerp, Intersentia, 2009, pp. 70 – 77.

DEGUZMAN, M.M. and SCHABAS, W.A., Initiation of Investigations and Selection of Cases, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, pp. 131 – 169.

DEGUZMAN, M.M., Article 21, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 701 – 712.

DERVIEUX, V., The French System, in M. DELMAS-MARTY and J.R. SPENCER (eds.), *European Criminal Procedure*, Cambridge, Cambridge University Press, 2002, pp. 218 – 291.

DIMITRIJEVIĆ, V. and MILANOVIĆ, M., Human Rights before International Criminal Courts, in J. GRIMHEDEN and R. RING, *Human Rights Law, From Dissemination to*

Application: Essays in Honour of Göran Melander, Leiden, Martinus Nijhoff Publishers, 2006, pp. 149 – 168.

EISSEN, M.A., The Principle of Proportionality in the Case-Law of the European Court of Human Rights, in R.ST.J MACDONALD, F. MATSCHER and H. PETZOLD (eds.), The European System for the Protection of Human Rights, Dordrecht – Boston – London, Martinus Nijhoff Publishers, 1993, pp. 125 – 146.

ESER, A., The “Adversarial” Procedure: A Model Superior to Other Trial Systems in International Criminal Justice? Reflections of a Judge, in T. KREUSMANN (ed.), ICTY: Towards a Fair Trial?, Antwerp, Intersentia, 2009, pp. 207 – 227.

ESER, A., Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY, in B. SWART, A. ZAHAR and G. SLUITER (eds.), The Legacy of the International Criminal Tribunal for the Former Yugoslavia, Oxford, Oxford University Press, 2011, pp. 108 - 148.

FAIRLIE, M., Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2002 - 2003, Vol. XI, Antwerp, Intersentia, 2007, pp. 219 – 226.

FERMON, J., VERBRUGGEN, F. and DE DECKER, S., The Investigative Stage of the Criminal Process in Belgium, in E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN (eds.), Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union, Intersentia, Oxford, 2007, pp. 29 – 58.

FOURMY, O., Powers of the Pre-Trial Chambers, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court: a Commentary, Oxford, Oxford University Press, 2002, pp.1207 - 1230.

FRIMAN, H., Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for Rwanda 2001 – 2002, Vol. X, Antwerp, Intersentia, 2007, pp. 119 – 124.

FRIMAN, H., Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: the Special Court for Sierra Leone 2003 – 2004, Vol. IX, Antwerp, Intersentia, 2006, pp. 345 – 353.

FRIMAN, H., Immunity of Property, in A. CASSESE, The Oxford Companion to International Criminal Justice, Oxford, Oxford University Press, 2009, pp. 369 – 370.

FRIMAN, H., Investigation and Prosecution, in R.S. LEE (ed.), The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence, Ardsley, Transnational Publishers, 2001, pp. 493 -538.

FRIMAN, H., Rights of Persons Suspected or Accused of a Crime, in S. LEE (ed.), The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results, The Hague, Kluwer Law International, 1999, pp. 247 – 262.

FRIMAN, H., The Rules of Procedure and Evidence in the Investigative Stage, in H. FISHER, C. KRESS and S.R. LÜDER (eds.), *International and National Prosecution of Crimes under International Law: Current Developments*, Berlin, Berlin Verlag Arno Spitz GmbH, 2001, pp. 191-217.

FUJIWARA, H. and PARMENTIER, S., Investigations, in L. REYDAMS, J. WOUTERS and C. REYNGAERT (eds.), *International Prosecutors*, Oxford, Oxford University Press, 2012, pp. 572 – 603.

GAYNOR, F., Admissibility of Documentary Evidence, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, pp. 1044 – 1082.

GAYNOR, F., JACOBS, D., KLAMBERG, M. and TOCHILOVSKY, V., Law of Evidence, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, pp. 1015 -1149.

GAYNOR, F., Provisional Release in the Law of the International Criminal Tribunal for the Former Yugoslavia, in J. DORIA, H-P GASSER and M.C. BASSIOUNI (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Leiden – Boston, Martinus Nijhoff Publishers, 2009, pp. 183 – 207.

GLESS, S., Functions and Constitution of the Court at the Pre-Trial and Trial Phase, in ESER and RABENSTEIN (eds.), *Strafjustiz im Spannungsfeld von Effizienz und Fairness*, Berlin, Dunker & Humblot, 2004, pp. 344 – 348.

GOOSSENS, F., *Gevraagd: duidelijkheid voor de politie. Vijf samenhangende stellingen over de legaliteit van politieel optreden en het bewaren ervan vanuit de Antigoonrechtspraak* in F. DERUYCK, M. DE SWAEF, J. ROZIE, M. ROZIE, P. TRAEEST and R. VERSTRAETEN (eds.), *De wet voorbij. Liber Amicorum Luc Huybrechts*, Intersentia, Mortsel, 2010, pp. 155 - 180.

GOSNELL, C., Admissibility of Evidence, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), *Principles of Evidence in International Criminal Justice*, Oxford, Oxford University Press, 2010, pp. 375 – 442.

GRADONI, L., The Human Rights Dimension of International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, pp. 74 – 95.

GRANDE, E., Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth, in J. JACKSON, M. LANGER and P. TILLERS (eds.), *Crime, Procedure and Evidence in a Comparative and International Context. Essays in Honour of Professor Mirjam Damaška*, Oxford and Portland, Oregon, Hart Publishing, 2008, pp. 145 – 164.

GUARIGLIA, F. and HOCHMAYR, G., Article 56, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1107 – 1115.

GUARIGLIA, F., HARRIS, K. and HOCHMAYR, G., Article 57, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1117 – 1131.

GUARIGLIA, F., *The Selection of Cases by the Office of the Prosecutor of the International Criminal Court*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, pp. 209 – 217.

HALL, C.K., Article 55, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1089 – 1105.

HALL, C.K., Article 58, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1133 – 1146.

HALL, C.K., Article 59, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1147 - 1158.

HALL, C.K., *The Danger of Selective Justice: All Cases Involving Crimes under International Law Should be Investigated and the Suspects, when there is Sufficient Admissible Evidence, Prosecuted*, in M. BERGSMO (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Oslo, Torkel Opsahl Academic EPublisher, 2010, pp. 171 – 181.

HARMON, M. and KARAGIANNAKIS, M., *The Disclosure of Exculpatory Material by the Prosecution to the Defence under Rule 68 of the ICTY Rules*, in R. MAY et al. (eds.), *Essays on ICTY Procedure and Evidence*, The Hague, Kluwer Law International, 2001, pp. 315 – 328.

HEALY, P., *Canada*, in L. ARBOUR, A. ESER, K. AMBOS and A. SANDERS (eds.), *The Prosecutor of an International Criminal Court: International Workshop in Co-Operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, Freiburg im Breisgau, Max-Planck Institut für ausländisches und internationales Strafrecht, 2000, pp. 245 – 250.

HEIKKILÄ, M., *The Balanced Scorecard of International Criminal Tribunals*, in C. RYNGAERT, *The Effectiveness of International Criminal Justice*, Antwerp, Intersentia, 2009, pp. 27 – 54.

INAZUMI, M., *Commentary*, in A. KLIP and G. SLUITER (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 2000-2001*, Vol. VI, Antwerp, Intersentia, 2003, pp. 437 – 443.

JONES, J.R.W.D., *The Office of the Prosecutor*, in A. CASSESE, P. GAETA and J. R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, Oxford, Oxford University Press, 2002, pp. 269 – 274.

JÖRG, N., FIELDS, S. and BRANTS, C., Are Inquisitorial and Adversarial Systems Converging?, in P. FENNELL, C. HARDING, N. JÖRG and B. SWART (eds.), *Criminal Justice in Europe, a Comparative Study*, Oxford, Clarendon Press, 1995, pp. 41 – 56.

JUY-BIRMANN, R., The German System, in M. DELMAS-MARTY and J.R. SPENCER (eds.), *European Criminal Procedure*, Cambridge, Cambridge University Press, 2002, pp. 292 – 347.

KARNAVAS, M., Gathering Evidence in International Criminal Trials – The View of the Defence Lawyer, in M. BOHLANDER (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, London, Cameron May, 2007, pp. 75 – 152.

KHAN, K.A.A., Article 60, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1159 – 1169.

KIRSCH, P. and ROBINSON, D., Referral by States Parties, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, pp. 619 – 625.

KIRSCH, S., Finding the Truth at International Criminal Tribunals, in T. KREUSMANN (ed.), *ICTY: Towards a Fair Trial?*, Antwerp, Intersentia, 2009, pp. 47 – 62.

KLAMBERG, M., Law of Evidence: General Requirements for the Admission of Evidence, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, pp. 1016 – 1043.

KLIP, A., Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: The Special Court for Sierra Leone 2003 - 2004*, Vol. IX, 2001, pp. 741 – 742.

KNOOPS, G.-J., Commentary, in A. KLIP and G. SLUITER (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 2000-2001*, Vol. VI, Antwerp, Intersentia, 2003, pp. 216 – 222.

KRESS, C. and BROOMHALL, B., Implementing Cooperation Duties under the Rome Statute: A Comparative Synthesis, in C. KRESS, F. LATTANZI, B. BROOMHALL and V. SANTORI (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders: Volume II: Constitutional Issues, Cooperation and Enforcement*, Nomos Verlagsgesellschaft – Editrice il Serente, Baden-Baden – Ripa di Fagnano Alto, 2005, pp. 515 – 543.

KRESS, C. and PROST, K., Article 102, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1645 - 1646.

KRESS, C. and PROST, K., Article 86, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1513 – 1516.

KRESS, C. and PROST, K., Article 87, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1517 - 1531.

KRESS, C. and PROST, K., Article 93 in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1571 – 1588.

KRESS, C. and PROST, K., Article 98, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1601 – 1620.

KRESS, C. and PROST, K., Article 99, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1621 – 1629.

KRESS, C. and SLUITER, G., Imprisonment, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, Oxford, Oxford University Press, 2002, pp. 1757 - 1821.

KRESS, C., PROST, K. and WILKITZKI, P., Part 9, International Cooperation and Judicial Assistance: Preliminary Remarks, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1503 - 1512.

KRESS, C., Witnesses in Proceedings Before the International Criminal Court, in H. FISHER, C. KRESS and S.R. LÜDER (eds.), *International and National Prosecution of Crimes under International Law: Current Developments*, Berlin, Berlin Verlag Arno Spitz GmbH, 2001, pp. 309 – 383.

KÜHNE, H-H., Germany, in C. VAN DEN WYNGAERT, *Criminal Procedures in the European Community*, Brussels, Butterworths, 1993, pp. 137 – 162.

LEWIS, P. and FRIMAN, H., Reparations to Victims, in R.S. LEE (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, Transnational Publishers, 2001, pp. 474 – 491.

LUBAN, D., Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of the International Criminal Law, in S. BESSON and J. TASIOLAS (eds.), *The Philosophy of International Law*, New York, Oxford University Press, 2010, pp. 569 – 588.

MARTIN-CHENUT, K., Procès international et modèles de justice pénale, in H. ASCENSIO (ed.), *Droit international pénal*, Paris, Pedone, 2012, pp. 847 – 863.

MCBRIDE, J., Proportionality and the European Convention on Human Rights, in E. ELLIS (ed.), *The Principle of Proportionality in the Laws of Europe*, Oxford – Portland Oregon, Hart Publishing, 1999, pp. 23 – 36.

MCDERMOTT, Y., Rights in Reverse: A Critical Analysis of Fair Trial Rights under International Criminal Law, in W.A. SCHABAS (ed.), *The Ashgate Research Companion to International Criminal Law*, Farnham, Ashgate, 2013, pp. 165 – 180.

MCINTYRE, G., Defining Human Rights, in G. BOAS and W.A. SCHABAS (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Brill Academic Publishers, Leiden, 2003, pp. 193 – 238.

MÉGRET, F., Accountability and Ethics, in L. REYDAMS, J. WOUTERS and C. RYNGAERT (eds.), *International Prosecutors*, Oxford, Oxford University Press, 2012, pp. 416 – 487.

MÉGRET, F., In Search of the ‘Vertical’: Towards an Institutional Theory of International Criminal Justice’s Core, in C. STAHN and L. VAN DEN HERIK (eds.), *Future Perspectives on International Criminal Justice*, Cambridge, Cambridge University Press, 2010, pp. 178 – 224.

MÉGRET, F., The Sources of International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, pp. 68 – 73.

MEVIS, P., Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1997-1999*, Vol. III, 2001, pp. 338 – 342.

MICHELICH, J., National Report, in L. ARBOUR, A. ESER, K. AMBOS and A. SANDERS (eds.), *The Prosecutor of an International Criminal Court: International Workshop in Co-Operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, Freiburg im Breisgau, Max-Planck Institut für ausländisches und internationales Strafrecht, 2000, pp. 481 – 485.

MOCHOCHOKO, P., International Cooperation and Judicial Assistance, in S. LEE (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, The Hague, Kluwer Law International, 1999, pp. 305 – 317.

MORRÉ, P., National Report: Germany, in L. ARBOUR, A. ESER, K. AMBOS and A. SANDERS (eds.), *The Prosecutor of an International Criminal Court: International Workshop in Co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, Freiburg im Breisgau, Max-Planck Institut für ausländisches und internationales Strafrecht, 2000, pp. 341 – 348.

MØSE, E., Impact of Human Rights Convention on the two *ad hoc* Tribunals, in M. BERGSMO, *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide*, Leiden, Martinus Nijhoff Publishers, 2003, pp. 179 – 208.

MUNDIS, D.A., Reporting Non-Compliance: Rule *7bis*, in R. MAY et al. (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, The Hague, Kluwer Law International, 2001, pp. 421 – 438.

NERENBERG, M. and TIMMERMAN, W., Documentary Evidence, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), *Principles of Evidence in International Criminal Justice*, Oxford, Oxford University Press, 2010, pp. 443 – 498.

NERLICH, V., The Status of ICTY and ICTR Precedent in Proceedings before the ICC, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, pp. 305 – 325.

NSEREKO, D., Cooperation with the Court on Matters of Arrest and Surrender of Indicted Fugitives: Lessons from the *ad hoc* Tribunals and National Jurisdictions, in J. DORIA, H-P GASSER and M.C. BASSIOUNI (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Leiden – Boston, Martinus Nijhoff Publishers, 2009, pp. 975 – 995.

OBOTE-ODORA, A., Case Selection and Prioritization Criteria at the International Criminal Tribunal for Rwanda, in M. BERGSMO (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Oslo, Torkel Opsahl Academic EPublisher, 2010, pp. 45 – 68.

OHLIN, J. D., Peace, Security and Prosecutorial Discretion, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, pp. 185 – 208.

OHLIN, J.D., Goals of International Criminal Justice and International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ, *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, pp. 55 – 68.

ORIE, A., Accusatorial v. Inquisitorial Approach in International Criminal Proceedings prior to the Establishment of the ICC and in the Proceedings Before the ICC, in A. CASSESE et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, pp. 1439 – 1495.

ORIE, A.M.M., De verdachte tussen wal en schip òf de systeem-breuk in de kleine rechtshulp, in E.A. DE LA PORTE et al., *Bij deze stand van zaken - bundel opstellen aangeboden aan A. L. Melai*, Gouda, Quint, 1983, pp. 351 – 361.

PELLET, A., Applicable Law, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, Oxford, Oxford University Press, 2002, pp. 1051 – 1084.

PERRODET, A., The Public Prosecutor, in M. DELMAS-MARTY and J.R. SPENCER (eds.), *European Criminal Procedure*, Cambridge, Cambridge University Press, 2002, pp. 415 – 458.

PIRAGOFF, D.K., Article 69, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1301 – 1336.

POCAR, F. and CARTER, L., The Challenge of Shaping Procedures in International Criminal Courts, in L. CARTER and F. POCAR (eds.), *International Criminal Procedure: The*

Interface of Civil Law and Common Law Legal Systems, Cheltenham, Edward Elgar Publishing, 2013, pp. 1 – 33.

PRAKKEN, T. and SPRONKEN, T., The Investigative Stage of the Criminal Process in the Netherlands in E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN (eds.), *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, Oxford, Intersentia, 2007, pp. 155 – 179.

RASTAN, R., The Responsibility to Enforce – Connecting Justice with Unity, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, pp. 163 – 182.

REISINGER, A., Cooperation from States and Other Entities, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, pp. 95 – 116.

ROACH, K.W., Canada, in C. M. BRADLEY, *Criminal Procedure: A Worldwide Study*, Durham, Carolina Academic Press, 1999, pp. 57 – 90.

ROBINSON, P.L., Fair but Expeditious Trials, in H. ABTAHI and G. BOAS (eds.), *The Dynamics of International Criminal Justice*, Martinus Nijhoff Publishers, Leiden, 2006, pp. 169 - 192.

ROHAN, C.M., Rules Governing the Presentation of Testimonial Evidence, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), *Principles of Evidence in International Criminal Justice*, Oxford, Oxford University Press, 2010, pp. 499 – 550.

RUXTON, G. F., Present and Future Record of Arresting War Criminals; the View of the Public Prosecutor of ICTY, in W.A.M. VAN DIJK and J.I. HOVENS (eds.), *Arresting War Criminals*, Nijmegen, Wolf Legal Productions, 2001, pp. 19 – 23.

RYNGAERT, C., Arrest and Detention, in L. REYDAMS, J. WOUTERS and C. RYNGAERT (eds.), *International Prosecutors*, Oxford, Oxford University Press, 2012, pp. 647 - 699.

SALAS, D., The Role of the Judge, in M. DELMAS-MARTY and J.R. SPENCER (eds.), *European Criminal Procedure*, Cambridge, Cambridge University Press, 2002, pp. 488 – 541.

SANDERS, A., England and Wales (United Kingdom), in L. ARBOUR, A. ESER, K. AMBOS and A. SANDERS (eds.), *The Prosecutor of an International Criminal Court: International Workshop in Co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, Freiburg im Breisgau, Max-Planck Institut für ausländisches und internationales Strafrecht, 2000, pp. 297 – 306.

SCHABAS, W. A., *In Absentia* Proceedings before International Criminal Courts, in G. SLUITER and S. VASILIEV (eds.), *International Criminal Procedure: Towards a Coherent Body of Law*, London, Cameron May, 2009, pp. 355 – 380.

SCHABAS, W.A., Article 66, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1233 - 1245.

SCHABAS, W.A., Article 67, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, München, Verlag C.H. Beck, 2008, pp. 1247 - 1274.

SCHABAS, W.A., *Droit pénal et droit international des droit de l'homme: faux frères ?*, in M. HENZELIN and R. ROTH (eds.), *Le Droit Pénal a l'épreuve de l'internationalisation*, Genève, Georg Éditeur, 2002, pp. 165-182.

SCHABAS, W.A., *Prosecutorial Discretion and Gravity*, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, pp. 229 – 245.

SCHOMBURG, W. and NEMITZ, J.C., *The Protection of Human Rights of the Accused Before the International Criminal Tribunal for Rwanda*, in E. DECAUX, A. DIENG and M. SOW, *From Human Rights to International Criminal Law: Studies in Honour of an African Jurist, the Late Judge Laity Kama*, Leiden / Boston, Martinus Nijhoff Publishers, 2007, pp. 89 – 108.

SEILS, P., *The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court*, in M. BERGSMO (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Oslo, Torkel Opsahl Academic EPublisher, 2010, pp. 69 – 78.

SLOAN, J., *Breaching International Law to Ensure its Enforcement: the Balance by the ICTY on Illegal Capture*, in T. McCORMACK and A. MCDONALD (eds.), *Yearbook of International Humanitarian Law*, Vol. 6, 2003, T.M.C. Asser Press, The Hague, 2006, pp. 319 – 344.

SLUITER, G., *Arrest and Surrender*, in A. CASSESE (ed.), *The Oxford Companion to International Criminal Justice*, Oxford, Oxford University Press, 2009, pp. 250 – 252.

SLUITER, G., *Commentary*, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2000 - 2001*, Vol. V, Antwerp, Intersentia, 2003, pp. 283 – 289.

SLUITER, G., *Commentary*, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1997-1999*, Vol. III, 2001, pp. 43 – 50.

SLUITER, G., *Commentary*, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2000 2001*, Vol. V, Antwerp, Intersentia, 2001, pp. 283 - 289.

SLUITER, G., *Commentary*, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 1997-1999*, Vol. III, 2001, pp. 151 – 156.

SLUITER, G., Human Rights Protection in the ICC Pre-Trial Phase, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, pp. 459 – 475.

SLUITER, G., in S. MÜLLER, S. ZOURIDIS, M. FRISHMAN and L. KISTEMAKER (eds.), *The Law of the Future and the Future of the Law*, Torkel Opsahl Academic EPublisher, Oslo, 2011, pp. 621 – 632 (available at: http://www.fichl.org/fileadmin/fichl/documents/FICHL_11_Web.pdf, last visited 22 December 2013).

SLUITER, G., Legal Assistance to Internationalized Courts and Tribunals, in C.P.R. ROMANO, A. NOLLKAEMPER and J. KLEFFNER (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia*, Oxford, Oxford University Press, 2004, pp. 379 – 406.

SLUITER, G., The Effects of the Law of International Criminal Procedure on Domestic Proceedings Concerning International Crimes, in G. SLUITER and S. VASILIEV (eds.), *International Criminal Procedure: Towards a Coherent Body of Law*, London, CMP Publishing, 2009, pp. 459 – 488.

SLUITER, G., Trends in the Development of a Unified Law of International Criminal Procedure, in C. STAHN and L. VAN DEN HERIK (eds.), *Future Perspectives on International Criminal Justice*, Cambridge, Cambridge University Press, 2010, pp. 585 – 599.

SMEULERS, A., Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the International Criminal Tribunal for the Former Yugoslavia 2002 - 2003*, Vol. XI, Antwerp, Intersentia, 2007, pp. 106 – 112.

SMITS, J.M., Redefining Normative Legal Science: Towards an Argumentative Discipline, in F. COOMANS, F. GRÜNFIELD and M.T. KAMMINGA (eds.), *Methods of Human Rights Research*, Antwerp, Intersentia, 2009, pp. 45 – 58.

SPENCER, J.R., Evidence, in M. DELMAS-MARTY and J.R. SPENCER (eds.), *European Criminal Procedure*, Cambridge, Cambridge University Press, 2002, pp. 594 – 640.

SPENCER, J.R., The English System, in M. DELMAS-MARTY and J.R. SPENCER (eds.), *European Criminal Procedure*, Cambridge, Cambridge University Press, 2002, pp. 142 – 217.

STAHN, C., Arrest and Surrender under the ICC Statute: a Contextual Reading, in C. STAHN and L. VAN DEN HERIK (eds.), *Future Perspectives on International Criminal Justice*, The Hague, T.M.C. Asser Press, 2010, pp. 659 – 685.

STAHN, C., Judicial Review of Prosecutorial Discretion: Five Years on, in C. STAHN and G. SLUITER (eds.), *The Emerging Practice of the International Criminal Court*, Leiden, Koninklijke Brill, 2009, pp. 247 – 279.

STAHN, C., Judicial Review of Prosecutorial Discretion: on Experiments and Imperfections, in G. SLUITER and S. VASILIEV (eds.), *International Criminal Procedure: Towards a Coherent Body of Law*, London, CMP Publishing, 2009, pp. 239 – 272.

STAKER, C., Article 84, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1487 - 1498.

STAKER, C., Article 85, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1499 – 1512.

STEGMILLER, I., *The Pre-Investigation Stage of the ICTY and the ICC Compared*, in T. KRUESSMANN (ed.), *ICTY: Towards a Fair Trial?*, Wien–Graz, Neuer Wissenschaftlicher Verlag, 2008, pp. 311 – 340.

STEWART, J.K., *International Criminal Prosecutions. The Ideal Prosecutor: Status, Means and Discretion*, in H. DUMONT (ed.), *La voie vers la Cour Pénale Internationale: tous les chemins mènent à Rome: les Journées Maximilien-Caron 2003*, Montreal, Éditions Thémis, 2004, pp. 14 - 32.

STRUETT, M.J., *The Politics of Discursive Legitimacy: Understanding the Dynamics and Implications of Prosecutorial Discretion at the International Criminal Court*, in S.C. ROACH (ed.), *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court*, Oxford, Oxford University Press, 2009, pp. 107 – 132.

SWART, B., *Arrest and Surrender*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, Oxford, Oxford University Press, 2002, pp. 1639 – 1703.

SWART, B., *Arrest Proceedings in the Custodial State*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, Oxford, Oxford University Press, 2002, pp. 1247 – 1255.

SWART, B., *Commentary*, in A. KLIP and G. SLUITER (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 1994-1999*, Vol. II, Antwerp, Intersentia, 2001, pp. 197 - 207.

SWART, B., *General Problems*, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, Oxford, Oxford University Press, 2002, pp. 1589 - 1605.

SWART, B., *International Cooperation and Judicial Assistance: General Problems*, in A. CASSESE et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, pp. 1589 - 1606.

SWART, B., *International Criminal Justice and Models of the Judicial Process*, in G. SLUITER and S. VASILIEV (eds.), *International Criminal Procedure: Towards a Coherent Body of Law*, London, Cameron May, 2009, pp. 93 – 118.

SWART, B., *Internationalized Courts and Substantive Criminal Law*, in C.P.R. ROMANO, A. NOLLKAEMPER and J. KLEFFNER (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia*, Oxford, Oxford University Press, 2004, pp. 291 - 316.

SWOBODA, S., Admitting Relevant and Reliable Evidence: The ICTY's Flexible Approach Towards the Admission of Evidence under Rule 89 (C) ICTY RPE, in T. KRUESMANN (ed.), *ICTY: Towards a Fair Trial?*, Antwerp, Intersentia, 2009, pp. 379 – 388.

TAKEMURA, H., Prosecutorial Discretion in International Criminal Justice: Between Fragmentation and Unification, in L. VAN DEN HERIK and C. STAHN (eds.), *The Diversification and Fragmentation of International Criminal Law*, Leiden, Martinus Nijhoff Publishers, 2012, pp. 633 – 656.

TOLBERT, D. and SWINNEN, F., The Protection of, and Assistance to, Witnesses at the ICTY, in H. ABTAHI and G. BOAS (eds.), *The Dynamics of International Criminal Justice*, Martinus Nijhoff Publishers, Leiden, 2006, pp. 196 - 199.

TRAEST, P., Hard bewijs, wanneer is de rechter overtuigd?, in J.-P. BAUTHIER, D. FLORE, A. MASSET, P. TRAEST and G. VERMEULEN (eds.), *Bewijs in strafzaken*, Brugge, die Keure, 2011, pp. 59 - 79.

TRECHSEL, S., Rights in Criminal Proceedings under the ECHR and the ICTY Statute—A Precarious Comparison, in B. SWART, A. ZAHAR and G. SLUITER (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford, Oxford University Press, 2011, pp. 149 - 188.

TURONE, G., Powers and Duties of the Prosecutor, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, Oxford, Oxford University Press, 2002, pp. 1137 – 1180.

VAN GERVEN, W., The Effect of Proportionality on the Actions of the Member States, in E. ELLIS, *The Principle of Proportionality in the Laws of Europe*, Oxford – Portland Oregon, Hart Publishing, 1999, pp. 37 – 64.

VAN SLIEDREGT, E., Arresting War Criminals: Male Captus Bene Detentus, Human Rights and the Rule of Law, in W.A.M. VAN DIJK and J.I. HOVENS (eds.), *Arresting War Criminals*, Nijmegen, Wolf Legal Productions, 2001, pp. 73 – 83.

VASILIEV, S., General Rules and Principles of International Criminal Procedure, in G. SLUITER and S. VASILIEV (eds.), *International Criminal Procedure: Towards a Coherent Body*, London, Cameron May, 2009, pp. 19 – 92.

VASILIEV, S., Introduction, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), *International Criminal Procedure: Principles and Rules*, Oxford, Oxford University Press, 2013, pp. 1 - 37.

VASILIEV, S., Trial, in L. REYDAMS, J. WOUTERS and C. RYNGAERT (eds.), *International Prosecutors*, Oxford, Oxford University Press, 2012, pp. 700 – 796.

VIERUCCI, L., 'Freezing of assets', in A. CASSESE (ed.), *The Oxford Companion to International Criminal Justice*, Oxford, Oxford University Press, 2009, pp. 326 – 328.

WALD, P. and MARTINEZ, J., Provisional Release at the ICTY: A Work in Progress, in R. MAY et al., *Essays on ICTY Procedure and Evidence*, The Hague, Kluwer Law International, 2001, pp. 231 – 246.

WEIGEND, T. and SALDITT, F., The Investigative Process of the Criminal Process in Germany, in E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN, *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, Intersentia, Oxford, 2007, pp. 79 – 100.

WHITING, A., The ICTY as a Laboratory of International Criminal Procedure, in B. SWART, A. ZAHAR and G. SLUITER (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford, Oxford University Press, 2011, pp. 83 – 107.

WILKITZI, P., Article 101, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, München, Verlag C.H. Beck, 2008, pp. 1635 – 1644.

WLADIMIROFF, W., Cooperation on Criminal Matters: A Defence Perspective, in R. YEPES-ENRÍQUEZ and L. TABASSI (eds.), *Treaty Enforcement and International Cooperation in Criminal Matters: with Special Reference to the Chemical Weapons Convention*, The Hague, T.M.C. Asser Press, 2002, pp. 242 – 250.

ZAHAR, A., Witness Memory and the Manufacture of Evidence at the International Criminal Tribunals, in C. STAHN and L. VAN DEN HERIK (eds.), *Future Perspectives on International Criminal Justice*, Cambridge, Cambridge University Press, 2010, pp. 600 – 610.

ZAPPALÀ, S., Commentary, in A. KLIP and G. SLUITER, *Annotated Leading Cases of International Criminal Tribunals: the Special Panels for Serious Crimes*, Vol. XIII, Antwerp, Intersentia, 2008, pp. 93 – 102.

ZAPPALÀ, S., Compensation to an Arrested or Convicted Person, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, Oxford, Oxford University Press, 2002, pp. 1577 – 1585.

ZAPPALÀ, S., Rights of Persons During an Investigation, in A. CASSESE, P. GAETA and J. R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, Oxford, Oxford University Press, 2002, pp. 1181 – 1203.

Conference papers, working papers and other publications

HEDER, S., A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia, London – Paris, 2011, 60p (available at: <http://www.cambodiatribunal.org/sites/default/files/20Review%20of%20the%20Negotiations%20Leading%20to%20the%20Establishment%20of%20the%20Personal%20Jurisdiction%20of%20the%20ECCC.pdf>, last visited 3 July 2012).

MCDONALD, A. and HAVEMAN, R., Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC, Expert

Consultation Process on General Issues Relevant to the ICC Office of the Prosecutor, 15 April 2003, 10p.

NSEREKO, D.D.N., Prosecutorial Discretion before National Courts and International Tribunals, Guest Lecture Series of the Office of the Prosecutor, 2004, 17p (available at: http://icc-cpi.int/iccdocs/asp_docs/library/organs/otp/Nsereko.pdf, last visited 10 February 2014).

OLÁSOLO, H., The Role of the International Criminal Court in Preventing Atrocity Crimes Through Timely Intervention: From the Humanitarian Intervention Doctrine and Ex Post Facto Judicial Institutions to the Notion of Responsibility to Protect and the Preventative Role of the International Criminal Court, Inaugural Lecture as Chair in International Criminal Law and International Criminal Procedure at Utrecht University, 18 October 2010, (available at: http://www.uu.nl/SiteCollectionDocuments/REBO/REBO_RGL/REBO_RGL_STRAF/inaugural%20lecture%20Olasolo.pdf, last visited 10 February 2014).

OTP, Informal Expert Paper: Fact-Finding and Investigative Functions of the Office of the Prosecutor, Including International Cooperation, 2003, 22p.

OTP, Informal Expert Paper: Measures Available to the International Criminal Court to Reduce the Length of Proceedings, 2003, 18p.

OTP, Informal Expert Paper: The Principle of Complementarity in Practice, 2003, 37p.

QUIRICO, O., The Relationship between General Principles and Custom in International Criminal Law, Working Paper, European University Institute, Florence, 2006, (available at: <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/WorkingGroups/WGCriminalLawMinutes22Nov2006.pdf>, last visited 17 July 2013).

SHANY, Y., Assessing the Effectiveness of International Courts: Can the Unquantifiable be Quantified?, Research Paper No. 03-10, Hebrew University of Jerusalem, 2010, 49p (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669954, last visited 5 November 2013).

NGO Reports

Amnesty International, Cambodia: Khmer Rouge Judgment Welcome, but Raises Human Rights Concerns, 3 February 2012 (available at: <http://www.amnesty.org/en/news/cambodia-khmer-rouge-judgment-welcome-raises-human-rights-concerns-2012-02-03>, last visited 4 July 2012).

C. REIGER, C. and WIERDA, M., The Serious Crimes Process in Timor-Leste: In Retrospect, International Center for Transnational Justice, 2006, 41p.

HRW, Unfinished Business, Closing Gaps in the Selection of ICC Cases, 2011, 50p (available at: <http://www.hrw.org/sites/default/files/reports/icc0911webwcover.pdf>, last visited 10 February 2014).

International Bar Association, Fairness at the International Criminal Court, August 2011, 51p.

International Bar Association, ICC Perspectives: Witnesses before the International Criminal Court, 2013, 67p (available at: http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_IBA_Publications.aspx, last visited 23 November 2013).

JSMP, Digest of the Jurisprudence of the Special Panels for Serious Crimes, April 2007, 124p.

JSMP, Dili District Court: Final Report, November 2003, 69p (available at: <http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN014017.pdf>, last visited 15 January 2014).

Open Society Justice Initiative, Briefing Paper: Recent Developments at the Extraordinary Chambers in the Courts of Cambodia, March 2013 (available at: <http://www.refworld.org/pdfid/5242b9f84.pdf>, last visited 10 February 2014).

Open Society Justice Initiative, Intermediaries and the International Criminal Court: A Role for the Assembly of States Parties, 2011, 5p (available at: <http://www.opensocietyfoundations.org/publications/intermediaries-and-international-criminal-court-role-assembly-states-parties> (last visited 29 August 2013)).

Open Society Justice Initiative, The Future of Cases 003/004 at the Extraordinary Chambers in the Courts of Cambodia, October 2012 (available at: http://www.opensocietyfoundations.org/sites/default/files/eccc-report-cases3and4-100112_0.pdf, last visited 10 February 2014).

Open Society Justice Initiative, Recent Developments in the Extraordinary Chambers in the Courts of Cambodia, February 2012, 9p (available at: <http://www.opensocietyfoundations.org/sites/default/files/cambodia-eccc-20120223.pdf>, last visited 10 February 2014).

PERRIELLO, T. and WIERDA, M., the Special Court for Sierra Leone under Scrutiny, ICTJ, March 2006, 56p.

REDRESS, State Cooperation and Rights of Victims before the International Criminal Court, 2006, 10p (available at: <http://www.redress.org/downloads/countryreports/StateCooperation&RightsofVictims.pdf>, last visited 14 February 2014)

U.S. BERKELY WAR CRIMES STUDIES CENTER, Interim Report on the Special Court for Sierra Leone, April 2005, 53p.

VAN TUYL, P., Effective, Efficient and Fair: An inquiry into the Investigative Practices of the Office of the Prosecutor at the Special Court for Sierra Leone, War Crimes Studies Center, University of California Berkeley, September 2008, 82p.

WCRO, the Gravity Threshold of the International Criminal Court, March 2008, 57p.

WCRO, The Relevance of a “Situation” to the Admissibility and Selection of Cases Before the International Criminal Court, October 2009, 36p.

YIM, C., Memorandum: Scope of Victim Participation before the ICC and the ECCC, Documentation Center of Cambodia, 2011, 47p.

Blog items

BOAS, G., A Response to Christian De Vos, 2011 (available at: <http://opiniojuris.org/2011/12/07/a-response-to-christian-de-vos-by-gideon-boas/>, last visited 29 August 2013).

SCHEFFER, D., The Negotiating history of the ECCC’s Personal Jurisdiction, 26 May 2011 (available at: <http://ki-media.blogspot.be/2011/05/negotiating-history-of-ecccs-personal.html>, last visited, 10 February 2014).

TABLE OF CASES

ICTY

ICTY, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadić*, Case No. IT-94-1, T. Ch., 10 August 1995

ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić*, Case No. IT-94-1, A. Ch., 2 October 1995

ICTY, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, *Prosecutor v. Nikolić*, Case No. IT-94-2-R.61, T. Ch., 20 October 1995

ICTY, Decision on the Review of the Indictment, *Prosecutor v. Kordić et al.*, Case No. IT-95-14-I, T. Ch., 10 November 1995

ICTY, Decision, *Prosecutor v. Martić*, Case No. IT-95-11-R61, T. Ch., 8 March 1996

ICTY, Decision on the Motion of the Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence, *Prosecutor v. Blaškić*, Case No. IT-95-14, President, 3 April 1996

ICTY, Decision Rejecting the Application to Withdraw Indictment and Order for Provisional Release, *Prosecutor v. Dukić*, Case No. IT-96-20-T, T. Ch., 24 April 1996

ICTY, Decision Partially Rejecting the Request Submitted by Mr. Igor Pantelić, Counsel for Radovan Karadžić, *Prosecutor v. Karadžić and Mladić*, Case No. IT-95-5-R61 and IT-95-18-R61, T. Ch., 27 June 1996

ICTY, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, *Prosecutor v. Karadžić and Mladić*, Case No. IT-95-5-R61 and IT-95-18-R61, T. Ch., 11 July 1996

ICTY, Decision Rejecting the Request Submitted by Mr. Medvene and Mr. Hanley III, Defence Counsel for Radovan Karadžić, *Prosecutor v. Karadžić and Mladić*, Case No. IT-95-5-R61 and IT-95-18-R61, T. Ch., 11 July 1996

ICTY, Letter to Registrar, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, 18 July 1996

ICTY, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, *Prosecutor v. Rajić and Andrić*, Case No. IT-95-12-R61, T. Ch., 13 September 1996

ICTY, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, T. Ch., 25 September 1996

ICTY, Decision on Motion on the Exclusion and Restitution of Evidence and Other Material Seized from the Accused Zejnil Delalić, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, T. Ch., 9 October 1996

ICTY, Decision on Application for Leave to Appeal (Provisional Release), *Prosecutor v. Delalić*, Case No. IT-96-21, A Bench of the A. Ch., 15 October 1996

ICTY, Decision on Motion for Provisional Release Filed by the Accused Hamzin Delić, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, T. Ch., 24 October 1996

ICTY, Decision of the President on the Prosecutor's Motion for the Production of Notes Exchanged between Zejnil Delalić and Zdravko Mucić, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, President, 11 November 1996

ICTY, Decision on Application for Leave to Appeal (Provisional Release) by Hazim Delić, *Prosecutor v. Delalić*, Case No. IT-96-21, A Bench of the App. Ch., 22 November 1996

ICTY, Decision on Prosecution Motion for Production of Defence Witness Statements, *Prosecutor v. Tadić*, Case No. IT-94-1-T, T. Ch., 27 November 1996

ICTY, Order Denying a Motion for Provisional Release, *Prosecutor v. Blaškić*, Case No. IT-95-14, T. Ch., 20 December 1996

ICTY, Transcript, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, T. Ch., 11 June 1997

ICTY, Decision on the Motion Ex Parte by the Defence of Zdravko Mucić Concerning the Issue of a Subpoena to an Interpreter, *Prosecutor v. Delalić*, Case No. IT-96-21-T, T. Ch., 8 July 1997

ICTY, Decision on Hazim Delić's Motion Pursuant to Rule 73, *Prosecutor v. Delalić et al.*, Case No. ICTY-96-21-T, T. Ch. I, 1 September 1997

ICTY, Decision on Zrdavko Mucić Motion for the Exclusion of Evidence, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, T. Ch., 2 September 1997

ICTY, Decision on the Motions for the Exclusion of Evidence by the Accused, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, T Ch. II, 25 September 1997

ICTY, Judgment, *Prosecutor v. Erdemović*, Case No. IT-96-22-A, A. Ch., 7 October 1997

ICTY, Judgment, *Prosecutor v. Erdemović*, Case No. IT-96-22-A, A. Ch., 7 October 1997, Separate and Dissenting Opinion of Judge Cassese

ICTY, Decision on the Motion for Release by the Accused Slavko Dokmanović, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997

ICTY, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v. Blaskić*, Case No. IT-95-14, A. Ch., 29 October 1997

ICTY, Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucić, to Provide a Handwriting Sample, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, T. Ch., 19 January 1998

ICTY, Decision on Defence Motion for Provisional Release, *Prosecutor v. Drljača and Kovačević*, Case No. IT-97-24, T. Ch., 20 January 1998

ICTY, Decision Denying a Request for Provisional Release, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, T. Ch., 23 January 2008

ICTY, Decision on the Tendering of Prosecution Exhibits 104–108, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, T. Ch., 9 February 1998

ICTY, Sentencing Judgement, *Prosecutor v. Erdemović*, Case No. IT-96-22-Tbis, T. Ch. II, 5 March 1998

ICTY, Decision on Provisional Release of the Accused, *Prosecutor v. Simić*, Case No. IT-95-9-PT, T. Ch., 26 March 1998

ICTY, The Trial Chamber’s Formal Complaint to the Prosecutor Concerning the Conduct of the Prosecution, *Prosecutor v. Furundžija*, Case No. IT-95-17-PT, T. Ch., 5 June 1998

ICTY, Decision Stating Reasons for the Appeals Chamber’s Order of 29 May 1998, *Prosecutor v. Kovačević*, Case No. IT-97-24-AR73, A. Ch., 2 July 1998

ICTY, Decision on Communication Between the Parties and their Witnesses, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, T. Ch. II, 21 September 1998

ICTY, Judgement, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, T. Ch., 16 November 1998

ICTY, Judgement, *Prosecutor v. Furundžija*, Case No. IT-95-17-T, T. Ch., 10 December 1998

ICTY, Decision on Prosecutor’s Appeal on Admissibility of Evidence, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, A. Ch., 16 February 1999

ICTY, Order of the Appeals Chamber on the Motion of the Appellant for a Provisional and Temporal Release, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, A. Ch., 19 February 1999

ICTY, Decision on Defence Preliminary Motion on the Form of the Indictment, *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, T. Ch. II, 24 February 1999

ICTY, Decision on Motion of Defence Counsel for Drago Josipović (Request for Permission to Attend Funeral), *Prosecutor v. Kupreškic et al.*, Case No. IT-95-16, T. Ch., 6 May 1999

ICTY, Decision on Review of Indictment and Application for Consequential Orders, *Prosecutor v. Milošević et al.*, Case No. IT-99-37-I, T. Ch., 24 May 1999

ICTY, Transcript, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, T. Ch. III, 31 May 1999

ICTY, Decision Stating Reasons for Trial Chamber's Ruling of 1 June 1999 Rejecting Defence Motion to Suppress Evidence, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, T. Ch. III, 25 June 1999

ICTY, Dissenting Opinion of Judge Rodrigues, Presiding Judge of the Trial Chamber, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, T. Ch. I, 25 June 1999

ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-95-1-A, A. Ch., 15 July 1999

ICTY, Appeals Chamber Decision on Appeal by Dragan Papić against Ruling to Proceed by Deposition, *Prosecutor v. Kupreškić*, A. Ch., 15 July 1999

ICTY, Order on Motion of the Accused Marko Čerkez for Provisional Release, *Prosecutor v. Kordić et al.*, Case No. IT-95-14/2-T, T. Ch., 14 September 1999

ICTY, Decision on Appeal by Stefan Todorović against the Oral Decision of 4 March 1999 and the Written Decision of 25 March 1999 of Trial Chamber III, *Prosecutor v. Simić et al.*, Case No. IT-95-9-AR.73.2, A. Ch., 13 October 1999

ICTY, Decision on Request for Provisional Release of Dragoljub Kunarać, *Prosecutor v. Kunarać and Kovać*, Case No. IT-96-PT, T. Ch. II, 11 November 1999

ICTY, Sentencing Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-Tbis-R117, T. Ch. II, 11 November 1999

ICTY, Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brđanin, *Prosecutor v. Brđanin*, Case No. IT-99-36, T. Ch. II, 8 December 1999

ICTY, Decision on Motion for Release, *Prosecutor v. Talić*, Case No. IT-99-36/1-T, T. Ch. II, 10 December 1999

ICTY, Decision on Motion to Translate Procedural Documents into French, *Prosecutor v. Talić*, Case No. IT-99-36-PT, T. Ch. II, 16 December 1999

ICTY, Judgment, *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, T. Ch. II, 14 January 2000

ICTY, Decision on Defence Motion for Provisional Release, *Prosecutor v. Kovačević*, Case No. IT-97-24, T. Ch., 20 January 2000

ICTY, Decision on Motions by Momor Talić (1) To Dismiss the Indictment, (2) For Release, and (3) For Leave to Reply to Response of Prosecution to Motion for Release, *Prosecutor v. Brđanin*, Case No. IT-99-36-PT, T. Ch. II, 1 February 2000

ICTY, Decision on Motion for Provisional Release of Miroslav Kvočka, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, T. Ch., 2 February 2000

ICTY, Transcript, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, T. Ch., 2 February 2000

ICTY, Judgement, *Prosecutor v. Alekovski*, Case No. IT-95-14/1-A, A. Ch., 24 March 2000

ICTY, Order on Defence Experts, *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, T. Ch., 29 March 2000

ICTY, Decision on Miroslav Tadić's Application for Provisional Release, *Prosecutor v. Simić et al.*, Case No. IT-95-9-PT, T. Ch., 4 April 2000

ICTY, Decision on Appeal Regarding Statement of a Deceased Witness, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, A. Ch., 21 July 2000

ICTY, Judgement, *Prosecutor v. Furundžija*, A. Ch., 21 July 2000, Declaration of Judge Patick Robinson

ICTY, Decision on Motion by Radoslav Brđanin for Provisional Release, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36-PT, T. Ch. II, 25 July 2000

ICTY, Decision on Application for Leave to Appeal, *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-AR65, A. Ch., 7 September 2000

ICTY, Decision in the Appeals Chamber Regarding the Admission into Evidence of Seven Affidavits and one Formal Statement, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-AR73.6, A. Ch., 18 September 2000

ICTY, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, A. Ch., 26 September 2000

ICTY, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, *Prosecutor v. Simić*, Case No. IT-95-9, T. Ch., 18 October 2000

ICTY, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, *Prosecutor v. Simić*, Case No. IT-95-9, T. Ch., 18 October 2000, Separate Opinion of Judge Robinson

ICTY, Transcript, *Prosecutor v. Krstić*, Case No. IT-98-33, T. Ch., 1 November 2000

ICTY, Decision on Prosecution's Motion to Take Deposition for Use at Trial (Rule 71), *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-PT, T. Ch. I, 10 November 2000

ICTY, Judgement, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, A. Ch., 20 February 2001

ICTY, Judgment, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, T. Ch., 22 February 2001

ICTY, Decision on the Admission of the Record of the Interview of the Accused Kvočka, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, T. Ch., 16 March 2001

ICTY, Decision on Motion by Momir Talić for Provisional Release, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36, T. Ch. II, 28 March 2001

ICTY, Decision on Motions to Extend Time for Filing Appellant's Briefs, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, A. Ch., 11 May 2001

ICTY, Decision on Second Motion by Brđanin and Talić, *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, T. Ch., 16 May 2001

ICTY, Decision on Application to Amend Indictment and on Confirmation of Amended Indictment, *Prosecutor v. Milošević*, Case No. IT-99-37-I, Confirming Judge, 29 June 2001

ICTY, Judgment, *Prosecutor v. Jelisić*, Case No. IT-95-10-A, A. Ch., 5 July 2001, Partial Dissenting Opinion of Judge Wald

ICTY, Decision on the Prosecutor's Request for Leave to Amend the Indictment and Issue of Warrant of Arrest and Order for Surrender, *Prosecutor v. Knežević*, Case No. IT-95-4-I, Confirming Judge, 19 July 2001

ICTY, Sentencing Judgment, *Prosecutor v. Todorović*, Case No. IT-95-9/1-S, T. Ch., 31 July 2001

ICTY, Judgement, *Prosecutor v. Krstić*, Case No. IT-98-33-A, T. Ch., 2 August 2001

ICTY, Decision on Motions for Re-consideration, Clarification, Request for Release and Applications for Leave to Appeal, *Prosecutor v. Prlić et al.*, Case Nos. IT-04-74-AR65.1; IT-04-74-AR65.2; IT-04-74-AR65.3, A. Ch., 8 September 2001

ICTY, Decision on Prosecutor's Request to Add Further Exhibits to the Confidential Prosecution Exhibit List Filed on the 9th of April 2001, *Prosecutor v. Simić et al.*, Case No. IT-95-9-T, T. Ch. II, Section B, 11 September 2001

ICTY, Decision on Momočilo Krajišnik's Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik and Plavšić*, Case No. IT-00-39 & 40-PT, T. Ch., 8 October 2001

ICTY, Decision on Momočilo Krajišnik's Notice of Motion for Provisional Release, *Prosecutor v. Krajišnik and Plavšić*, Case No. IT-00-39 & 40-PT, T. Ch., 8 October 2001, Dissenting Opinion of Judge Patrick Robinson

ICTY, Decision on Defence Motion Concerning Translation of all Documents, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, T. Ch. I-A, 18 October 2001

ICTY, Decision on Preliminary Motions, *Prosecutor v. Milošević*, Case No. IT-99-37-PT, T. Ch., 8 November 2001

ICTY, Decision on Review of Indictment, *Prosecutor v. Milošević*, Case No. IT-01-51-I, Confirming Judge, 22 November 2001

ICTY, Decision Granting Provisional Release to Amir Kubura, *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, T. Ch. II, 19 December 2001

ICTY, Decision Granting Provisional Release to Enver Hadžihasanović, *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, T. Ch. II, 19 December 2001

ICTY, Decision Granting Provisional Release to Mehmed Alagić, *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, T. Ch. II, 19 December 2001

ICTY, Order on Motion for Provisional Release, *Prosecutor v. Ademi*, Case No. IT-01-46-PT, T. Ch., 20 February 2002

ICTY, Order on Miodrag Jokić Motion for Provisional Release, *Prosecutor v. Jokić*, Case No. IT-01-42-PT, T. Ch., 20 February 2002

ICTY, Decision on Darko Mrđa's Request for Provisional Release, *Prosecutor v. Mrđa*, Case No. IT-02-59-PT, T. Ch. II, 15 April 2002

ICTY, Decision on Application by Dragan Jokić for Leave to Appeal, *Prosecutor v. Blagojević et al.*, Case No. IT-05AR65, A Bench of the A. Ch., 18 April 2002

ICTY, Reasons for Refusal of Leave to Appeal from Decision to Time Limit, *Prosecutor v. Milošević*, Case No. IT-02-54-AR73, Bench of the A. Ch., 16 May 2002

ICTY, Decision on Application by Dragan Jokić for Provisional Release, *Prosecutor v. Blagojević et al.*, Case No. IT-02-53-AR65, A. Ch., 28 May 2002

ICTY, Decision on Interlocutory Appeal Concerning Rule 92bis (C), *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, A. Ch., 7 June 2002

ICTY, Decision on Motion Challenging Jurisdiction, *Prosecutor v. Strugar*, Case No. IT-01-42-PT, T. Ch., 7 June 2002

ICTY, Order to the Registry of the Tribunal to Provide Documents, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T.Ch. II, 5 July 2002

ICTY, Decision Granting Leave to Appeal, *Prosecutor Šainović and Ojdanić*, Case No. IT-99-37-AR65, A Bench of the A. Ch., 16 July 2002

ICTY, Reconsideration of Order of 9 May 20002, Case No. IT-02-55-Misc4, Duty Judge, 17 July 2002

ICTY, Decision on Vidoje Blagojević's Application of Provisional Release, *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-PT, T. Ch. II, 22 July 2002

ICTY, Decision on Dragan Obrenović's Application of Provisional Release, *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-PT, T. Ch. II, 22 July 2002

ICTY, Decision on Defence Request to Exclude Evidence as Inadmissible, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch. II, 31 July 2002

ICTY, Order Under Rule 59bis for the Transmission of Arrest Warrant, *Prosecutor v. Todović*, Case No. IT-97-25-I, Duty Judge, 23 August 2002

ICTY, Decision on Application for Leave to Appeal, *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-AR-65, A Bench of the A. Ch., 26 August 2002

ICTY, The Krajišnik Defence Motion for an Order Suppressing Illegally Intercepted Communications, *Prosecutor v. Krajišnik*, Case No. IT-00-39 & 40-PT, T. Ch. III, 13 September 2002

ICTY, Decision on the Motion for Provisional Release of the Accused Momir Talić, *Prosecutor v. Brđanin et Talić*, Case No. It-99-36-T, T. Ch. II, 20 September 2002

ICTY, Decision on Admissibility of Prosecution Investigator's Evidence, *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.2, A. Ch., 30 September 2002

ICTY, Decision on Admissibility of Prosecution Investigator's Evidence, *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.2, A. Ch., 30 September 2002, Partial Dissenting Opinion of Judge Shahabuddeen

ICTY, Decision on Provisional Release on Vidoje Blagojević and Dragan Obrenović, *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-AR65 & IT-02-60-AR65.2, A. Ch., 3 October 2002

ICTY, Decision on Provisional Release on Vidoje Blagojević and Dragan Obrenović, *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-AR65 & IT-02-60-AR65.2, A. Ch., 3 October 2002, Separate Opinion of Judge Hunt

ICTY, Decision on Appeal against Refusal to Grant Provisional Release, *Prosecutor v. Mrksić*, Case No. IT-95-13/1-AR65, A. Ch., 8 October 2002

ICTY, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, T. Ch. II, 9 October 2002

ICTY, Decision, *Prosecutor v. Stakić*, Case No. IT-97-24-AR73.5, A. Ch., 10 October 2002

ICTY, Decision on Provisional Release, *Prosecutor v. Šainović and Ojdanić*, Case No. IT-99-37-AR65, A. Ch., 30 October 2002

ICTY, Decision on Provisional Release, *Prosecutor v. Šainović et al.*, Case No. IT-99-37-AR65, A. Ch., 30 October 2002, Dissenting Opinion of Judge David Hunt on Provisional Release

ICTY, Order Granting Leave to File an Amended Indictment and Confirming the Amended Indictment, *Prosecutor v. Mladić*, Case No. IT-95-5/18-I, Confirming Judge, 8 November 2002

ICTY, Decision on the Defence Counsel's Request for Translation of all Documents, *Prosecutor v. Ljubičić*, Case No. IT-00-41-PT, T. Ch. II, 20 November 2002

ICTY, Transcript, *Prosecutor v. Stakić*, Case No. IT-97-24, T. Ch., 25 November 2002

ICTY, Judgement, *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, T. Ch. II, 29 November 2002

ICTY, Decision on Application by Blagejović and Obrenović for Leave to Appeal, *Prosecutor v. Blagejović et al.*, Case No. IT- 02-60-AR65.3 & 02-60-AR65.4, A Bench of the A. Ch., 16 January 2003

ICTY, Order on Translation of Documents, *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, T. Ch. II, 6 March 2003

ICTY, Reasons for Decision on Prosecution's Motion to Use Telephone Interviews, *Prosecutor v. Simić et al.*, Case No. IT-95-9-T, T. Ch. II, 11 March 2003

ICTY, Judgement, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, T. Ch. I, 31 March 2003

ICTY, Decision on Darko Mrđa's Request for Provisional Release, *Prosecutor v. Mrđa*, Case No. IT-02-59-PT, T. Ch. II, 15 April 2003

ICTY, Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, A. Ch., 5 June 2003

ICTY, Decision on Application for Subpoenas, *Prosecutor v. Krstić*, Case No. IT-98-33-A, A. Ch., 1 July 2003

ICTY, Decision on Application for Subpoenas, *Prosecutor v. Krstić*, Case No. IT-98-33-A, A. Ch., 1 July 2003, Dissenting Opinion of Judge Shahabuddeen

ICTY, Decision Refusing Milutinović Leave to Appeal, *Prosecutor v. Milutinović*, Case No. IT-99-37-AR65.3, A Bench of the A. Ch., 3 July 2003

ICTY, Decision on Defendant Dušan Fuštar's Emergency Motion Seeking a Temporary Provisional Release to Attend the 40-day Memorial of his Father's Death, *Prosecutor v. Meakić et al.*, Case No. IT-02-65-PT, T. Ch., 11 July 2003

ICTY, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, *Prosecutor v. Mrksić*, Case No. IT-95-13/1-AR73, A. Ch., 30 July 2003

ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24, T. Ch. II, 31 July 2003

ICTY, Search Warrant for the Public Security Center (CJB) Srpsko Sarajevo, *Prosecutor v. Karadžić*, Case No. IT-95-05/18, Duty Judge, 11 September 2003

ICTY, Decision on Provisional Release of Fatmir Limaj, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-PT, T. Ch., 12 September 2003

ICTY, Decision on Prosecution's Motion for Clarification of Oral Decision Regarding Admissibility of Accused's Statement, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, T. Ch. I, Section A, 18 September 2003

ICTY, Decision on Interlocutory Appeal on the Admissibility of Evidence-In-Chief in the Form of Written Statements, *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.4, A. Ch., 30 September 2003

ICTY, Decision on Interlocutory Appeal on the Admissibility of Evidence-In-Chief in the Form of Written Statements, *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.4, A. Ch., 30 September 2003, Dissenting Opinion of Judge Hunt on Admissibility of Evidence-in-Chief in the Form of Written Statement

ICTY, Separate Opinion of Judge Mohammed Shahabuddeen Appended to the Appeals Chamber Decision on Admissibility of Evidence-in-Chief in the Form of Written Statements, *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR 73.4, A. Ch., 30 September 2003

ICTY, Decision on the Defence "Objection to Intercept Evidence", *Prosecutor v. Brđanin*, Case No. IT-99-36-T, T. Ch. II, 3 October 2003

ICTY, Decision on Fatmir Limaj's Request for Provisional Release, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-AR65, A. Ch., 31 October 2003

ICTY, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, *Prosecutor v. Blagojević*, Case No. IT-02-60-AR73.4, A. Ch., 7 November 2003

ICTY, Decision on Interlocutory Appeal on Motion for Additional Funds, *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR73.2, A. Ch., 13 November 2003, Dissenting Opinion of Judge David Hunt

ICTY, Sentencing Judgement, *Prosecutor v. M. Nikolić*, Case No. IT-02-60/1-S, T. Ch. I (Section A), 2 December 2003

ICTY, Preliminary Decision on the Admissibility of Intercepted Communications, *Prosecutor v. Milošević*, Case No. IT-02-54-T, T. Ch., 16 December 2003

ICTY, Decision on the Admission into Evidence of Intercept-Related Materials, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, T. Ch. I, Section A, 18 December 2003

ICTY, Decision on Provisional Release Application of Blagojević, *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-AR65.4, 17 February 2004

ICTY, Decision on Review of Indictment and Order for Non-Disclosure, *Prosecutor v. Čermak and Markač*, Case No. IT-03-73-I, Judge, 24 February 2004

ICTY, Decision Pursuant to Rule 65 Granting Amir Kabura Authorization to Attend his Mother's Funeral, *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-T, Duty Judge, 12 March 2004

ICTY, Decision on Provisional Release, *Prosecutor v. Kovačević*, Case No. IT-01-42/2-I, T. Ch. II, 2 June 2004

ICTY, Decision in the Issuance of Subpoenas, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, A. Ch, 21 June 2004

ICTY, Decision in the Issuance of Subpoenas, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, A. Ch, 21 June 2004, Declaration of Judge Shahabuddeen

ICTY, Decision on Defence Motion for Provisional Release, *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, T. Ch. II, 23 July 2004

ICTY, Decision on Provisional Release, *Prosecutor v. Simatović*, Case No. IT-03-69, T. Ch., 28 July 2004

ICTY, Decision on Provisional Release, *Prosecutor v. Stanišić*, Case No. IT-03-69, T. Ch., 28 July 2004

ICTY, Order on Provisional Release of Jadranko Prlić, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, T. Ch. I, 30 July 2004

ICTY, Order on Provisional Release of Valentin Čorić, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, T. Ch. I, 30 July 2004

ICTY, Decision on Motions for Re-consideration, Clarification, Request for Release and Applications for Leave to Appeal, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.1; IT-04-74-AR65.2; IT-04-74-AR65.2, A Bench of the A. Ch., 8 September 2004

ICTY, Decision on Joint Motion for Leave to Appeal Decision on Provisional Release, *Prosecutor v. Čermak and Markač*, Case No. IT-03-73-AR65.1, A Bench of the A. Ch., 13 October 2004

ICTY, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, *Prosecutor v. Milošević*, Case No. IT-02-54-AR.73.7, A. Ch., 1 November 2004

ICTY, Decision on Interlocutory Appeal against Trial Chamber's Decision Denying Provisional Release, *Prosecutor v. Čermak and Markač*, Case No. IT-03-73-AR65.1, A. Ch., 2 December 2004

ICTY, Decision on Prosecution's Appeal against Decision on Provisional Release, *Prosecutor v. Simatović*, Case No. IT-03-69-AR65.2, A. Ch., 3 December 2004

ICTY, Warrant of Arrest, Order for Surrender, *Prosecutor v. Stanišić*, Case No. IT-014-79-I, Single Judge, 25 February 2005

ICTY, Judgement, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, A. Ch., 28 February 2005

ICTY, Decision on Defence Motion for Provisional Release, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-PT, T. Ch. II, 9 March 2005

ICTY, Decision on Defence Request for Provisional Release of Stanislav Galić, *Prosecutor v. Galić*, Case No. IT-98-29-A, A. Ch., 23 March 2005

ICTY, Decision on Second Application for Provisional Release, *Prosecutor v. Milutinović*, Case No. IT-99-37-PT, T. Ch. III, 14 April 2005

ICTY, Decision on Prosecution's Motions to Admit Prior Statements as Substantive Evidence, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, T. Ch. II, 25 April 2005

ICTY, Decision on the Prosecutor's Application to Re-open its Case, *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47, T. Ch. II, 1 June 2005

ICTY, Decision on Ramush Haradinaj's Motion for Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, T. Ch. II, 6 June 2005

ICTY, Decision on Momčilo Perišić's Motion for Provisional Release, *Prosecutor v. Perišić*, Case No. IT-04-81-PT, T. Ch., 9 June 2005

ICTY, Decision on Admission into Evidence of Prior Statement of a Witness, *Prosecutor v. Halilović*, Case No. IT-01-48-T, T. Ch. I, Section A, 5 July 2005

ICTY, Decision on Motion for Exclusion of Statement of Accused, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, T. Ch. I, Section A, 8 July 2005

ICTY, Decision on Referral of Case Pursuant to Rule 11bis, *Prosecutor v. Milošević*, Case No. IT-98-29/1-PT, Referral Bench, 8 July 2005

ICTY, Decision on Defence Motion for Provisional Release, *Prosecutor v. Milošević*, Case No. IT-98-29/1-PT, T. Ch. II, 13 July 2005

ICTY, Decision on Vinko Pandurević's Application for Provisional Release, *Prosecutor v. Pandurević and Trbić*, Case No. IT-05-86-PT, T. Ch. II, 18 July 2005

ICTY, Decision on Mićo Stanišić Motion for Provisional Release, *Prosecutor v. Stanišić*, Case No. IT-04-79-PT, T. Ch. II, 19 July 2005

ICTY, Decision Concerning Motion for Provisional Release of Milan Gvero, *Prosecutor v. Tolimir et al.*, Case No. IT-04-80-PT, T. Ch II, 19 July 2005

ICTY, Decision Concerning Motion for Provisional Release of Radivoje Miletić, *Prosecutor v. Tolimir et al.*, Case No. IT-04-80-PT, T. Ch. II, 19 July 2005

ICTY, Decision on Savo Todović's Application for Provisional Release, *Prosecutor v. Rasević and Todović*, Case No. IT-97-25/1-PT, T. Ch., 22 July 2005

ICTY, Decision on Second Application for Provisional Release, *Prosecutor v. Ljubičić*, Case No. IT-00-41-PT, T. Ch., 26 July 2005

ICTY, Reasons for Oral Decision Denying Mr. Krajišnik's Request to Proceed Unrepresented by Counsel, *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, T. Ch., 18 August 2005

ICTY, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 19 August 2005

ICTY, Decision on Motion for Provisional Release, *Prosecutor v. Halilović*, Case No. IT-01-48-T, T Ch. I (Section A), 1 September 2005

ICTY, Decision on Second Motion for Provisional Release, *Prosecutor v. Martić*, Case No. IT-95-11-PT, T. Ch. I, 12 September 2005

ICTY, Decision on Ljube Boskoški's Interlocutory Appeal on Provisional Release, *Prosecutor v. Boskoški and Tarčulovski*, Case No. IT-04-82-AR65.2, A. Ch., 28 September 2005

ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vinko Pandurević's Application for Provisional Release, *Prosecutor v. Pandurević and Trbić*, Case No. IT-05-86-AR65.1, A. Ch., 3 October 2005

ICTY, Mladen Naletilić's Revised Appeals Brief – Redacted, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, A. Ch., 6 October 2005

ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Savo Todović's Application for Provisional Release, *Prosecutor v. Rasević and Todović*, Case No. IT-97-25/1-AR65.1, A. Ch., 7 October 2005

ICTY, Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release, *Prosecutor v. Haradinaj*, Case No. IT-04-84-PT, T. Ch. II, 12 October 2005

ICTY, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, A. Ch., 17 October 2005

ICTY, Decision on Prosecution Motion Seeking Leave to Amend the Indictment, *Prosecutor v. Čermak and Markač*, Case No. IT-03-73-PT, T. Ch. II, 19 October 2005

ICTY, Decision on Interlocutory Appeal against Trial Chamber's Decision Granting Provisional Release, *Prosecutor v. Tolimir et al.*, Case No. IT-04-80-AR65.1, A. Ch., 19 October 2005

ICTY, Decision on Defence Renewed Motion for Provisional Release of Fatmir Limaj, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, T. Ch. II, 26 October 2005

ICTY, Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković's Provisional Release, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.1, A. Ch., 1 November 2005

ICTY, Decision on Drago Nikolić's Request for Provisional Release, *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, T. Ch. II, 9 November 2005

ICTY, Decision on Rule 11bis Referral, *Prosecutor v. Janković*, Case No. IT-96-23/2-AR11bis.2, A. Ch., 15 November 2005

ICTY, Second Decision on Nebojša Pavković Provisional Release, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, T. Ch. III, 18 November 2005

ICTY, Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex, *Prosecutor v. Milošević*, Case No. IT-02-54-T, T. Ch., 13 December 2005

ICTY, Decision on "Defence Motion: Defence Request for Provisional Release for Providing Medical Aid in the Republic of Montenegro", *Prosecutor v. Strugar*, Case No. IT-01-42-A, A. Ch., 16 December 2005

ICTY, Decision on Prosecution's Motions for the Admission of Written Evidence pursuant to Rule 92bis of the Rules, *Prosecutor v. Martić*, Case No. IT-95-11-T, T. Ch. I, 16 January 2006

ICTY, Order for the Translation of Documents, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, PTJ, 17 January 2006

ICTY, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, *Prosecutor v. Martić*, Case No. IT-95-11-T, T. Ch. I, 19 January 2006

ICTY, Decision on Defence Motion to Exclude Interview of the Accused Pursuant to Rule 89 (D) and 95, *Prosecutor v. Orić*, Case No. IT-03-68-T, T. Ch. II, 7 February 2006

ICTY, Decision on Assigned Counsel Request for Provisional Release, *Prosecutor v. Milošević*, Case No. IT-02-54-T, T. Ch. III, 23 February 2006

ICTY, Decision on Lahi Brahimaj's Interlocutory Appeal against the Trial Chamber's Decision Denying his Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.2, A. Ch., 9 March 2006

ICTY, Decision on Ramush Haradinaj's Modified Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006

ICTY, Decision on Ramush Haradinaj's Modified Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, A. Ch., 10 March 2006, Joint Dissenting Opinion of Judge Shahabuddeen and Judge Schomburg

ICTY, Further Decision on Brahimaj's Motion, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, T. Ch. II, 3 May 2006

ICTY, Judgement, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, A. Ch., 3 May 2006

ICTY, Decision on Request of the North Atlantic Treaty Organisation for Review, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR108bis.1, A. Ch., 15 May 2006

ICTY, Judgement, *Prosecutor v. Orić*, Case No. IT-03-68-T, T. Ch. II, 30 June 2006

ICTY, Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, *Prosecutor v. Popović et al.*, A. Ch., 30 June 2006

ICTY, Decision on Ljube Boskoški's Interlocutory Appeal on Second Motion for Provisional Release, *Prosecutor v. Boskoški and Tarčulovski*, Case No. IT-04-82-AR65.3, A. Ch., 28 August 2006

ICTY, Decision on Savo Todović's Appeal against Decisions on Referral under Article 11bis, *Prosecutor v. Rašević and Todović*, Case No. IT-97-25/1-AR11bis.1, A. Ch., 4 September 2006

ICTY, Judgement, *Prosecutor v. Krajišnik*, Case No IT-00-39-T, T. Ch. I, 27 September 2006

ICTY, Decision on Prosecution's Motion to Interview Defence Witnesses, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, T. Ch. II, 1 October 2006

ICTY, Decision Concerning the Use of Statements Given by the Accused, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, T. Ch. II, 9 October 2006

ICTY, Decision on Appeal against Decision Denying Motion for Provisional Release, *Prosecutor v. Milošević*, Case No. IT-98-29/1-AR65.1, A. Ch., 17 October 2006

ICTY, Decision on Referral of Case Pursuant to Rule 11bis, *Prosecutor v. Kovačević*, Case No. IT-1-42/2-1, Referral Bench, 17 November 2006

ICTY, Judgement, *Prosecutor v. Stanislav Galić*, Case No. 98-29-A, A. Ch., 30 November 2006, Separate and Partially Dissenting Opinion of Judge Schomburg

ICTY, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.2, A. Ch., 14 December 2006

ICTY, Decision on Renewed Prosecution Motion for Leave to Amend its Rule 65ter List to Add Michael Philips and Shaun Byrnes, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, T. Ch., 15 January 2007

ICTY, Decision Concerning Renewed Motion for Provisional Release of Johan Tarčulovski, *Prosecutor v. Boškosi and Tarčulovski*, Case No. IT-04-82-PT, T. Ch II, 17 January 2007

ICTY, Decision on Referral of Case Pursuant to Rule 11*bis* with Confidential Annex A and Annex B, *Prosecutor v. Lukić et al.*, Case No. I-98-32/1-PT, Referral Bench, 5 April 2007

ICTY, Decision on Defence Appeal against Trial Chamber's Decision on Sredoje Lukić's Motion for Provisional Release, *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-AR65.1, A. Ch., 16 April 2007

ICTY, Decision on Prosecution's Third Motion for Leave to Amend its Rule 65ter Exhibit List, *Prosecutor v. Milošević*, Case No. IT-98-21/1-T, T. Ch. III, 23 April 2007

ICTY, Reasons for Oral Decision Denying Boškoski Defence Motion to Stop Prosecution's Continued Investigation and Continued Disclosure, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, T. Ch. II, 10 May 2007

ICTY, Decision on Momčilo Krajišnik's Request to Self-Represent, on Counsel's Motion in Relation to Appointment of *Amicus Curiae*, and on the Prosecution Motion of 16 February 2007, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, A. Ch., 11 May 2007

ICTY, Decision on Defence Request for Audio Recording of Prosecution Witness Proofing Sessions, *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, T. Ch. I, 23 May 2007

ICTY, Decision on Šainović Motion for Temporary Provisional Release, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, T. Ch., 7 June 2007

ICTY, Decision on the Motion for Provisional Release of the Accused Ćorić, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, T. Ch. III, 11 June 2007

ICTY, Decision on Ojdanić Motion for Temporary Provisional Release, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, T. Ch., 4 July 2007

ICTY, Decision on Milan Lukić's Appeal Regarding Referral, *Prosecutor v. Lukić*, Case No. IT-98-32/1-AR11*bis*.1, A. Ch., 11 July 2007

ICTY, Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, T. Ch. I, 20 July 2007

ICTY, Decision on the Admission into Evidence of Slobodan Praljak's Evidence in the case of Naletilić and Martinović, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, T. Ch. III, 5 September 2007

ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007

ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Separate Opinion of Judge Meron

ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Separate Opinion of Judge Schomburg

ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Declaration of Judge Shahabuddeen

ICTY, Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65ter Exhibit List, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. Ch. II, 25 October 2007

ICTY, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.6, A. Ch., 23 November 2007

ICTY, Decision on Admissibility of Intercepted Communications, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. Ch. II, 7 December 2007

ICTY, Decision on Appeals Against Decision Admitting Material Related to Borovčanin's Questioning, *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.10, A. Ch., 14 December 2007

ICTY, Decision on Preliminary Motions on the Indictment Pursuant to Rule 72 of the Rules, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, T. Ch. II, 14 December 2007

ICTY, Decision on Prosecution's Consolidated Appeal against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čorić, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.5, A. Ch., 11 March 2008

ICTY, Decision on "Prosecution's Appeal from *Décision relative à la Demande de mise en liberté provisoire de l'Accusé Petković*", Case No. IT-04-74-AR65.8, A. Ch., 21 April 2008

ICTY, Decision on Prosecution's Motion to Amend Rule 65ter Witness List and on Related Submissions, *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-PT, T. Ch. III, 22 April 2008

ICTY, Decision on Prosecution's Appeal From *Décision relative à la demande de mise en liberté provisoire de l'accusé Stojić*, Dated 8 April 2008, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.9, A. Ch., 29 April 2008

ICTY, Decision on Motion to Re-Open the Prosecution Case, *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.5, A. Ch., 9 May 2008

ICTY, Decision on Lukić Request for Reconsideration of the Trial Chamber's Admission into Evidence of his Interview with the Prosecution (Exhibit P948), *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, T. Ch., 22 May 2008

ICTY, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, *Prosecutor v. Stanišić and Simatović*, A. Ch., 26 June 2008

ICTY, Decision on the Accused Praljak's Motion for Provisional Release, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, T. Ch. III, 17 July 2008

ICTY, Decision on the Accused Stojić's Motion for Provisional Release, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, T. Ch. III, 17 July 2008

ICTY, Reasons for the Decision on the Admission of two Statements and Related Exhibits of Witness Zdravko Janić into Evidence Pursuant to Rule 92ter, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, T. Ch. I, 24 July 2008

ICTY, Astrit Haraqija's Defence Motion to Join Bajrush Morina's Request for a Declaration of Inadmissibility and Exclusion of Evidence and to Seek the Exclusion of Same Against Astrit Haraqija, *Prosecutor v. Haraqija et al.*, Case No. IT-04-84-R77.4, T. Ch. I, 4 August 2008

ICTY, Decision on Bajrush Morina's Request for a Declaration of Inadmissibility and Exclusion of Evidence, *Prosecutor v. Haraqija et al.*, Case No. IT-04-84-R77.4, T. Ch. I, 28 August 2008

ICTY, Decision on Šainović Motion for Variation of Conditions of Temporary Provisional Release, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, T. Ch., 1 October 2008

ICTY, Decision on Astrit Haraqija and Bajrush Morina's Joint Request for Reconsideration of the Trial Chamber's Decision of 28 August 2008, *Prosecutor v. Haraqija et al.*, Case No. IT-04-84-R77.4, T. Ch. I, 14 October 2008

ICTY, Decision on Bajrush Morina's Request to Vary Conditions of Provisional Release, *Prosecutor v. Haraqija and Morina*, Case No. IT-08-84-R77.4, T. Ch. I, 14 October 2008

ICTY, Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 92 bis, *Prosecutor v. Perišić*, Case No. IT-04-81-T, T. Ch., 20 October 2008

ICTY, Decision on Morina and Haraqija Second Request for a Declaration of Inadmissibility and Exclusion of Evidence, *Prosecutor v. Haraqija and Morina*, Case No. IT-04-84-R77.4, T. Ch. I, 27 November 2008

ICTY, Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, T. Ch. III, 27 November 2008

ICTY, Correspondence from Host Country Re: Request for Provisional Release, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, 16 December 2008

ICTY, Decision on Submissions of the Accused Concerning the Legality of Arrest, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, T. Ch. II, 18 December 2008

ICTY, Decision on Urgent Defence Motion Requesting an Urgent Motion to the Amicus Curiae to Take and Disclose Witness Statements, *Prosecutor v. Hartmann*, Case No. IT-02-54-R77.5, T. Ch., 29 January 2009

ICTY, “Reasons for Decision on the Defence Motion for Stay of Proceedings for Abuse of Process”, *Prosecutor v. Hartman*, Case No. IT-02-54-R77.5, Specially Appointed Chamber, 3 February 2009

ICTY, Prosecution Motion for Admission of Evidence from the Bar Table Pursuant to Rule 89(C), *Prosecutor v. Hartmann*, Case No. IT-02-54-R77.5, T. Ch., 17 February 2009

ICTY, Judgement, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, T. Ch., 26 February 2009

ICTY, Decision on Zdravko Tolimir’s Appeal against the Decision on Submissions of the Accused Concerning Legality of Arrest, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-AR72.2, A. Ch., 12 March 2009

ICTY, Decision on Stojan Župljanin’s Motion for Provisional Release, *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-PT, T. Ch. III, 30 June 2009

ICTY, Decision on the Accused’s Holbrooke Agreement Motion, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, T. Ch., 8 July 2009

ICTY, Judgement, *Prosecutor v. Haračija and Morina*, Case No. IT-04-84-R77.4-A, A. Ch., 23 July 2009

ICTY, Decision on Accused’s Motion for Remedy for Violation of Rights in Connection with Arrest, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, T. Ch., 31 August 2009

ICTY, Decision on Karadžić’s Appeal of Trial Chamber’s Decision on Alleged Holbrooke Agreement, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.4, A. Ch., 12 October 2009

ICTY, Decision on Review of Indictment, *Prosecutor v. Tabaković*, Case No. IT -98-32/1-R77.1, Confirming Judge, 17 November 2009

ICTY, Transcript, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, T. Ch. I, 11 December 2009

ICTY, Decision Denying the Stanišić Motion for Exclusion of Recorded Intercepts, *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, T. Ch. II, 16 December 2009

ICTY, Decision on Requests for Temporary Restraining Orders Directed to the Republic of Croatia and Reasons for the Chamber’s Order of 11 December 2009, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, T. Ch. I, 18 December 2009

ICTY, Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, T. Ch. I, 12 March 2010

ICTY, Decision on Mr. Perišić Motion for Provisional Release, *Prosecutor v. Perišić*, Case No. IT-04-81-T, T. Ch. I, 31 March 2010

ICTY, Judgement, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. Ch. II, 10 June 2010

ICTY, Redacted Version of the “Decision in Reconsideration of the Decision of 15 May 2007 on Vojislav Šešelj’s Motion for Contempt Against Carla del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon”, *Prosecutor v. Šešelj*, Case No. IT-03-67-T, T. Ch. III, 29 June 2010

ICTY, Decision on Lahi Brahimaj’s Motion for Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. 04-84bis-PT, T. Ch. II, 10 September 2010

ICTY, Decision on the Accused’s Motion to Exclude Intercepted Conversations, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, T. Ch., 30 September 2010

ICTY, Decision on the Prosecution’s Motion to Re-open its Case, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, T. Ch. III, 6 October 2010

ICTY, Decision on Prosecution’s Motion for Admission of Evidence to Mladić Notebooks with a Separate Opinion from Presiding Judge Antonetti Attached, *Prosecutor v. Šešelj*, Case No. IT-03-67-T, T. Ch. III, 22 October 2010

ICTY, Decision on the Praljak Defence Motion to Reopen its Case, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, T. Ch. III, 23 November 2010

ICTY, Decision on the Petković Defence Motion to Reopen its Case, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, T. Ch. III, 23 November 2010

ICTY, Decision on Jadranko Prlić’s Defence Motion to Admit Evidence Rebutting Evidence Admitted by the Decision of 6 October 2010, Case No. IT-04-74-T, T. Ch. III, 24 November 2010

ICTY, Decision on the Stojić Defence Request to Reopen its Case, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, T. Ch. III, 25 November 2010

ICTY, Decision on Gotovina Defence Appeal against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-A-AR73.5, A. Ch., 14 February 2011

ICTY, Trial Judgement, *Prosecutor v. Gotovina et al.*, Case No. IT-05-87/1-T, T. Ch. I, 15 April 2011

ICTY, Decision on Vojislav Šešelj’s Motion for Contempt Against Carla del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon and on the Subsequent Requests of the Prosecution, *Prosecutor v. Šešelj*, Case No. IT-03-67-T, T. Ch. III, 22 December 2011

ICTY, Decision on Motion for Assignment of Counsel to Dragomir Milošević, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, T. Ch. III, 6 January 2012

ICTY, Decision on Urgent Defence Motion to Preclude GH-162’s Appearance until after Disclosure of a proper Witness Statement, *Prosecutor v. Hadžić*, Case No. IT-04-75-T, T. Ch. II, 17 May 2013

ICTR

ICTR, Decision on the Review of the Indictment, *Prosecutor v. Kayishema et al.*, Case No. ICTR-95-1-T, Confirming Judge, 28 November 1995

ICTR, Decision on the Request Filed by the Defence for Provisional Release of Georges Rutaganda, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, T. Ch. I, 7 February 1997

ICTR, Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment, *Prosecutor v. Ntagerura*, Case No. ICTR-96-10-I, T. Ch. II, 28 November 1997

ICTR, Decision on the Defence Motion for Restitution of Personal Effects, *Prosecutor v. Rugiu*, Case No. ICTR-97-32-I, T. Ch. I, 7 July 1998

ICTR, Judgement, *Prosecutor v. Akayesu*, Case No. ICTR-94-6-T, T. Ch. I, 2 September 1998

ICTR, Decision on Defence Motion to Lodge Complaint and to Open Investigation into Alleged Acts of Torture under Rules 40 (C) and 73 (A) of the Rules of Procedure and Evidence, *Prosecutor v. Kabiligi*, Case No. ICTR-97-34-I, T. Ch II, 6 October 1998

ICTR, Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-I, T. Ch. II, 18 November 1998

ICTR, Decision on an Application by African Concern for Leave to Appear as *Amicus Curiae*, *Prosecutor v. Musema*, ICTR-96-13-T, T. Ch. I, 17 March 1999

ICTR, Decision on the Prosecutor's Motion to Withdraw the Indictment, *Prosecutor v. Nuyahaga*, Case No. ICTR-98-40-T, T. Ch. I, 18 March 1999

ICTR, Decision on the Prosecutor's Request for Leave to Amend the Indictment, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, T. Ch. I, 6 May 1999

ICTR, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-A, A. Ch., 3 June 1999, Joint and Separate Opinion of Judge McDonald and Judge Vohrah

ICTR, Reasons for the Decision on the Prosecutor's Request for Leave to Amend the Indictment, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, T. Ch. II, 12 August 1999

ICTR, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, *Prosecutor v. Ndayambaje*, Case No. ICTR-96-8-T, T. Ch. II, 2 September 1999

ICTR, Decision on the "Motion to Set aside the Arrest and Detention of Laurent Semanza as Unlawful", *Prosecutor v. Semanza*, Case No. ICTR-97-20-I, T. Ch. III, 6 October 1999

ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999

ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, Separate Opinion of Judge Shahabuddeen

ICTR, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, *Prosecutor v. Nahimana*, Case No. ICTR-96-11-T, T. Ch. I, 5 November 1999

ICTR, Decision on the Defence Motion for the Restitution of Documents and other Personal or Family Belongings Seized (Rule 40 (C) of the Rules of Procedure and Evidence), and the Exclusion of such Evidence which may be Used by the Prosecutor in Preparing an Indictment against the Applicant, *Prosecutor v. Karemera*, Case No. ICTR-98-44-I, T. Ch. II, 10 December 1999

ICTR, Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items, *Prosecutor v. Ngirumpatse*, Case No. ICTR-97-44-I, T. Ch. II, 10 December 1999

ICTR, Judgement, *Prosecutor v. Musema*, Case No. 96-13-A, T. Ch. I, 27 January 2000

ICTR, Decision (Prosecutor's Request for Review or Reconsideration), Case No. ICTR-97-19-AR72, A. Ch., 31 March 2000

ICTR, Decision (Prosecutor's Request for Review or Reconsideration), *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 31 March 2000, Declaration of Judge Rafael Nieto-Navia

ICTR, Decision (Prosecutor's Request for Review or Reconsideration), *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., 31 March 2000, Separate Opinion of Judge Shahabuddeen

ICTR, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-I, T. Ch. I, 11 April 2000

ICTR, Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44-I, T. Ch. II, 8 May 2000

ICTR, Decision on the Defence Extremely Urgent Motion on *Habeas Corpus* and for Stoppage of Proceedings, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-I, T. Ch. II, 23 May 2000

ICTR, Decision, *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, A. Ch., 31 May 2000

ICTR, Decision, *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, A. Ch., 31 May 2000, Declaration by Judge Lal Chand Vohrah

ICTR, Decision on Prosecutor's Request for Leave to File an Amended Indictment, *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-I, T. Ch. II, 21 June 2000

ICTR, Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized, *Prosecutor v. Nzirorera*, T. Ch. II, 7 September 2000

ICTR, Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized, *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, T. Ch. II, 12 October 2000

ICTR, Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused, *Prosecutor v. Rwamakuba et al.*, Case No. ICTR-98-44-T, T. Ch. II, 12 December 2000

ICTR, Decision on the Defence Motion for the Provisional Release of the Accused, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, T. Ch. II, 21 February 2001

ICTR, Judgement, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, A. Ch., 1 June 2001

ICTR, Judgement (Reasons), *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, A. Ch., 1 June 2001

ICTR, Judgement, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, T. Ch. I, 7 June 2001

ICTR, Decision (on Application for Leave to Appeal under Rule 65 (D) of the Rules of Procedure and Evidence), *Kanyabashi v. Prosecutor*, Case No. ICTR-96-15-A, A Bench of the A. Ch., 13 June 2001

ICTR, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, *Prosecutor v. Nahimana and Barayagwiza*, Case No. ICTR-99-55-T, T. Ch. I, 26 June 2001

ICTR, Decision on the Defence's Motion for Provisional Release Pursuant to Rule 65 of the Rules, *Prosecutor v. Bicamumpaka*, Case No. ICTR-99-50-T, T. Ch. II, 25 July 2001

ICTR, Trial Record, *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case Nos. ICTR-96-10-T and ICTR-96-17-T, 27 September 2001

ICTR, Decision on the Defence Motion for the Release of the Accused, *Prosecutor v. Nshamihigo*, Case No. ICTR-2001-63-I, T. Ch. I, 8 October 2001

ICTR, Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel, *Prosecutor v. Muhimana*, Case No 95-1B-1, T. Ch. I, 6 November 2001

ICTR, Decision on Prosecutor's Motion to Modify her List of Exhibits, *Prosecutor v. Ndajambaye et al.*, Case No. ICTR-96-8-T, T. Ch. II, 14 December 2001

ICTR, Decision on Musabyimana's Motion on the Violation of Rule 55 and International Law at the Time of his Arrest and Transfer, *Prosecutor v. Musabyimana*, Case No. ICTR-2001-62-T, T. Ch. II, 20 June 2002

ICTR, Decision on Defence Motion for Release, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. III, 12 July 2002

ICTR, Decision on the Defence's Motion for Provisional Release of Jean-bosco Barayagwiza, *Prosecutor v. Barayagwiza*, Case No. ICTR-99-52-T, T. Ch. I, 3 September 2002

ICTR, Decision on the Defence's Motion for the Release or Alternatively Provisional Release of Ferdinand Nahimana, *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, T. Ch. I, 5 September 2002

ICTR, Decision on Sagahutu's Preliminary Provisional Release and Severance Motions, *Prosecutor v. Sagahutu et al.*, Case No. ICTR-00-56-T, T. Ch. II, 25 September 2002

ICTR, Defence Motion for Provisional Release of the Accused, *Prosecutor v. Muhimana*, Case No. ICTR-95-1-B-I, T. Ch. I, 1 October 2002

ICTR, *Prosecutor v. Renzaho*, Minutes of Hearing Pursuant to Rule 40 *bis* (J) of the Rules of Procedure and Evidence, Case No. ICTR-97-31-DP, Judge, 3 October 2002

ICTR, Decision on the Defence Motion for the Provisional Release of the Accused, *Prosecutor v. Ndayambaje*, Case No. ICTR-98-42-T, T. Ch. II, 21 October 2002

ICTR, Decision on Bizimungu's Motion for Provisional Release Pursuant to Rule 65 of the Rules, *Prosecutor v. Bizimungu*, Case No. ICTR-99-50-T, T. Ch. II, 4 November 2002

ICTR, Decision on the Defence Motion for Return of Documents and Other Seized Personal Items, *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-I, T. Ch. III, 20 November 2002

ICTR, Decision (Appeal of the Family of Felicien Kabuga Against Decisions of the Prosecutor and President of the Tribunal), *Prosecutor v. Kabuga*, Case No. Miscellaneous-Kabuga Family-01-A, A. Ch., 22 November 2002

ICTR, Decision on Motion to Appeal against the Provisional Release Decision of Trial Chamber II of 21 October 2002, *Prosecutor v. Ndayambaje*, Case No. ICTR-98-42-T, A Bench of the A. Ch., 10 January 2003

ICTR, Judgement, *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10, A. Ch., 21 February 2003

ICTR, Judgement and Sentence, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, T. Ch., 15 May 2003

ICTR, Judgement and Sentence, *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, T. Ch. I, 16 May 2003

ICTR, Judgement, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, A. Ch., 26 May 2003, Dissenting Opinion of Judge Pocar

ICTR, Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, T. Ch. I, 5 June 2003

ICTR, Decision on Defence Motion to Fix a Date for the Commencement of the Trial of Father Emmanuel Rukundo or, in the Alternative, to Request his Provisional Release, *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-I, T. Ch. III, 18 August 2003

ICTR, Decision on Defence Motion for Subpoena to Witness G, *Prosecutor v. Nzirorera et al.*, Case No. ICTR-98-44-I, T. Ch. III, 20 October 2003

ICTR, Decision on Augustin Ndindiliyimana's Emergency Motion for Temporary Provisional Release, *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-2000-56-I, T. Ch. II, 11 November 2003

ICTR, Judgment and Sentence, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, T. Ch. II, 1 December 2003

ICTR, Judgment, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, T. Ch. I, 3 December 2003

ICTR, Decision on Prosper Mugiraneza's Renewed Motion to Exclude his Custodial Statements from Evidence, *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, T. Ch. II, 4 December 2003

ICTR, Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council, *Prosecutor v. Ndindiliyimana*, Case No. ICTR-2000-56-I, T. Ch. II, 26 March 2004

ICTR, Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana, *Prosecutor v. Bagosora*, Case No. 98-41-T, T. Ch. I, 25 May 2004

ICTR, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. I, 23 June 2004

ICTY, Judgement, *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, A. Ch., 9 July 2004

ICTR, Decision on the Motion for Provisional Release of Father Emmanuel Rukundo, *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-I, T. Ch. II, 15 July 2004

ICTR, Decision on Ngeze's Motion for a Stay of Proceedings, *Prosecutor v. Nahimana et al.*, Pre-Appeal Judge, 4 August 2004

ICTR, Decision on Defence Motions for Stay of Proceedings and for Adjournment of the Trial, Including Reasons in support of the Chamber's Oral Ruling Delivered on Monday 20

September 2004, *Prosecutor v. Bizimungu et al.*, Case No. ICTR-2000-56-T, T. Ch. II, 24 September 2004

ICTR, Decision on the Prosecutor's Motion for the Admission of Certain Materials, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. I, 14 October 2004

ICTR, Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance, *Prosecutor v. Bagosora*, Case No. 98-41-T, T. Ch. I, 7 February 2005

ICTR, Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, A. Ch., 3 May 2005

ICTR, Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005

ICTR, Decision on Defence Motion for Stay of Proceedings, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-PT, T Ch. III, 3 June 2005

ICTR, Decision on Application by Hormisdas Nsengimana for Leave to Appeal the Trial Chamber's Decision on Provisional Release, *Prosecutor v. Nsengimana*, Case No. ICTR-01-69-AR65, A. Ch., 23 August 2005

ICTR, Decision on Interlocutory Appeals of Decision on Witness Protection Orders, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73 & ICTR-98-41-AR73 (B), A. Ch., 6 October 2005

ICTR, Decision on the Prosecutor's Motion Pursuant to Trial Chamber's Directives of 7 December 2005 for the Verification of the Authenticity of Evidence Obtained out of Court Pursuant to Rules 89 (C) & (D), *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, T. Ch. II, 26 April 2006

ICTR, Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997, *Prosecutor v. Ndayambaje et al.*, Case No. ICTR-98-42-T T. Ch. II, 15 May 2006

ICTR, Decision on Nzuwonemeye's Motion Requesting Cooperation from the Government of Belgium Pursuant to Article 28 of the Statute, *Prosecutor v. Bizimungu et al.*, Case No. ICTR-00-56-T, T. Ch. II, 7 June 2006

ICTR, Decision on Appellant Hassan Ngeze's Motion for Approval of Further Investigations on Specific Information Relating to the Additional Evidence of Potential Witnesses, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, A. Ch., 20 June 2006

ICTR, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Disclosure Suite in Discharging Disclosure Obligations, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.7, A. Ch., 30 June 2006

ICTR, Decision on the Defence Motion for Disclosure of Exculpatory Information With Respect to Prior Statements of Prosecution Witnesses, *Prosecutor v. Zigiranyirazo*, Case No. ICTR, 2001-73-T, T. Ch., 6 July 2006

ICTR, Decision on Nzirorera's Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 12 July 2006

ICTR, Decision on Kabiligi Motion for the Exclusion of Portions of Testimony of Prosecution Witness Alison des Forges, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. I, 4 September 2006

ICTR, Judgment, *Prosecutor v. Rwamakuba et al.*, Case No. ICTR-98-44C-T, T. Ch. III, 20 September 2006

ICTR, Decision on Defence Motion for Disclosure of RPF Material and for Sanctions against the Prosecution, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 19 October 2006

ICTR, Decision on "Appeal of Accused Arsène Shalom Ntahobali against the Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Investigators in July 1997, *Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Case No. ICTR-97-21-AR73, A. Ch., 27 October 2006

ICTR, Decision on Reconsideration of Protective Measures for Prosecution Witnesses, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 30 October 2006

ICTR, Decision on Interlocutory Appeal, *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-AR73, A. Ch., 30 October 2006

ICTR, Decision on the *Voir Dire* Hearing of the Accused's *Curriculum Vitae*, *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, T. Ch. III, 29 November 2006

ICTR, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, *Prosecutor v. Nahimana et al.*, Case No. IT-99-52-A, A. Ch., 8 December 2006

ICTR, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92bis of the Rules; and Order for Reduction of Prosecution Witness List, *Prosecutor v. Karemera et al.*, Case No. ICTR 98-44-T, T. Ch. III, 11 December 2006

ICTR, Decision on Appellants Jean-Bosco Barayagwiza's and Ferdinand Nahimana's Motions for Leave to Present Additional Evidence Pursuant to Rule 115, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, A. Ch., 12 January 2007

ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, T. Ch. III, 31 January 2007

ICTR, Decision on the Prosecutor's Application to Admit into Evidence the Transcript of the Accused's Interview as a Suspect and the Defense Request to Hold a *Voir Dire*, *Prosecutor v. Nchamihigo*, Case No. ICTR-01-63-T, T. Ch. III, 5 February 2007

ICTR, Decision on Exclusion of Testimony and Admission of Exhibit, *Prosecutor v. Renzaho*, Case No. ICTR-97-37-T, T. Ch. I, 20 March 2007

ICTR, Decision on Ntabakuze Petition for a Writ of Mandamus and Related Defence Requests, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. I, 18 April 2007

ICTR, Decision on Interlocutory Appeal Regarding Witness Proofing, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.8, A. Ch., 11 May 2007

ICTR, Decision on Bagosora Request for Ruling or Certification on Subpoena Issued to General Marcel Gatsinzi, *Prosecutor v. Bagosora et al.*, ICTR No. ICTR-98-41-T, T. Ch. I, 23 May 2007

ICTR, Decision on Defence Request for Provisional Release, *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-1, T. Ch. I, 5 June 2007

ICTR, Decision on Appeals against Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-A, A. Ch., 13 September 2007

ICTR, Decision on Reconsideration of Admission of Written Statements in Lieu of Oral Evidence and Admission of the Testimony of Witness GAY, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 28 September 2007

ICTR, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ndirumpatse, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 2 November 2007

ICTR, Judgment, *Prosecutor v. Nahimana, Barayagwiza, and Ngeze*, Case No. ICTR-99-52-A, A. Ch., 28 November 2007

ICTR, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, T. Ch. II, 22 September 2008

ICTR, Decision on Defence Motion for Provisional Release, *Prosecutor v. Nshogoza*, Case No. ICTR-07-91-PT, T. Ch. III, 17 December 2008

ICTR, Judgement and Sentence, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. I, 18 December 2008

ICTR, Decision on the Various Motions Relating to Mathieu Ndirumpatse's Health, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 6 February 2009

ICTR, Decision on Nzirorera's Motions to Subpoena Witnesses G and AWD for Interview, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 10 February 2009

ICTR, Decision on the Defence's Urgent Motion for a Subpoena to Ms. Loretta Lynch, *Prosecutor v. Nshogoza*, Case No. ICTR-07-91-T, T. Ch. III, 10 February 2009

ICTR, Decision on Defence Motion for Order to Prosecutor to Comply with his Disclosure Obligations and Motion for Stay of Proceedings Due to the On-going Violations of the Prosecutor's Disclosure Obligations, *Prosecutor v. Nshogoza*, Case No. ICTR—07-91-T, T. Ch. III, 10 February 2009

ICTR, Decision on Nzirorera's Motion for Subpoena to Jean-Marie Vianney Mudahinyuka, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 24 March 2009

ICTR, Decision on Defence Motion for Reconsideration of Decision Denying Provisional Release, *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-R65, T. Ch. III, 3 April 2009

ICTR, Decision on Mathieu Ndirumpatse's Appeal against Trial Chamber's Decision Denying Provisional Release, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR65, A. Ch., 7 April 2009

ICTR, Decision on Édouard Karemera's Motion Relating to his Right to be Tried Without Undue Delay, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 23 June 2009

ICTR, Décision on renvoi sur la requête de Mathieu Ndirumpatse en demande de mise en liberté provisoire, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 10 September 2009

ICTR, Judgement, *Prosecutor v. Nsengimana*, Case No. 01-69-T, T. Ch. I, 17 November 2009

ICTR, Decision on Joseph Nzirorera's Motion to Subpoena Michel Bagaragaza for an Interview, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 12 January 2010

ICTR, Decision on Matthieu Ndirumpatse's Motion to Vary his Conditions of Detention, *Prosecutor v. Ndirumpatse*, Case No. ICTR-98-44-T, President, 24 June 2010

ICTR, Further Registrar's Submissions Under Rule 33(B) of the Rules of Procedure and Evidence in Respect of the Appeals Chamber Order to the Registrar Dated 9 June 2010, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-A, A. Ch., 15 June 2010

ICTR, Judgement and Sentence, *Prosecutor v. Gatete*, Case No. ICTR-2000-61-T, T. Ch. III, 31 March 2011

ICTR, Decision on Nzabonimana's Motion for the Admission of Written Witness Statements, *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, T. Ch. III, 10 May 2011

ICTR, Judgement and Sentence, *Prosecutor v. Bizimungu*, Case No. Case No. ICTR-99-50-T, T. Ch. II, 30 September 2011

ICTR, *Prosecutor v. Bagosora et al.*, Judgement, Case No. ICTR-98-41-A, A. Ch., 14 December 2011

ICTR, Decision on Callixte Nzabonimana's Appeal against the Trial Chamber's Decision on Motion for Rule 91 Proceedings against Prosecution Investigators, *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-AR91, A. Ch., 27 April 2012

ICTR, Decision on Protais Zigiranyirazo's Motion for Damages, *Prosecutor v. Zigiranyirazo*, T. Ch. III, 18 June 2012

ICTR, Decision on Protais Zigiranyirazo's Motion for Damages, *Prosecutor v. Zigiranyirazo*, T. Ch. III, 18 June 2012, Partially Dissenting Opinion – Judge Park

SCSL

SCSL, Ruling on a Motion Applying for Bail or for Provisional Release Filed by the Applicant, *Prosecutor v. Brima*, Case No. SCSL-03-06-PT, T. Ch., 22 July 2002

SCSL, Documents Served on the National Authorities Pursuant to Rule 55 (C), *Prosecutor v. Gbao*, Case No. SCSL-2003-09-I, 18 March 2003

SCSL, Ruling on the Application for the Issue of a Writ of *Habeas Corpus* Filed by the Applicant, *Prosecutor v. Brima*, Case SCSL-03-66-PT, T. Ch., 22 July 2003

SCSL, Motion for Modification of the Conditions of Detention, *Prosecutor v. Norman*, Case No. SCSL-2003-08-PT, President, 23 July 2003

SCSL, Decision on the Urgent Defence Application for Release from Provisional Detention, *Prosecutor v. Kondewa*, Case No. SCSL-2003-12-PT, T. Ch., 21 November 2003

SCSL, Decision on the Urgent Defence Application for Release from Provisional Detention, *Prosecutor v. Fofana*, Case No. SCSL-2003-11-P[T], T. Ch., 21 November 2003

SCSL, Decision on the Motion by Morris Kallon for Bail, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-PT, T. Ch., 23 February 2004

SCSL, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction filed on Behalf of Accused Fofana, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-PT, T. Ch., 3 March 2004

SCSL, Decision on Constitutionality and Lack of Jurisdiction, *Prosecutor v. Kallon et al.*, Case No. SCSL-2004-15-AR72 (E), A. Ch, 13 March 2004

SCSL, Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process due to the Infringement of Principles of *Nullum Crimen Sine Lege* and Non-

Retroactivity as to Several Counts, *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-PT, T. Ch., 31 March 2004

SCSL, Decision on Application of Issa Sesay for Provisional Release, *Prosecutor v. Sesay*, Case No. SCSL-04-15-PT, T. Ch., 31 March 2004

SCSL, Norman – Decision on *Inter Partes* Motion by Prosecution to Freeze the Account of the Accused Sam Hinga Norman at the Union Trust Bank (SL) Limited or at any Other Bank in Sierra Leone, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-PT, T. Ch., 19 April 2004

SCSL, Decision on Immunity from Jurisdiction, *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, A. Ch., 31 May 2004

SCSL, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), *Prosecutor v. Norman*, Case No. SCSL-04-14-AR72(E), A. Ch., 31 May 2004

SCSL, Decision on Disclosure of Witness Statements and Cross-Examination, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, T. Ch. I, 16 July 2004

SCSL, Decision on Prosecution Request for Leave to Call Additional Witnesses, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, T. Ch., 29 July 2004

SCSL, Fofana - Decision on Application for Bail Pursuant to Rule 65, *Prosecutor v. Norman et al.*, T. Ch., 5 August 2004

SCSL, Fofana-Appeal against Decision Refusing Bail, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-AR65, A. Ch., 11 March 2005

SCSL, Transcript, *Prosecutor v. Sesay et al.*, Case No. 2004-15-T, T. Ch. 1, 28 April 2005

SCSL, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68, *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, T. Ch. II, 4 May 2005

SCSL, Decision on the Joint Defence Motion Requesting Conformity of Procedural Practice for Taking Witness Statements, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, T. Ch. I, 26 October 2005

SCSL, Decision on Complaint Pursuant to Article 32 of the Code of Professional Conduct for Counsel with the Right to Audience before the Special Court for Sierra Leone, *Prosecutor v. Sesay*, Case No. SCSL-04-15-CCC32, President, 20 February 2006

SCSL, Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, *Prosecutor v. Brima et al.*, Case No. SCSL-04-16T, T. Ch. II, 31 March 2006

SCSL, Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of Subpoena *Ad testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the

Republic of Sierra Leone, *Prosecutor v. Norman et al.*, Case No 04-14-T, T. Ch. I, 13 June 2006

SCSL, Dissenting Opinion of Hon. Justice Bankole Thompson on Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of Subpoena *Ad testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, *Prosecutor v. Norman et al.*, Case No 04-14-T, T. Ch. I, 13 June 2006

SCSL, Decision on Interlocutory Appeals against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T, A. Ch., 11 September 2006

SCSL, Dissenting Opinion of Hon. Justice Robertson on Decision on Interlocutory Appeals against Trial Chamber Decision Refusing to Subpoena The President of Sierra Leone, *Prosecutor v. Norman et al.*, SCSL-2004-14-T, A. Ch., 11 September 2006

SCSL, Decision on Confidential Prosecution Motion to Reopen the Prosecution Case to Present an Additional Prosecution Witness, *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, T. Ch. II, 28 September 2006

SCSL, Trial Transcript, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15, T. Ch. I, 13 June 2007

SCSL, Judgment, *Prosecutor v. Brima et al. (AFRC)*, Case No. SCSL-2004-16-T, T. Ch. II, 20 June 2007

SCSL, Trial Transcript, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15, T. Ch. I, 22 June 2007

SCSL, Judgement, *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T, T. Ch. I, 2 August 2007

SCSL, Judgement, *Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-A, A. Ch., 22 February 2008

SCSL, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15, T. Ch. I, 30 June 2008

SCSL, Separate Concurring and Partially Dissenting Opinion of Hon. Justice Benjamin Mutanga Itoe on the Decision on the Admissibility of Certain prior Statements of the Accused given to the Prosecution, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15, T. Ch. I, 30 June 2008

SCSL, Written Reasoned Decision on Motion for Issuance of a Subpoena to H.E. Dr. Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, T. Ch. I, 30 June 2008

SCSL, A Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber's Unanimous Written Reasoned on the Motion for Issuance of a Subpoena to H.E. Dr. Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, T. Ch. I, 30 June 2008

SCSL, Transcript, *Prosecutor v. Taylor*, Case No. SCSL-03-1-T, T. Ch. II, 19 January 2009.

SCSL, Decision on 'Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents', *Prosecutor v. Taylor*, Case No. SCSL-2003-01-AR73, A. Ch. 6 February 2009

SCSL, Judgement, *Prosecutor v. Brima et al.*, A. Ch., Case No. SCSL-2004-16-A, 14 October 2011

SCSL, Judgement, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, T. Ch. II, 18 May 2012

ICC

ICC, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, *Situation in Uganda*, Case No. ICC-02/04-1, Presidency, 5 July 2004

ICC, Decision to Convene a Status Conference, *Situation in the DRC*, Case No. ICC-01/04-9, PTC I, 17 February 2005

ICC, Decision on the Prosecutor's Request for Measures under Article 56, *Situation in the DRC*, Case No. ICC-01/04-21, PTC I, 26 April 2005

ICC, Decision on Prosecutor's Application for Warrants of Arrest under Article 58, *Situation in Uganda*, Situation No. ICC-02/04, PTC II, 8 July 2005

ICC, Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, *Situation in Uganda*, Case No. 02/04-01/05-60, PTC II, 28 October 2005

ICC, Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, *Situation in Uganda*, Case No. ICC-02/04-01/05-68, PTC II, 2 December 2005

ICC, OTP Submission Providing Information on the Status of the Investigation in Anticipation of the Status Conference to be Held on 13 January 2006, *Prosecutor v. Kony et al.*, *Situation in Uganda*, PTC II, Case No. ICC-02/04-01/05-76, 11 January 2006

ICC, Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the DRC*, Case No. ICC-01/04-101, PTC I, 17 January 2006

ICC, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06, PTC I, 10 February 2006

ICC, Decision on the Prosecutor's Application for Warrants of Arrest, *Situation in the DRC*, Case No. ICC-01/04-01/07, PTC I, 10 February 2006

ICC, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-8, PTC I, 24 February 2006

ICC, Demande adressée à la République Démocratique du Congo en vue d'obtenir l'identification, la localisation, le gel et la saisie des biens et avoirs de M. Thomas Lubanga Dyilo, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06, PTC I, 9 March 2006

ICC, Decision to Unseal the Warrant of Arrest against Mr. Thomas Lubanga Dyilo and Related Documents, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06, PTC I, 17 March 2006

ICC, Request to States Parties to the Rome Statute for the Identification, Tracing and Freezing or Seizure of the Property and Assets of Mr. Lubanga Dyilo, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06, PTC I, 31 March 2006

ICC, Decision on the Final System of Disclosure and the Establishment of the Timetable, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-102, PTC I, 15 May 2006

ICC, Application for Release, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06, PTC I, 23 May 2006

ICC, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, *Situation in the DRC*, Case No. ICC-01/04-168, A. Ch., 13 July 2006

ICC, Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I Entitled: "Decision on the Prosecutor's Application for Warrants of Arrest", Article 58, *Situation in the Democratic Republic of the Congo*, Situation No. ICC-01/04-169, A. Ch., 13 July 2006

ICC, Decision Inviting Observations in Application of Rule 103, *Situation in Darfur, Sudan*, Situation No. 02/05-10, PTC I, 24 July 2006

ICC, Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC, *Situation in Darfur, Sudan*, Situation No. ICC-01/05-14, PTC I, 25 August 2006

ICC, Notification that Government of Uganda has Requested the Office of The Prosecutor to Provide Assistance in Conducting DNA Tests on the Alleged Body of Raska Lukwiya, *Situation in Uganda*, Case No. ICC-02/04-01/05-269, PTC II, 28 August 2006

ICC, Decision on the Prosecutor’s “Application for Leave to Reply to ‘Conclusions de la défense en réponse au mémoire d’appel du Procureur’”, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06, A. Ch., 12 September 2006, Separate Opinion of Judge Georghios M. Pikis

ICC, Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-512, PTC I, 3 October 2006

ICC, Observations of the United Nations High Commissioner for Human Rights Invited in Application of Rule 103 of the Rules of Procedure and Evidence, *Situation in Darfur, Sudan*, Situation No. 02/05-19, PTC I, 10 October 2006

ICC, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I Entitled: “Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-568 (OA 3), A. Ch., 13 October 2006

ICC, Decision on the Application for the Interim Release of Thomas Lubanga Dyilo, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-586, PTC I, 18 October 2006

ICC, Public Redacted Version of Request to Exclude Evidence Obtained in Violation of Article 69 (7) of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-683, PTC I, 7 November 2006

ICC, Decision on the Practices of Witness Familiarisation and Witness Proofing, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-679, PTC I, 8 November 2006

ICC, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, *Situation in the Central African Republic*, Situation No. ICC-01/05-6, PTC III, 30 November 2006

ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006

ICC, Prosecution’s Report pursuant to Pre-Trial Chamber III’s 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the

Central African Republic, *Situation in the Central African Republic*, Situation No. ICC-01/05-7, PTC III, 15 December 2006

ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-803, PTC I, 29 January 2007

ICC, Judgment on the Appeal of Mr. Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. 01/04-01/06-824, A. Ch., 13 February 2007

ICC, Judgment on the Appeal of Mr. Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. 01/04-01/06-824, A. Ch., 13 February 2007, Separate Opinion of Judge Georghios M. Pikis

ICC, Review of the “Decision on the Application for the Interim Release of Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-826, PTC I, 14 February 2007

ICC, Reasons for “Decision of the Appeals Chamber on the Defence Application ‘Demande de suspension de toute action ou procédure afin de permettre la désignation d’un nouveau Conseil de la Défense’ Filed on 20 February 2007” Issued on 23 February 2007, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-844, A. Ch., 9 March 2007

ICC, Decision on the Prosecution Application under Article 58 (7) of the Statute, *Prosecutor v. Harun and Kushayb, Situation in Darfur, Sudan*, Case No. ICC-02/05-01/07-1, PTC I, 27 April 2007

ICC, Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-915, PTC I, 24 May 2007

ICC, Second Review of the “Decision on the Application for Interim Release of Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-926, PTC I, 11 June 2007

ICC, Decision on the Admissibility of the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled “Décision sur la confirmation des charges” of 29 January 2007, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-926 (OA 8), A. Ch., 13 June 2007

ICC, Urgent Request to the Democratic Republic of the Congo for the Purpose of Obtaining the Identification, Tracing, Freezing and Seizure of the Property and Assets of Germain Katanga, *Prosecutor v. Katanga, Situation in the DRC*, Case No. ICC-01/04-01/07, PTC I, 6 July 2007

ICC, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Mathieu Ngudjolo Chui, *Prosecutor v. Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-02/07, PTC I, 6 July 2007

ICC, Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a0070/06, a0081/06 to a0104/06 and a0111/06 to a0127/06, *Prosecutor v. Kony, Otti, Odhiambo and Ongwen, Situation in Uganda*, Case No. ICC-02/04-01/05-252, PTC II, 10 August 2007

ICC, Decision Reviewing the "Decision on the Application for the Interim Release of Thomas Lubanga Dyilo", *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-976, T. Ch. I, 9 October 2007

ICC, Transcript, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-T-52, T. Ch. I, 10 October 2007

ICC, Decision to Unseal the Warrant of Arrest against Germain Katanga, *Prosecutor v. Katanga, Situation in the DRC*, Case No. 01/04-01/07, PTC I, 18 October 2007

ICC, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-1049, T. Ch. I, 30 November 2007

ICC, Decision Concerning Observations on the Review of the Pre-Trial Detention of Germain Katanga, *Prosecutor v. Katanga, Situation in the DRC*, Case No. ICC-01/04-01/07, PTC I, 24 January 2008

ICC, Decision to Unseal the Warrant of Arrest against Mathieu Ngudjolo Chui, *Prosecutor v. Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-02/07, PTC I, 7 February 2008

ICC, Decision Concerning Pre-Trial Detention of Germain Katanga, *Prosecutor v. Katanga, Situation in the DRC*, Case No. ICC-01/04-01/07, PTC I, 21 February 2008

ICC, Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-307, PTC I, 10 March 2008

ICC, Decision on the Powers of the Pre-Trial Chamber to Review *proprio motu* the Pre-Trial Detention of Germain Katanga, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-330, PTC I, 18 March 2008

ICC, Prosecution's Observations Regarding Admission for the Confirmation Hearing of the Transcripts of Interview of Deceased Witness 12 pursuant to Articles 61 and 69 of the Statute, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-336, PTC I, 20 March 2008

ICC, Consolidated E-Court Protocol, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No ICC-01/04-01/06-1263, T. Ch. I, 4 April 2008

ICC, Decision on the Admissibility for the Confirmation Hearing of the Transcripts of Interview of the Deceased Witness 12, *Prosecutor v. Katanga and Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-412, PTC I, 18 April 2008

ICC, Decision on the “Defence Application Pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)”, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-444, PTC I, 25 April 2008

ICC, Decision on the “Defence Application pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)”, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-444, PTC I, 25 April 2008, Partly Dissenting Opinion of Judge Anita Ušacka

ICC, Decision to Unseal the Warrant of Arrest against Bosco Ntaganda, *Prosecutor v. Ntaganda, Situation in the DRC*, Case No. ICC-01/04-02/06-18, PTC I, 28 April 2008

ICC, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-474, PTC I, 13 May 2008

ICC, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I Entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, *Prosecutor v. Katanga, Situation in the DRC*, Case No. ICC-01/04-01/07-475, A. Ch., 13 May 2008

ICC, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I Entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, *Prosecutor v. Katanga, Situation in the DRC*, Case No. ICC-01/04-01/07-475, A. Ch., 13 May 2008, Dissenting Opinion of Judge Pikis

ICC, Decision on the Defences’ Applications for Leave to Appeal the “Decision on the Admissibility for the Confirmation Hearing of the Transcripts of Interview of Deceased Witness 12”, *Prosecution v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-496, PTC I, 22 May 2008

ICC, Decision to Unseal the Warrant of Arrest against Mr. Jean-Pierre Bemba Gombo, *Prosecutor v. Bemba Gombo, Situation in the CAR*, Case No. ICC-01/05-01/08-5, PTC III, 24 May 2008

ICC, Judgment on the Appeal of Mr. Germain Katanga against the Decision of Pre-Trial Chamber I Entitled “Decision on the Defence Request Concerning Languages”, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07, A. Ch., 27 May 2008

ICC, In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, *Prosecutor v.*

Katanga and Chui, Situation in the DRC, Case No. ICC-01/04-01/07-572 (OA 4), A. Ch., 9 June 2008

ICC, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08, PTC III, 10 June 2008

ICC, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-1401, T. Ch. I, 13 June 2008

ICC, Decision Concerning Observations on the Review of the Pre-Trial Detention of Mathieu Ngudjolo Chui, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-602, PTC I, 17 June 2008

ICC, Decision on the Release of Thomas Lubanga Dyilo, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-1418, T. Ch. I, 2 July 2008

ICC, Decision Concerning Observations on the Review of the Pre-Trial Detention of Germain Katanga, *Prosecutor v. Katanga and Ngudjolo Chiu*, Case No. ICC-01/04-01/07-668, PTC I, 9 July 2008

ICC, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-1432 (OA 9 OA 10), A. Ch., 11 July 2008

ICC, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, *Prosecutor v. Bemba Gombo, Situation in the CAR*, ICC-01/05-01/08-14, PTC III, 17 July 2008

ICC, Review of the "Decision on the Application for Interim Release of Mathieu Ngudjolo Chui", *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07, PTC I, 23 July 2008

ICC, Defence Request for a Ruling on the Admissibility of two Categories of Evidence, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. 01/04-01/10-329-Corr, PTC I, 10 August 2008

ICC, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07, T. Ch. II, 20 August 2008

ICC, Decision on the Prosecutor's Application for Leave to Appeal Pre-Trial Chamber III's Decision on Disclosure, *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-75, PTC III, 25 August 2008

ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the African Republic*, Case No. ICC-01/05-01/08-80-Anx, PTC III, 20 August 2008 (annexed to ICC, Decision Concerning the Public Version of the “Decision on Application for Interim Release” of 20 August 2008, *Prosecutor v. Bemba, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-80, PTC II, 26 August 2008)

ICC, Decision on the Confirmation of Charges, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-717, PTC I, 30 September 2008

ICC, Judgment on the Appeal against the Decision of Trial Chamber I Entitled “Decision on the Release of Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01-06-1487 (OA 12), A. Ch., 21 October 2008

ICC, Judgment on the Appeal against the Decision of Trial Chamber I Entitled “Decision on the Release of Thomas Lubanga Dyilo”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01-06-1487 (OA 12), A. Ch., 21 October 2008, Dissenting Opinion of Judge Georghios M. Pikis

ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I Entitled “Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-1486 (OA 13), A. Ch., 21 October 2008

ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I Entitled “Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-1486 (OA 13), A. Ch., 21 October 2008, Separate Opinion of Judge Georghios M. Pikis

ICC, Request for Cooperation to Initiate an Investigation Addressed to the Competent Authorities of the Republic of Portugal, *Prosecutor v. Bemba Gombo, Situation in the CAR*, Case No. ICC-01/05-01/08, PTC II, 17 November 2008

ICC, Fourth Decision on Victims’ Participation, *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-320, PTC III, 12 December 2008

ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08, PTC III, 16 December 2008

ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled “Decision on Application for Interim Release”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-323 (OA), A. Ch., 16 December 2008

ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III Entitled “Decision on Application for Interim Release”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-323 (OA), A. Ch., 16 December 2008, Dissenting Opinion of Judge Pikis

ICC, Judgment on Victim Participation in the Investigation Stage of Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, *Situation in the DRC*, Case No. ICC-01/04-556 (OA4 OA5 OA6), A. Ch., 19 December 2008

ICC, Decision on the Prosecution’s Application for the Admission of Prior Recorded Statements of two Witnesses, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06, T. Ch. I, 15 January 2009

ICC, Judgment on Victim Participation in the Investigation Phase of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 3 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 6 December 2007, *Situation in Darfur, Sudan*, Case No. ICC-02/05-177 (OA OA2 OA3), A. Ch., 2 February 2009

ICC, Decision on Application Under Rule 103, *Situation in Darfur, Sudan*, Case No. ICC-02/05-185, PTC I, 4 February 2009

ICC, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Prosecutor v. Al Bashir, Situation in Darfur, Sudan*, Case No. ICC 02/05-01/09-3, PTC I, 4 March 2009

ICC, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Prosecutor v. Al Bashir, Situation in Darfur, Sudan*, Case No. ICC 02/05-01/09-3, PTC I, 4 March 2009, Separate and Partly Dissenting Opinion of Judge Ušacka

ICC, Decision on the Admissibility of the Case under Article 19 (1), *Prosecutor v. Kony et al., Situation in Uganda*, Case No. ICC-02/04-01/05-377, PTC II, 10 March 2009

ICC, Third Review of the Decision on the Application for Interim Release of Mathieu Ngujolo (Rule 118 (2) of the Rules of Procedure and Evidence), *Prosecutor v. Katanga and Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-965, T. Ch. II, 17 March 2009

ICC, Decision on the Prosecutor’s Request Relating to three Forensic Experts, *Prosecutor v. Katanga and Ngujolo Chui, Situation in the DRC*, Case No. ICC- 01/04-01/07-988, T. Ch. II, 25 March 2009

ICC, Decision on Application for Interim Release, *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-403, PTC II, 14 April 2009

ICC, Decision on the Prosecutor’s Application under Article 58, *Prosecutor v. Abu Garda, Situation in Darfur, Sudan*, Case No. ICC-02/05-02/09, PTC I, 7 May 2009

ICC, Summons to Appear for Bahr Idriss Abu Garda, *Prosecutor v. Abu Garda, Situation in Darfur, Sudan*, Case No. ICC-02/02-02/09-2, PTC I, 7 May 2009

ICC, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-1213, T. Ch. II, 16 June 2009

ICC, Decision on the Admission of Material from the “Bar Table”, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-1981, T. Ch. I, 24 June 2009

ICC, Transcript of Hearing, *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-T, PTC II, 29 June 2009

ICC, Public Redacted Version of the Defence Motion for a Declaration on Unlawful Detention and Stay of Proceedings (ICC-01/07-01/04-1258-Conf-Exp), *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07, T. Ch. II, 2 July 2009

ICC, Decision on the Defence’s Urgent Request Concerning Mr. Jean-Pierre Bemba’s Attendance of his Father’s Funeral, *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-437-Conf, PTC II, 8 July 2009

ICC, Decision on the Applications by 7 Victims to Participate in the Proceedings, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2035, T. Ch. I, 10 July 2009

ICC, Prosecution Response to the Defence’s Urgent “Requête aux fins de suspension de toute la procédure en cours”, *Prosecutor v. Bemba Gombo, Situation in the CAR*, Case No. ICC-01/05-01/08, PTC II, 7 August 2009

ICC, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08, PTC II, 14 August 2009

ICC, Second Decision on the Prosecutor’s Application under Article 58, Sudan, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan*, Case No. ICC-02/05-03/09, PTC I, 27 August 2009

ICC, Summons to Appear for Saleh Mohammed Jerbo Jamus, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Janus, Situation in Darfur, Sudan*, Case No. ICC-02/05-03/09-2, PTC I, 27 August 2009

ICC, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-1497, PTC II, 25 September 2009

ICC, Decision on the Prosecution Request for the Addition of Witness P-219 to the Prosecution List of Incriminating Witnesses and the Disclosure of Related Incriminating Material to the Defence, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-1553, T. Ch. II, 23 October 2009

ICC, Transcript, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009

ICC, Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-631 (OA2), A. Ch., 2 December 2009

ICC, Public Redacted Version of the "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings" of 20 November 2009 (ICC-01/04-01/07-1666-Cong-Exp), *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07, T. Ch. II, 3 December 2009

ICC, Transcript of Hearing, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-T, T. Ch. III, 8 December 2009

ICC, Judgment on the Appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 Entitled "Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court", *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2205 (OA15 OA16), A. Ch., 8 December 2009

ICC, Decision on Modalities of Victim Participation, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-1788, T. Ch. II, 22 January 2010

ICC, Judgment on the Appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", *Prosecutor v. Al Bashir, Situation in Darfur, Sudan*, Case No. ICC 02/05-01/09-73, PTC I, 3 February 2010

ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010

ICC, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, PTC II, 31 March 2010, Dissenting Opinion of Judge Hans-Peter Kaul

ICC, Decision on Review of the Detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rules of Procedure and Evidence, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-743, T. Ch. III, 1 April 2010

ICC, Public Redacted Version of “Decision on the Defence Request for Disclosure of Pre-Interview Assessments and the Consequences of Non-Disclosure” (ICC-01/05-01/08-750-Conf), *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. 01/05-01/08-750-Red, T. Ch. III, 9 April 2010

ICC, Redacted Decision on Intermediaries, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2434, T. Ch. I, 31 May 2010

ICC, Transcript, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-T-303, T. Ch. I, 17 June 2010

ICC, Redacted Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending further Consultations with the VWU, *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-2517, T. Ch. I, 8 July 2010

ICC, Judgment on the Appeal of Mr. Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-2259 (OA 10), A. Ch., 12 July 2010

ICC, Transcript, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-T-314, T. Ch. I, 15 July 2010

ICC, Decision on the Review of the Detention of Mr. Jean-Pierre Bemba pursuant to Rule 118 (2) of the Rules of Procedure and Evidence, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-843, T. Ch. III, 28 July 2010

ICC, Judgment on the Appeal of Mr. Katanga against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, Dissenting Opinion of Judge Erkki Kourula and Judge Ekaterina Trendafilova, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-2259 (OA 10), A. Ch., 28 July 2010

ICC, Decision on the Prosecutor’s Request to Allow the Introduction into Evidence of the Prior Recorded Testimony of P-166 and P-219, *Prosecutor v. Katanga and Mathieu Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-2362, T. Ch. II, 3 September 2010

ICC, Decision Requesting Clarification on the Prosecutor’s Application under Article 58, *Situation in the DRC*, Case No. ICC-01/04-575, PTC I, 6 September 2010

ICC, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10, PTC I, 28 September 2010

ICC, Judgment on the Appeal of Prosecutor against the Oral Decision of Trial Chamber I of 15 July 2010 to Release Thomas Lubanga Dyilo, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2583 (OA 17), A. Ch., 8 October 2010

ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I of 8 July 2010 Entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU" (OA 18), *Prosecutor v. Lubanga, Situation in the DRC*, Case No. ICC-01/04-01/06-2582, A. Ch., 8 October 2010

ICC, Recommendations adressées à la Chambre d'instruction de la Cour d'Appel de Paris en vertu de l'article 59 du Statut de Rome, *Le Procureur c. Mbarushimana, Situation en RDC*, Affaire No. ICC-01/04-01/10-15, Ch. P. I, 18 octobre 2010

ICC, Decision on "Prosecution's Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)", *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-2589, T. Ch. I, 21 October 2010

ICC, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. 01/09-24, 3 November 2010

ICC, Decision on Victims' Participation in Proceedings Related to the Situation in the Central African Republic, *Situation in the CAR*, Situation No. 01/05-31, PTC II, 11 November 2010

ICC, Transcript of Deposition of 16 November 2010, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-Rule68Deposition-Red2-ENG, T. Ch. I, 16 November 2010

ICC, Decision on the "Defence Application pursuant to Article 57(3)(b) of the Statute for an Order for the Preparation and Transmission of a Cooperation Request to the Government of the Republic of Sudan", *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan*, Case No. ICC-02/05-03/09-102, PTC I, 17 November 2010

ICC, Transcript of Deposition on 18 November 2010, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, T. Ch. I, 18 November 2010

ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 28 July 2010 Entitled "Decision on the Review of the Detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rules of Procedure and Evidence", *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1019 (OA 4), A. Ch., 19 November 2010

ICC, Decision on Review of Detention of Mr. Jean-Pierre Bemba Gombo pursuant to the Appeals Judgment of 19 November 2010, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1088, T. Ch. III, 17 December 2010

ICC, Decision on the Prosecutor's Bar Table Motions, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-2635, T. Ch. II, 17 December 2010

ICC, Decision on the Defence Request for Mr. Jean-Pierre Bemba to Attend his Stepmother's Funeral, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1099, T. Ch. III, 12 January 2011

ICC, Second Decision on Application by Nine Persons to be Questioned by the Office of the Prosecutor, *Situation in the Republic of Kenya*, Case No. ICC-01/09-39, PTC II, 31 January 2011

ICC, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-51, PTC I, 31 January 2011

ICC, Prosecution's Response to the Defence's "Requête de la défense aux fins d'arrêt définitive des procédures", *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2678-Red, T. Ch. I, 31 January 2011

ICC, Decision on the "Prosecution's Request for a Review of Potentially Privileged Material", *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-67, PTC I, 4 March 2011

ICC, Redacted Decision on the "Defence Application Seeking a Permanent Stay of Proceedings", *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-2011, T. Ch. I, 7 March 2011

ICC, Decision on Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Situation in the Republic of Kenya*, Case No. 01/09-01/11-01, PTC II, 8 March 2011

ICC, Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-01, PTC II, 8 March 2011

ICC, Decision on the 'Defence Request for an Order for State Cooperation Pursuant to Article 57(3)(b) of the Rome Statute', *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-85, PTC I, 24 March 2011

ICC, Decision Ensuring the Rights of the Defence for the Purposes of the Initial Appearance Hearing, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Situation in the Republic of Kenya*, PTC II, 30 March 2011

ICC, Decision on Variation of Summons Conditions, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-38, PTC II, 4 April 2011

ICC, Decision on Victims' Participation in Proceedings Relating to the Situation in the Democratic Republic of the Congo, *Situation in the DRC*, Case No. ICC-01/04-593, PTC I, 11 April 2011

ICC, Second Decision on Matters Regarding the Review of Potentially Privileged Material, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-105, PTC I, 15 April 2011

ICC, Version publique expurgée de «Ordonnance relative à la mise en oeuvre de l'article 93-2 du Statut et des règles 191 et 74 du Règlement de procédure et de preuve au profit de témoins de la Défense de Germain Katanga », *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, ICC-01/04-01/07-2748, TC II, 3 May 2011

ICC, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-96, PTC II, 30 May 2011

ICC, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2) (b) of the Statute, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Situation in the Republic of Kenya*, Case No. ICC-01/09-01/11-101, PTC II, 30 May 2011

ICC, Decision on the Re-interviews of six Witnesses by the Prosecution, *Prosecutor v. Abakaer Nourain and Jerbo Jamus, Situation in Darfur, Sudan*, Case No. ICC-02/05-03/09-158, T. Ch. IV, 6 June 2011

ICC, Decision on the Prosecutor's Application pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADAFFI, Saif Al-Islam GADAFFI and Abdullah AL-SENSUSSI, *Situation in the Libyan Arab Jamahiriya*, Situation No. ICC-01-11, 27 June 2011

ICC, Decision on "Defence Application Pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an Order for the Preparation and Transmission of a Cooperation Request to the Government of the Republic of the Sudan", *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan*, ICC-02/05-03/09-169, T. Ch. IV, 1 July 2011

ICC, Decision on the "Defence Request for a Permanent Stay of Proceedings", *Prosecutor v. Callixte Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-264, PTC I, 1 July 2011

ICC, Judgment on the Appeal of Mr Callixte Mbarushimana against the Decision of Pre-Trial Chamber I of 19 May 2011 entitled "Decision on the Defence Request for Interim Release",

Prosecutor v. Mbarushimana, Situation in the DRC, Case No. ICC-01/04-01/10-283, A. Ch., 14 July 2011

ICC, Defence Challenge to the Jurisdiction of the Court, *Prosecutor v. Mbarushimana, Situation in the DRC*, ICC-01/04-01/10-290, PTC I, 20 July 2011

ICC, Redacted Decision on the Request by DRC-DOI-WWWW-0019 for Special Protective Measures Relating to his Asylum Application, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2766-Red, T. Ch. I, 5 August 2011

ICC, Public Redacted Version of the “Decision on Applications for Provisional Release” of 27 June 2011, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1565-Red, T. Ch. III, 16 August 2011

ICC, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 27 June 2011 Entitled “Decision on Applications for Provisional Release”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1626-Red (OA 7), A. Ch., 19 August 2011

ICC, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Situation in the Republic of Kenya*, Case No. ICC-01/09-01/11-307, A. Ch., 30 August 2011

ICC, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-274, A. Ch., 30 August 2011

ICC, Decision on the “Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1691, T. Ch. III, 2 September 2011

ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 2 September 2011 Entitled “Decision on the ‘Demande de mise en liberté de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo’”, *Prosecutor v. Bemba Gombo, Situation in the DRC*, Case No. ICC-01/05-01/08-1722 (OA 8), A. Ch., 9 September 2011

ICC, Public Redacted Version of the 26 September 2011 Decision on the Accused's Application for Provisional Release in Light of the Appeals Chamber's Judgment of 19 August 2011, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1789-Red, T. Ch. III, 27 September 2011

ICC, Judge Fernández de Gurmendi's Separate and Partially Dissenting Opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in Côte d'Ivoire*, Situation No. ICC-02/11-15, PTC III, 3 October 2011

ICC, Corrigendum to “Judge Fernández de Gurmendi’s Separate and Partially Dissenting Opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d’Ivoire”, *Situation in the Republic of Cote d’Ivoire*, Situation No. ICC-02/11-15-Corr, PTC III, 5 October 2011

ICC, Decision on the “Defence Challenge to the Jurisdiction of the Court”, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-451, PTC I, 26 October 2011

ICC, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09-24, PTC II, 4 November 2011

ICC, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Situation in the Republic of Côte d’Ivoire”, *Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-14-Corr, PTC III, 15 November 2011

ICC, Public Redacted Version of “Decision on the Prosecutor’s Application Pursuant to Article 58 for a Warrant of Arrest against Laurent Koudou Gbagbo, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-9-Red, PTC III, 30 November 2011

ICC, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Prosecutor v. Al Bashir, Situation in Darfur, Sudan*, Case No. ICC-02/05-01/09-139-Corr, PTC I, 12 December 2011

ICC, Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Prosecutor v. Al Bashir, Situation in Darfur, Sudan*, Case No. ICC-02/05-01/09-140, PTC I, 13 December 2011

ICC, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 26 September 2011 Entitled “Decision on the Accused's Application for Provisional Release in Light of the Appeals Chamber's Judgment of 19 August 2011”, *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-1937-Red2 (OA 9), A. Ch., 15 December 2011

ICC, Decision on the Confirmation of Charges, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-465-Red, PTC II, 16 December 2011

ICC, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Muthaura, Muigai Kenyatta and Hussein Ali, Situation in the Republic of Kenya*, Case No ICC-01/09-02/11-382-Red, PTC II, 23 January 2012

ICC, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Muthaura, Muigai Kenyatta and Hussein Ali, Situation in the Republic of Kenya*, Case No ICC-01/09-02/11-382-Red, PTC II, 23 January 2012, Dissenting Opinion by Judge Hans-Peter Kaul

ICC, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Situation in the Republic of Kenya*, Case No. ICC-01/09-01/11-373, PTC II, 23 January 2012

ICC, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Situation in the Republic of Kenya*, Case No. ICC-01/09-01/11-373, PTC II, 23 January 2012, Dissenting Opinion by Judge Hans-Peter Kaul

ICC, Decision on Victims' Participation in Proceedings Related to the Situation in Libya, *Situation in Libya*, Situation No. ICC-01/11-28, PTC I, 24 January 2012

ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber IV of 12 September 2011 Entitled "Reasons for the Order on Translation of Witness Statements (ICC-02/05-03/09-199) and Additional Instructions on Translation", *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan*, Case No. ICC-02/05-03/09-295, A. Ch., 17 February 2012

ICC, Public Redacted Version of "Decision on the Prosecutor's Application under Article 58 Relating to Abdel Raheem Muhammad Hussein, *Prosecutor v. Abdel Raheem Muhammad Hussein, Situation in Darfur, Sudan*, Case No. ICC-02/05-01-12-1, PTC I, 1 March 2012

ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 6 January 2012 Entitled "Decision on the Defence's 28 December 2011 "Requête de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo", *Prosecutor v. Bemba Gombo, Situation in the Central African Republic*, Case No. ICC-01/05-01/08-2151-Red (OA 10), A. Ch., 5 March 2012

ICC, Decision on Victim's Participation in Proceedings Related to the Situation in Uganda, *Situation in Uganda*, Situation No. ICC-02/04-191, PTC II, 9 March 2012

ICC, Judgement pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012

ICC, Judgement pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, Separate Opinion of Judge Adrian Fulford

ICC, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 Entitled “Decision on the Confirmation of Charges”, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. 01/04-01/10-514 (OA 4), A. Ch., 30 May 2012

ICC, Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-180-Red, PTC I, 13 July 2012

ICC, Decision on the Prosecutor’s Application under Article 58, *Prosecutor v. Mudacumura, Situation in the DRC*, Case No. ICC-01/04-01/12-1, PTC II, 13 July 2012

ICC, Decision on the ‘Corrigendum of the Challenge to the Jurisdiction of the International Criminal Court on the Basis of Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute Filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)’, *Prosecutor v. Gbagbo, Situation in Côte d’Ivoire*, Case No. ICC-02/11-01/11-212, PTC I, 15 August 2012

ICC, Protocol, Annex to ICC, Decision on the Protocol Concerning the Handling of Confidential Information and Contacts of a Party with Witnesses whom the Opposing Party Intends to Call, *Prosecutor v William Samoei Ruto and Joshua Arap Sang, Situation in the Republic of Kenya*, ICC-01/09-01/11-449, T. Ch. V, 24 August 2012

ICC, Protocol, Annex to Decision on the Protocol Concerning the Handling of Confidential Information and Contacts of a Party with Witnesses whom the Opposing Party Intends to Call, *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-469, T. Ch. V, 24 August 2012

ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan*, Case No. ICC-02/05-03/09-410, T. Ch. IV, 26 October 2012

ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-278 (OA), A. Ch., 26 October 2012

ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-278 (OA), A. Ch., 26 October 2012, Dissenting Opinion of Judge Anita Ušacka

ICC, Decision on the Fitness of Laurent Gbagbo to Take Part in the Proceedings before this Court, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11-01/11-286-Red, PTC I, 2 November 2012

ICC, Decision on the Review of Laurent Gbagbo's Detention pursuant to Article 60(3) of the Rome Statute, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d'Ivoire*, Case No. ICC-02/11-01/11-291, PTC I, 12 November 2012

ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I on Jurisdiction and Stay of Proceedings, *Prosecutor v. Gbagbo, Situation in Côte d'Ivoire*, Case No. ICC-02/11-01/11-321 (OA 2), A. Ch., 12 December 2012

ICC, Judgment pursuant to Article 74 of the Statute, *Prosecutor v. Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-02/12-3, T. Ch. II, 18 December 2012

ICC, Decision on the Application for a Ruling on the Legality of the Arrest of Mr. Dennis Ole Intumbi, *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-534, T. Ch. V, 19 December 2012

ICC, Decision on the Request for the Conditional Release of Laurent Gbagbo and on his Medical Treatment, *Prosecutor v. Gbagbo, Situation in the Republic of Côte d'Ivoire*, Case No. ICC-02/11-01/11-362-Red, PTC I, 18 January 2013

ICC, Protocol on the Handling of Confidential Information and Contact between a Party and Witnesses of the Opposing Party, Annex to ICC, Decision on the Protocol on the Handling of Confidential Information and Contact between a Party and Witnesses of the Opposing Party, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan*, ICC-02/05-03/09-451, T. Ch. IV, 18 February 2013

ICC, Decision on Defence Application pursuant to Article 64(4) and Related Requests, *Prosecutor v. Uhuru Muigai Kenyatta, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-728, T. Ch. V, 26 April 2013

ICC, Decision on Defence Application pursuant to Article 64(4) and Related Requests, *Prosecutor v. Uhuru Muigai Kenyatta, Situation in the Republic of Kenya*, Case No. ICC-01/09-02/11-728, T. Ch. V, 26 April 2013, Concurring Opinion of Judge Christine Van den Wyngaert

ICC, Decision on the Admissibility of the Case against Saif Al-Islam Gadaffi, *Prosecutor v. Saif Al-Islam Gadaffi and Abdullah Al-Senussi, Situation in Lybia*, Case No. ICC-01/11-01/11-344-Red, PTC I, 31 May 2013

ECCC

ECCC, Order of Provisional Detention, *KAING Guek Eav alias "Duch"*, Case No. 002/14-08-2006, OCIJ, 31 July 2007

ECCC, Order of Provisional Detention, *NUON Chea*, Case No. 002/14-08-2006, OCIJ, 19 September 2007

ECCC, Police Custody Decision, *IENG Sary*, Case No. 002/14-08-2006, OCIJ, 12 November 2007

ECCC, Police Custody Decision, *IENG Thirith*, Case No. 002/14-08-2006, OCIJ, 12 November 2007

ECCC, Provisional Detention Order, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, OCIJ, 14 November 2007

ECCC, Provisional Detention Order, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ, OCIJ, 14 November 2007

ECCC, Provisional Detention Order, *KHIEU Samphan*, Case No. 002/14-08-2006, OCIJ, 19 November 2007

ECCC, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias “Duch”, *KAING Guek Eav alias “Duch”*, Case No. 001/18-07-2007-ECCC-OCIJ, PTC, 3 December 2007

ECCC, OCIJ Memorandum to the Defence, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ, 10 January 2008

ECCC, Decision on Appeal Against Provisional Detention Order of Nuon Chea, *NUON Chea et al.*, Case File No. 002/19-09-2007, PTC, 20 March 2008

ECCC, Decision on Civil Party Participation in Provisional Detention Appeals, *Nuon Chea et al.*, Case No. ECCC-002/19-09-2007-ECCC/OCIJ (PTC 1), PTC, 20 March 2008

ECCC, Order Refusing the Request for Release, *KHIEU Samphan*, Case No. 002/14-08-2006, OCIJ, 23 June 2008

ECCC, Decision on Appeal against Provisional Detention Order of IENG Thirith, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), PTC, 9 July 2008

ECCC, Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, *NUON Chea et al.*, Case No. 002/19-09-2007, PTC, 26 August 2008

ECCC, Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/10-09-2007-ECCC-OCIJ, OCIJ, 16 September 2008

ECCC, Decision Relating to Notice of Withdrawal of Appeal, *NUON Chea et al.*, Case No. 002/9-09-2007/ECCC/OCIJ (PTC04), PTC, 15 October 2008

ECCC, Decision on Appeal against Provisional Detention Order of IENG Sary, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), PTC, 17 October 2008

ECCC, Decision on Ieng Sary’s Appeal Regarding Appointment of a Psychiatric Expert, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 10), 21 October 2008

ECCC, Decision on Nuon Chea's Appeal Regarding Appointment of an Expert, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC07), PTC, 22 October 2008

ECCC, Order Refusing Request for Release, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 28 October 2008

ECCC, Order on Extension of Provisional Detention, *IENG Sary*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008

ECCC, Order on Extension of Provisional Release, *IENG Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2008

ECCC, Order on Extension of Provisional Detention, *KHIEU Samphan*, Case No. 002/14-08-2006, OCIJ, 18 November 2008

ECCC, Decision on Appeal against Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009

ECCC, Decision on IENG Thirith's Appeal against Order on Extension of Provisional Detention, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC16), PTC, 11 May 2009

ECCC, Decision on Request for Release, *KAING Guek Eav "Duch"*, Case No. 001/18-07-2007/ECCC/TC, T. Ch., 15 June 2009

ECCC, Decision on Appeal of Ieng Sary against OCIJ's Order on Extension of Provisional Detention, *IENG Sary*, Case No. 002/19-19-2007-ECCC/OCIJ (PTC17), PTC, 26 June 2009

ECCC, Decision on Khieu Samphan's Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 14 and 15), PTC, 3 July 2009

ECCC, Annex I: Public Redacted Version - Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, Disagreement No. 001/18-11-2008-ECCC/PTC, PTC, 18 August 2009

ECCC, Order on Extension of Provisional Detention, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 15 September 2009

ECCC, Request for Adoption of Certain Procedural Measures, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ, Defence, 5 November 2009

ECCC, Order on Extension of Provisional Detention, *IENG Sary*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2009

Order on Extension of Provisional Detention, *IENG Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 10 November 2009

ECCC, Order on Extension of Provisional Detention, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 18 November 2009

ECCC, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC24), PTC, 18 November 2009

ECCC, Order Concerning the Co-Prosecutor's Request for Clarification of Charges, *NUON Chea et al.*, Case No. 002/19-09-2007, OCIJ, 20 November 2009

ECCC, Order on Request for Adoption of Certain Procedural Measures, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 25 November 2009

ECCC, Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis of Abuse of Process Filed by Ieng Thirith, *NUON Chea et al.*, Case No. 002/19-09-2007, OCIJ, 31 December 2009

ECCC, Order Issuing Warning Under Rule 38, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 25 February 2010

ECCC, Decision on NUON Chea's Application for Disqualification of Judge Marcel Lemonde, *NUON Chea et al.*, Case No. 002/29-10-2009-ECCC/PTC (04), PTC, 23 March 2010

ECCC, Decision on IENG Sary's Rule 35 Application for Judge Lemonde's Disqualification, *NUON Chea et al.*, Case No. 002/07-12-2009 (07), 29 March 2010

ECCC, Decision on Appeals against Co-Investigating Judges' Combined Order D250/3/3 Dated 13 January 2010 and Order D250/3/2 Dated 13 January 2010 on Admissibility of Civil Party Applications, *Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 47 & 48), PTC, 27 April 2010

ECCC, Decision on Khieu Samphan's Appeal against Order on Extension of Provisional Detention, *KHIEU Samphan*, Case No. 002/19-09-2007, PTC, 30 April 2010.

ECCC, Decision on IENG Sary's Appeal against Order on Extension of Provisional Detention, *IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC32), PTC, 30 April 2010

ECCC, Decision on IENG Thirith's Appeal against Order on Extension of Provisional Detention, *IENG Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC33), PTC, 30 April 2010

ECCC, Decision on Co-Prosecutor's Appeal against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Proving the Charged Person's Knowledge of the Crimes, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, PTC, 15 June 2010

ECCC, Decision on IENG Sary's and on Ieng Thirith's Application under Rule 34 to Disqualify Judge Marcel Lemonde, *NUON Chea et al.*, Case No. 002/07-12-2009-ECCC/PTC (05), PTC, 15 June 2010

ECCC, Decision on the Appeal against the 'Order on the Request to Place on the Case [File] the Documents Relating to Mr. Khieu Samphan's Real Activity', *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 63), PTC, 7 July 2010

ECCC, Decision on Appeal of Co-Lawyers for Civil Parties against Order Rejecting Request to Interview Persons Named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, *Nuon Chea et al.*, Case No. 002/19-09-2009-ECCC-OCIJ (PTC 52), PTC, 21 July 2010

ECCC, Judgement, *KAING Guek Eav (Duch)*, Case No. 001/18-07-2007/ECCC/TC, T. Ch., 26 July 2010

ECCC, Decision on Appeal of Co-Lawyers for Civil Parties against Order on Civil Parties' Request for Investigative Actions Concerning all Properties Owned by the Charged Persons, *Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 57), PTC, 4 August 2010

ECCC, Decision on Ieng Thirith's Appeal against the Co-Investigating Judges' Order Rejecting the Request for Stay of Proceedings on the Basis of an Abuse of Process (D264/1), *Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 42), PTC, 10 August 2010

ECCC, Closing Order, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 15 September 2010

ECCC, Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, *NUON Chea et al.*, Case No. 002/19-09-2007/ECCC/TC, T. Ch., 16 February 2011

ECCC, Decision on Immediate Appeal by KHIEU Samphan on Application for Release, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC/TCSC(04), SCC, 6 June 2011

ECCC, Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, *Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 76, PTC 112, PTC 113, PTC 114, PTC 115, PTC 142, PTC 157, PTC 164, PTC 165, and PTC 172), PTC, 24 June 2011

ECCC, Decision on Nuon Chea's Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules, *NUON Chea et al.*, Case No. 002/19-09-2007/ECCC/TC, T. Ch., 8 August 2011

ECCC, Decision on Ieng Thirith's Fitness to Stand Trial, *NUON Chea et al.*, Case No. 002/19-09-2007, T. Ch., 17 November 2011

ECCC, Appeal Judgement, *KAING Guek Eav (Duch)*, Case No. 001/18-07-2007/ECCC/SC, SCC, 3 February 2012

ECCC, Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, Case No. 003/07-09-2009-ECCC-OCIJ, OCIJ, 2 May 2012

ECCC, Decision on Reassessment of Accused IENG Thirith's Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011, *NUON Chea et al.*, Case No. 002/19-09-2007-ECCC/TC, T. Ch., 13 September 2012

ECCC, Statement by the Co-Investigating Judges Regarding Case 003, 28 February 2013

ECCC, Decision on Khieu Samphan's Application for Immediate Release, *KHIEU Samphan*, Case No. 002/19-09-2007-ECCC/TC, T. Ch., 26 April 2013

ECCC, Decision on Motion and Supplemental Brief on Suspect's Right to Counsel, Case No. 004/07-09-2009-ECCC-OCIJ, Case File No. 002/19-09-2007, OCIJ, 17 May 2013

SPSC

SPSC, Hearing of 20.02.2001, *Prosecutor v. Joseph Leki*, Case No. 05/2000, SPSC, 21 January 2001

SPSC, Judgement of the Court of Appeal of East Timor, *Prosecutor v. Júlio Fernandes et al.*, Case of Appeal No. 2000/1, COA, 14 February 2001

SPSC, Judgement of the Court of Appeal of East Timor, *Prosecutor v. Júlio Fernandes et al.*, Case of Appeal No. 2000/1, COA, 14 February 2001, Judgment of Frederick Egonda-Ntende

SPSC, Decision, *Prosecutor v. Francisco Pedro (alias Chico)*, Case No. 1/2001, 22 May 2001

SPSC, The Request for the Release of the Accused Benjamin Sarmento, Romerio Tilman and Joao Sarmento, *Prosecutor v. Sarmento et al.*, Case No. 18/2001, SPSC, 22 March 2002

SPSC, Sentence, *Prosecutor v. Anigio de Oliveira*, Case No. 07/2001, SPSC, 27 March 2002

SPSC, Decision to the Application for Release of the Accused Jose Cardoso Ferreira alias Muzhino, *Prosecutor v. Franca da Silva alias Jhoni Franca et al.*, Case No. 04/2001, SPSC, 27 April 2002

SPSC, Decision to the Application for Release of the Accused Lino de Carvalho, *Prosecutor v. Lino Carvalho*, Case No. 10/2001, SPSC, 28 October 2002

SPSC, Decision on the Application for Release of the Accused Benjamin Sarmento, *Prosecutor v. Sarmento*, Case No. 18/2001, SPSC, 7 February 2003

SPSC, Decision on the Application for Release of the Accused Abilio Mendez Correia, *Prosecutor v. Abilio Mendez Correia*, Case No. 19/2001, SPSC, 10 June 2003

SPSC, Decision to the Application for Release of the Accused Carlos Ena, *Prosecutor v. Carlos Ena*, Case No. 5/2002, SPSC, 12 June 2003

SPSC, Judgment, *Prosecutor v. Carlos Ena*, Case of Appeal No. 5/2002, COA, 24 September 2003

SPSC, Decision on the Motion of the Deputy General Prosecutor for a Hearing on the Application for an Arrest Warrant in the Case of Wiranto, *Prosecutor v. Wiranto et al.*, Case No. 05/2003, SPSC, 18 February 2004

SPSC, Decision on Prosecutor's Request for Pre-Trial Detention, *Prosecutor v. Sisto Barros et al.*, Case No. 01/2004, SPSC, 17 March 2004

SPSC, Judgement, *Prosecutor v. Ena and Ena*, Case No. 5/2002, SPSC, 23 March 2004

SPSC, Decision on the Application for Initial Detention of the Accused Apreccio Mali Dao, *Prosecutor v. Apreccio Mali Dao*, Case No. 18/2003, SPSC, 29 April 2004

SPSC, Dissenting Opinion on the Defendant's Oral Motion to Exclude Statement of the Accused, *Prosecutor v. Francisco Pereira*, Case No. 34/2003, SPSC, 17 September 2004

STL

STL, OTP, Application by the Prosecutor to the Pre-Trial Judge under Article 4(2) of the Statute and Rule 17 of the Rules of Procedure and Evidence, 25 March 2009

STL, Order Directing the Lebanese Judicial Authorities Seized with the Case of the Attack against Prime Minister Rafiq Hariri and Others to Defer to the Special Tribunal for Lebanon, Case No. CH/PTJ/2009/01, PTJ, 27 March 2009

STL, Order Setting a Time Limit for Filing of an Application by the Prosecutor in Accordance with Rule 17 (B) of the Rules of Procedure and Evidence, Case No. CWPTJ/2009/03, PTJ, 15 April 2009

STL, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06, PTJ, 29 April 2009

STL, Order Assigning Matter to Pre-Trial Judge, *El Sayed*, Case No. CH/PRES/2010/01, President, 15 April 2010

STL, Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr. El Sayed Dated 17 March 2010 and whether Mr. El Sayed has Standing before the Court, *El Sayed*, Case No. CH/PTJ/2010/005, PTJ, 17 September 2010

STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I, A. Ch., 16 February 2011

STL, Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated against Mr. Elias El-Murr on 12 July 2005 to Defer to the Special Tribunal for Lebanon, Prosecutor, Case No. STL-11-02/D/PTJ, PTJ, 19 August 2011

ECommHR

ECommHR, *Koch v. Federal Republic of Germany*, Application No. 1270/61, Decision of 8 March 1962

ECommHR, *W. R. v. The Federal Republic of Germany*, Application No. 3376/67, Decision of 4 February 1969

ECommHR, *Jentzsch v. Germany*, Application No. 2604/65, Report of 30 November 1970

ECommHR, *X. v. Austria*, Application No. 775/77, Decision of 18 May 1977

ECommHR, *X v. The Netherlands*, Application No. 8239/78, Report of 4 December 1978

ECommHR, *X. v. Germany*, Application No. 8098/77, Decision of 13 December 1978

ECommHR, *X. v. Federal Republic of Germany*, Application No. 8414/78, Decision of 4 July 1979

ECommHR, *McVeigh, O'Neill and Evans v. The United Kingdom*, Application Nos. 8022/77; 8025/77; 8027/77, Report of 18 March 1981

ECommHR, *Jespers v. Belgium*, Application No. 8403/78, Report of 14 December 1981

ECommHR, *Skoogström v. Sweden*, Application No. 8582/79, Decision of 15 July 1983

ECommHR, *K. v. Belgium*, Application No. 10819/84, Decision of 5 July 1984

ECommHR, *K v. Austria*, Application No. 16002/90, Report of 13 October 1992

ECommHR, *Stocké v. Germany*, Application No. 1175/85, Report of 12 October 1989

ECtHR

ECtHR, *Wemhoff v. Austria*, Application No. 2212/64, Series A, No. 7, Judgment of 27 June 1968

ECtHR, *Neumeister v. Austria*, Application No. 1936/63, Series A, No. 8, Judgment of 27 June 1968

ECtHR, *Stögmüller v. Austria*, Application No. 1602/62, Series A, No. 9, Judgment of 10 November 1969

ECtHR, *Wilde, Ooms and Versyp v. Belgium*, Application Nos. 2832/66; 2835/66; 2899/66, Series A, No. 12, Judgment of 18 June 1971

ECtHR, *Handyside v. The United Kingdom*, Application No. 5493/72, Series A, No. 24, Judgment of 7 December 1976

ECtHR, *Ireland v. The United Kingdom*, Application No. 5310/71, Judgment of 18 January 1978

ECtHR, *Klass and Others v. Germany*, Application No. 5029/71, Series A, No. 28, Judgment of 6 September 1978

ECtHR, *Leudicke, Belkacem and Koç v. Germany*, Application Nos. 6210/73; 6877/75; 7132/75, Judgment of 28 November 1978

ECtHR, *Sunday Times v. United Kingdom*, Application No. 13166/87, Judgment of 26 April 1979

ECtHR, *Winterwerp v. Netherlands*, Communication No. 6301/73, Series A, No. 33, Judgment of 24 October 1979

ECtHR, *Schiesser v. Switzerland*, Application No. 7710/76, Series A, No. 34, Judgment of 4 December 1979

ECtHR, *Deweert v. Belgium*, Application No. 6903/75, Series A, No. 35, Judgment of 27 February 1980

ECtHR, *Adolf v. Austria*, Application No. 8269/78, Series A, No. 49, Judgment of 26 March 1982

ECtHR, *Corigliano v. Italy*, Application No. 8304/78, Judgment of 10 December 1982

ECtHR, *Silver and Others v. The United Kingdom*, Application Nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Series A, No. 83, Judgment of 25 March 1983

ECtHR, *De Jong, Baljet and Van den Brink v. The Netherlands*, Application Nos. 8805/79; 8806/79; 9242/81, Series A, No. 77, Judgment of 22 May 1984

ECtHR, *James and Others v. The United Kingdom*, Application No. 8793/79, Series A, No. 98, Judgment of 12 July 1984

ECtHR, *Malone v. United Kingdom*, Judgement, Application No. 8691/79, Judgment of 2 August 1984

ECtHR, *McGoff v. Sweden*, Application No. 9017/80, Series A, No. 83, Judgment of 26 October 1984

ECtHR, *X and Y v. The Netherlands*, Application No. 8978/80, Series A, No. 91, Judgment of 26 March 1985

ECtHR, *Sanchez-Reisse v. Switzerland*, Application No. 9862/82, Series A, No. 75, Judgment of 21 October 1986

ECtHR, *AGOSI v. The United Kingdom*, Application No. 9118/80, Series A, No. 106, Judgment of 24 October 1986

ECtHR, *De Cubber v. Belgium*, Application No. 9186/80, Series A, No. 86, 26 October 1986

ECtHR, *Unterpertinger v. Austria*, Application No. 9120/80, Series A, No. 110, Judgment of 24 November 1986

ECtHR, *Bozano v. France*, Application No. 9990/82, Series A, No. 111, Judgment of 18 December 1986

ECtHR, *Bouamar v. Belgium*, Application No. 9106/80, Series A, No. 129, Judgment of 29 February 1988

ECtHR, *Schenk v. Switzerland*, Application No. 10862/84, Judgment of 12 July 1988

ECtHR, *Brogan and others v. The United Kingdom*, Application Nos. 11209/84; 11234/84; 11386/85, Series A, No. 145-B, Judgment of 29 November 1988

ECtHR, *Chappell v. United Kingdom*, Application No. 10461/83, Judgment of 30 March 1989

ECtHR, *Lamy v. Belgium*, Application No. 10444/83, Judgment of 30 March 1989

ECtHR, *Hauschildt v. Denmark*, Application No. 10486/83, Series A, No. 154, 24 May 1989

ECtHR, *Brogan and others v. The United Kingdom*, Application Nos. 11209/84; 11234/84; 11266/84; 11386/85, Series A, No. 145-B, Judgment of 29 November 1989

ECtHR, *Kamasinski v. Austria*, Application No. 9783/82, Series A, No. 168, Judgment of 19 December 1989

ECtHR, *Brozicek v. Italy*, Application No. 10964/84, Judgment of 19 December 1989

ECtHR, *Håkansson and Sturesson v. Sweden*, Series A, No. 171, Application No. 11855/85, Judgment of 21 February 1990

ECtHR, *Van der Leer v. The Netherlands*, Application No. 11509/85, Series A, No. 170-A, Judgment of 21 February 1990

ECtHR, *Huwig v. France*, Application No. 11105/84, Judgment of 24 April 1990

ECtHR, *Kruslin v. France*, Application No. 11801/85, Series A, No. 176-A, Judgment of 24 April 1990

ECtHR, *Fox, Campbell and Hartley v. United Kingdom*, Application Nos. 12244/86; 12245/86; 12383/86, Series A, No. 182, Judgment of 30 August 1990

ECtHR, *Huber v. Switzerland*, Application No. 12794/8740, Series A, No. 188, Judgment of 23 October 1990

ECtHR, *Stocké v. Germany*, Application No. 1175/85, Series A, No. 199, Judgment of 19 March 1991

ECtHR, *Letellier v. France*, Application No. 12369/86, Series A, No. 207, Judgment of 26 June 1991

ECtHR, *Brandstetter v. Austria*, Applications Nos. 11170/84, 12876/87, 13468/87, Series A, No. 211, Judgment of 28 August 1991

ECtHR, *Kemmache v. France (Nos. 1 and 2)*, Application Nos. 12325/86; 14992/89, Judgment of 27 November 1991

ECtHR, *Koster v. Netherlands*, Application No. 12843/87, Series A, No. 221, Judgment of 28 November 1991

ECtHR, *Toth v. Austria*, Application No. 11894/85, Series A, No. 224, Judgment of 12 December 1991

ECtHR, *Pfeifer and Plankl v. Austria*, Application No. 10802/84, Series A, No. 227, Judgment of 25 February 1992

ECtHR, *Megyeri v. Germany*, Application No. 13770/88, Series A, No. 237-A, Judgment of 12 May 1992

ECtHR, *Lüdi v. Switzerland*, Application No. 12433/86, Series A, No. 256-A, Judgment of 15 June 1992

ECtHR, *Tomasi v. France*, Application No. 12850/87, Series A, No. 241-A, Judgment of 27 August 1992

ECtHR, *Niemietz v. Germany*, Application No. 13710/88, Judgment of 16 December 1992

ECtHR, *W. v. Switzerland*, Application No. 14379/88, Series A, No. 254-A, Judgment of 26 January 1993

ECtHR, *Fey v. Austria*, Application No. 14396/88, Series A, No. 255-A, Judgment of 24 February 1993

ECtHR, *Funke v. France*, Application No. 10828/84, Series A, No. 256-A, Judgement of 25 February 1993

ECtHR, *Crémieux v. France*, Application No. 11471/85, Series A, No. 256-B, Judgment of 25 February 1993

ECtHR, *Miailhe v. France (no. 1)*, Application No. 12661/87, Series A, No. 256-C, Judgment of 25 February 1993

ECtHR, *Costello-Roberts v. The United Kingdom*, Application No. 13134/87, Judgment of 25 March 1993

ECtHR, *Dombo Beheer B.V. v. The Netherlands*, Application No. 14448/88, Series A, No. 274, Judgment of 27 October 1993

ECtHR, *Navarra v. France*, Application No. 13190/87, Judgment of 23 November 1993

ECtHR, *Imbrioscia v. Switzerland*, Application No. 13972/88, Series A, No. 275, 24 November 1993

ECtHR, *Raimondo v. Italy*, Application No. 12954/87, Judgment of 22 February 1994

ECtHR, *Mansur v. Turkey*, Application No. 16026/90, Series A, No. 319-B, Judgment of 15 April 1994

ECtHR, *Murray v. the United Kingdom*, Application No. 18731/91, Reports 1996-I, Judgment of 28 October 1994

ECtHR, *Gasus Dosier –und Fördertechnik GmbH v. The Netherlands*, Application No. 15375/89, Series A, No. 306-B, Judgment of 23 February 1995

ECtHR, *Quinn v. France*, Application No. 18580/91, Judgment of 22 March 1995

ECtHR, *Yagci and Sargin v. Turkey*, Series A, No. 319-A, Judgment of 8 June 1995

ECtHR, *Van der Tang v. Spain*, Application No. 19382/92, Judgment of 13 July 1995

ECtHR, *Murray v. the United Kingdom*, Application No. 18731/91, Reports 1996-I, Judgment (Grand Chamber) of 8 February 1996

ECtHR, *Bulut v. Austria*, Application No. 17358/90, Reports 1996-II, Judgment of 22 February 1996

ECtHR, *Chahal v. The United Kingdom*, Application No. 22414/93, Reports 1996-V, Judgment (Grand Chamber) of 15 November 1996

ECtHR, *Saunders v. The United Kingdom*, Application No. 19187/91, Reports 1996-VI, Judgment of 17 December 1996

ECtHR, *Scott v. Spain*, Application No. 21335/93, Reports 1996-VI, Judgment of 18 December 1996

ECtHR, *Van Mechelen and Others v. The Netherlands*, Application Nos. 21363/93, 21364/93, 21427/93 and 22056/93, Reports 1997-III, Judgement of 23 April 1997

ECtHR, *Serves v. France*, Application No. 20225/92, Reports 1997-VI, Judgment of 20 October 1997

ECtHR, *Camenzind v. Switzerland*, Application No. 21353/93, Judgment of 16 December 1997

ECtHR, *Edificaciones March Gallego S.A. v. Spain*, Application No. 28028/95, Reports 1998-I, Judgment of 19 February 1998

ECtHR, *Belziuk v. Poland*, Application No. 23103/93, Reports 1998-II, Judgment of 25 March 1998

ECtHR, *Teixeira de Castro v. Portugal*, Application No. 25829/94, Judgment of 9 June 1998

ECtHR, *I.A. v. France*, Application No. 28213/95, Reports 1998-VII, Judgment of 23 September 1998

ECtHR, *Assenov and Others v. Bulgaria*, Application No. 24760/94, Reports 1998-VIII, Judgement of 28 October 1998

ECtHR, *Doorson v. Netherlands*, Application No. 20524/92, Reports 1996-II, Judgment of 8 December 1998

ECtHR, *Rigopoulos v. Spain*, Application No. 37388/97, Reports 1999-II Judgment of 12 January 1999

ECtHR, *Matthews v. UK*, Application No. 24833/94, Reports 1999-I, Judgment (Grand Chamber) of 21 January 1999

ECtHR, *Hood v. The United Kingdom*, Application No. 27267/95, Reports 1998-VIII, Judgment of 18 February 1999

ECtHR, *Waite and Kennedy*, Application No. 26083/94, Reports 1999-I, Judgment of 18 February 1999

ECtHR, *Nikolova v. Bulgaria*, Application No. 31195/96, Reports 1999-II, Judgment of 25 March 1999

ECtHR, *Pélissier et Sassi v. France*, Application No. 25444/94, Reports 1999-II, Judgment of 25 March 1999

ECtHR, *Aquilina v. Malta*, Application No. 25642/94, Reports 1999-III, Judgment of 29 April 1999

ECtHR, *T.W. v. Malta*, Application No. 25644/94, Judgment (Grand Chamber) of 29 April 1999

ECtHR, *A.M. v. Italy*, Application No. 37019/97, Judgment of 14 December 1999

ECtHR, *Amann v. Switzerland*, Application No. 27798/95, Judgment (Grand Chamber) of 16 January 2000

ECtHR, *Jasper v. the United Kingdom*, Application No. 27052/95, Judgment (Grand Chamber) of 16 February 2000

ECtHR, *Leander v. Sweden*, Application No. 27798/95, Reports 2000-II, Judgment (Grand Chamber) of 16 February 2000

ECtHR, *Baranowski v. Poland*, Application No. 28358/95, Reports 2000-III, Judgment of 28 March 2000

ECtHR, *Labita v. Italy*, Application No. 26772/95, Reports 2000-IV, Judgment of 6 April 2000

ECtHR, *Rotaru v. Romania*, Application No. 28341/95, Reports 2000-V, Judgment (Grand Chamber) of 4 May 2000

ECtHR, *Khan v. the United Kingdom*, Application No. 35394/97, Reports 2000-V, Judgment of 12 May 2000

ECtHR, *Averill v. The United Kingdom*, Application No. 36408/97, Reports 2000-VI, Judgment of 6 June 2000

ECtHR, *Coëme and Others v. Belgium*, Application Nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgment of 22 June 2000

ECtHR, *Wloch v. Poland*, Application No. 27785/95, Reports 2000-XI, Judgment of 19 October 2000

ECtHR, *Kudła v. Poland*, Application No. 30210/96, Reports 2000-XI, Judgment (Grand Chamber) of 26 October 2000

ECtHR, *Taş v. Turkey*, Application No. 24396/94, Judgment of 14 November 2000

ECtHR, *Vaccaro v. Italy*, Application No. 41852/98, Judgment of 16 November 2000

ECtHR, *Rehbock v. Slovenia*, Application No. 29462/95, Judgment of 28 November 2000

ECtHR, *Egmez v. Cyprus*, Application No. 30873/96, Reports 2000-XII, Judgment of 21 December 2000

ECtHR, *Heaney and McGuinness v. Ireland*, Application No. 34720/97, Reports 2000-XII, 21 December 2000

ECtHR, *Garcia Alva v. Germany*, Application No. 23541/94, Judgment of 13 February 2001

ECtHR, *Lieztow v. Germany*, Application No. 24479/94, Reports 2001-I, Judgment of 13 February 2001

ECtHR, *Lucà v. Italy*, Application No. 33354/96, Judgment of 27 February 2001

ECtHR, *H.B. v. Switzerland*, Application No. 26899/95, Judgment of 5 April 2001

ECtHR, *Priebke v. Italy*, Application No. 48799/99, Judgment of 5 April 2001

ECtHR, *J.B. v. Switzerland*, Application No. 31827/96, Reports 2001-III, Judgment of 3 May 2001

ECtHR, *Papon v. France*, Application No. 64666/01, Judgment of 7 June 2001

ECtHR, *Ilijkov v. Bulgaria*, Application No. 33977, Judgment of 26 July 2001

ECtHR, *P.G. and J.H. v. The United Kingdom*, Application No. 44787/98, Judgment of 25 September 2001

ECtHR, *Solakov v. The Former Yugoslav Republic of Macedonia*, Application No. 47023/99, Reports 2001-X, Judgment of 31 October 2001

ECtHR, *Allan v. United Kingdom*, Application No. 48539/99, Reports 2002-IX, Judgment of 5 November 2001

ECtHR, *Čonka v. Belgium*, Application No. 51564/99, Reports 2002-I, Judgment of 5 February 2002

ECtHR, *Stafford v. The United Kingdom*, Application No. 46295/99, Reports 2002-IV, Judgment (Grand Chamber) of 28 May 2002

ECtHR, *S.B.C. v. The United Kingdom*, Application No. 39360/98, Judgment of 19 June 2002

ECtHR, *Migoń v. Poland*, Application No. 24244/94, Judgment of 25 June 2002

ECtHR, *S.N. v. Sweden*, Application No. 34209/96, Reports 2001-II, Judgment of 2 July 2002

ECtHR, *Kalashnikov v. Russia*, Application No. 47095/99, Reports 2002-VI, Judgment of 15 July 2002

ECtHR, *Mouisel v. France*, Application No. 67263/01, Judgment of 14 November 2002

ECtHR, *Hutchison Reid v. The United Kingdom*, Application No. 50272/99, Reports 2003-IV, Judgment of 20 February 2003

ECtHR, *Edwards and Lewis v. the United Kingdom*, Applications Nos. 39647/98, 40461/98, Judgment of 22 July 2003

ECtHR, *Smirnova v. Russia*, Application Nos. 46133/99, 48183/99, Reports 2003-IX, Judgment of 24 July 2003

ECtHR, *Thompson v. The United Kingdom*, Application No. 36256/96, Judgment of 15 September 2004

ECtHR, *Mamatkulov and Askarov*, Application Nos. 46827/99 and 46951/99, Reports 2005-I, Judgment (Grand Chamber) of 4 February 2005

ECtHR, *Bordovskiy v. Russia*, Application No. 49491/99, Judgment of 8 February 2005

ECtHR, *Panchenko v. Russia*, Application No. 45100/98, Judgment of 8 February 2005

ECtHR, *Buck v. Germany*, Application No. 41604/98, Reports 2005-IV, Judgment of 28 April 2005

ECtHR, *Öcalan v. Turkey*, Application No. 46221/99, Reports 2005-IV, Judgment (Grand Chamber) of 12 May 2005

ECtHR, *Claes c. Belgique*, Application Nos. 46825/99, 47132/99, 47502/99, 49010/99, 49104/99, 49195/99 et 49716/99, Judgment of 2 June 2005

ECtHR, *Bosphorus v. Ireland*, Application No. 45036/98, Reports 2005-VI, Judgment (Grand Chamber) of 30 June 2005

ECtHR, *Mild and Virtanen v. Finland*, Application Nos. 39481/98 and 40227/98, Judgment of 26 July 2005

ECtHR, *Shamayev and others v. Georgia and Russia*, Application No. 36378/02, Reports 2005-III, Judgment of 12 October 2005

ECtHR, *Bulut v. Austria*, Application No. 17358/90, Reports 1996-II, Judgment of 22 February 1996

ECtHR, *Vayiç v. Turkey*, Application No. 18078/02, Reports 2006-VIII, Judgment of 20 June 2006

ECtHR, *Weber and Saravia v. Germany*, Application No. 54934/00, Reports 2006-XI, Judgment of 29 June 2006

ECtHR, *Jalloh v. Germany*, Application No. 54810/00, Judgment (Grand Chamber) of 11 July 2006

ECtHR, *Beshiri and Others v. Albania*, Application No. 7352/03, Judgment of 22 August 2006

ECtHR, *McKay v. The United Kingdom*, Application No. 543/03, Reports 2006-X, Judgment (Grand Chamber) of 3 October 2006

ECtHR, *Chraidı v. Germany*, Application No. 6565/01, Reports 2006-XII, Judgment of 26 October 2006

ECtHR, *Van der Velden v. the Netherlands*, Application No. 29514/05, Reports 2006-XV, Decision of 7 December 2006

ECtHR, *Mattei v. France*, Application No. 34043/02, Judgment of 19 December 2006

ECtHR, *Hesse v. Austria*, Application No. 26186/02, Series A, No. 254-A, Judgment of 25 January 2007

ECtHR, *Vozhigov v. Russia*, Application No. 5953/02, Judgment of 26 April 2007

ECtHR, *O'Halloran and Francis v. The United Kingdom*, Application Nos. 15809/02 and 25624/02, Reports 2007-III, Judgment (Grand Chamber) of 29 June 2007

ECtHR, *Harutyunyan v. Armenia*, Application No. 36549/03, Judgment of 28 September 2007

ECtHR, *Lebedev v. Russia*, Application No. 4493/04, Judgment of 25 October 2007

ECtHR, *Smirnov v. Russia*, Application No. 71362/01, Judgment of 12 November 2007

ECtHR, *Cebotari v. Moldova*, Case No. Application No. 35615/06, Judgment of 13 November 2007

ECtHR, *Saadi v. the United Kingdom*, Application No. 13229/03, Judgment (Grand Chamber) of 28 January 2008

ECtHR, *Ladent v. Poland*, Application No. 11036/03, Judgment of 18 March 2008

ECtHR, *Stefanov v. Bulgaria*, Application No. 65755/01, Judgment of 22 May 2008

ECtHR, *Vrenčev v. Serbia*, Application No. 2361/05, Judgment of 23 September 2008

ECtHR, *Rusu v. Austria*, Application No. 34082/02, Judgment of 2 October 2008

ECtHR, *Bochev v. Bulgaria*, Application No. 73481/01, Judgment of 13 November 2008

ECtHR, *Salduz v. Turkey*, Application No. 36391/02, Reports 2008, Judgment (Grand Chamber) of 27 November 2008

ECtHR, *S. and Marper v. The United Kingdom*, Application Nos. 30562/04 and 30566/04, Judgment (Grand Chamber) of 4 December 2008

ECtHR, *Panovits v. Cyprus*, Application No. 4268/04, Judgment of 11 December 2008

ECtHR, *Levinta v. Moldova*, Application No. 17332/03, Judgment of 16 December 2008

ECtHR, *Khudyakova v. Russia*, Application No. 13476/04, Judgment of 8 January 2009

ECtHR, *Borzhonov v. Russia*, Application No. 18274/04, Judgment of 22 January 2009

ECtHR, *A and Others v. The United Kingdom*, Application No. 3455/05, Judgment of 19 February 2009

ECtHR, *Shabelnik v Ukraine*, Application No. 16404/03, Judgment of 19 February 2009

ECtHR, *Bykov v. Russia*, Application No. 4378/02, Judgment (Grand chamber) of 10 March 2009

ECtHR, *Bykov v. Russia*, Application No. 4378/02, Judgment (Grand chamber) of 10 March 2009, Partly Dissenting Opinion of Judge Costa

ECtHR, *Aleksandr v. Russia*, Application No. 15217/07, Judgment of 12 March 2009

ECtHR, *Polonskiy v. Bulgaria*, Application No. 30033/05, Judgment of 19 March 2009

ECtHR, *Mooren v. Germany*, Application No. 11364/03, Judgment (Grand Chamber) of 9 July 2009

ECtHR, *Milošević v. Serbia*, Application No. 31320/05, Judgment of 28 July 2009

ECtHR, *Dayanan v. Turkey*, Application No. 7377/03, Judgment of 31 October 2009

ECtHR, *Kaboulov v. Ukraine*, Application No. 41015/04, Judgment of 19 November 2009

ECtHR, *Shannon v. Latvia*, Application No. 32214/03, Judgment of 24 November 2009

ECtHR, *Caka v. Albania*, Application No. 44023/02, Judgment of 8 December 2009

ECtHR, *Zaichenko v. Russia*, Application No. 39660/02, Judgment of 18 February 2010

ECtHR, *Al-Saadoon and Mufdhi v. UK*, Application No. 61498/08, Reports 2010, Judgment of 2 March 2010

ECtHR, *Medvedyev and others v. France*, Application No. 3394/03, Judgment (Grand Chamber) of 29 March 2010

ECtHR, *Feldman v. Ukraine*, Application Nos. 76556/01 and 38779/04, Judgment of 8 April 2010

ECtHR, *Adetoro v. The United Kingdom*, Application No. 46834/06, Judgment of 20 April 2010

ECtHR, *Yakovlev v. Russia*, Application No. 5453/08, Judgment of 29 April 2010

ECtHR, *Khaydarov v. Russia*, Application No. 21055/09, Judgment of 20 May 2010

ECtHR, *Gäfgen v. Germany*, Application No. 22978/05, Reports 2010, Judgment (Grand Chamber) of 1 June 2010

ECtHR, *Gäfgen v. Germany*, Application No. 22978/05, Reports 2010, Judgment (Grand Chamber) of 1 June 2010, Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power

ECtHR, *Uzun v. Germany*, Application No. 35623/05, Reports 2010, Judgment of 2 September 2010

ECtHR, *Sanoma Uitgevers BV v. The Netherlands*, Application No. 38224/03, Judgment (Grand Chamber) of 14 September 2010

ECtHR, *Brusco v. France*, Application No. 1466/07, Judgment of 14 October 2010

ECtHR, *Mikolajová v. Slovakia*, Case No. 4479/03, Judgment of 18 January 2011

ECtHR, *M.S.S v. Belgium and Greece*, Application No. 30696/09, Reports 2011, Judgment (Grand Chamber) of 21 January 2011

ECtHR, *Heino v. Finland*, Application No. 56720/09, Judgment of 15 February 2011

ECtHR, *Khodorkovskiy v. Russia*, Application No. 5829/04, Judgment of 31 May 2011

ECtHR, *Al-Khawaja and Tahery v. The United Kingdom*, Application Nos. 26766/05 and 22228/06, Reports 2011, Judgment (Grand Chamber) of 15 December 2011

ECtHR, *Othman (Abu Qatada) v. United Kingdom*, Application No. 8139/09, Reports 2012, Judgment of 17 January 2012

ECtHR, *Simons v. Belgium*, Application No. 71407/10, Decision of 28 August 2012, par. 31

ECtHR, *El Haski v. Belgium*, Application No. 649/08, Judgment of 15 September 2012

HRC

HRC, *Moriana Hernández Valentini de Bazzano*, Communication No. 5/1997, U.N. Doc. CCPR/C/7/D/5/1977, 15 August 1979

HRC, *Leopoldo Buffo Carballal v. Uruguay*, Communication No. 33/1978, U.N. Doc. CCPR/C/12/D/33/1978, 27 March 1981

HRC, *López Burgos v. Uruguay*, Communication No. R.12/52, U.N. Doc. CCPR/C/13/D/52/1979, 29 July 1981

HRC, *Pinkney v. Canada*, Communication No. 27/1978, U.N. Doc. CCPR/C/OP/1, 29 October 1981

HRC, *Drescher Caldas v. Uruguay*, Communication No. 43/1979, U.N. Doc. CCPR/C/OP/2, 21 July 1983

HRC, *Almeida de Quinteros et al. v. Uruguay*, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2, 21 July 1983

HRC, *Monja Jaona v. Madagascar*, Communication No. 132/1982, U.N. Doc. CCPR/C/24/D/132/1982, 1 April 1985

HRC, *Bolaños v. Ecuador*, Communication No. 238/1997, U.N. Doc. Supp. No. 40 (A/44/40), 26 July 1989

HRC, *Moraël v. France*, Communication No. 207/1986, U.N. Doc. CCPR/C/36/D/207/1986, 28 July 1989

HRC, *Celiberti de Casariego v. Uruguay*, Application No. 56/1979, U.N. Doc. CCPR/C/13/D/56/1979, 29 July 1989

HRC, *Torres v. Finland*, Communication No. 291/19 88, U.N. Doc. CCPR/C/38/D/191/1988, 2 April 1990

HRC, *Kelly v. Jamaica*, Communication No. 253/1987, U.N. Doc. CCPR/C/41/D/253/1987, 8 April 1991

HRC, *García v. Ecuador*, Communication No. 319/1988, U.N. Doc. CCPR/C/43/D/319/1988, 5 November 1991

HRC, *Bizouarn v. Bolivia*, Application No. 336/1988, U.N. Doc. CCPR/C/43/D/336/1988, 5 November 1991

HRC, *Glenford Campbell v. Jamaica*, Communication No. 248/1987, U.N. Doc. CCPR/C/44/D/248/1987, 30 March 1992

HRC, *Berry v. Jamaica*, Communication No. 330/88, U.N. Doc. CCPR/C/50/D/330/1988, 7 April 1994

HRC, *Harward v. Norway*, Communication No. 451/1991, U.N. Doc. CCPR/C/51/D/451/1991, 16 August 1994

HRC, *Koné v. Senegal*, Communication No. 386/1989, U.N. Doc. CCPR/C/52/D/386/1989, 27 October 1994

HRC, *Griffin v. Spain*, Communication No. 493/1992, U.N. Doc. CCPR/C/53/D/493/1992, 4 April 1995

HRC, *Van der Houwen v. The Netherlands*, Communication No. 583/1994, U.N. Doc. CCPR/C/54/D/583/1994, 14 July 1995

HRC, *Gerald John Griffin v. Spain*, Communication No. 493/1992, U.N. Doc. CCPR/C/53/D/493/199, 25 April 1995

HRC, *Peter Grant v. Jamaica*, Communication No. 597/1994, U.N. Doc. CCPR/C/56/D/597/1994, 22 March 1996

HRC, *Michael and Brian Hill v. Spain*, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997

HRC, *A. v. Australia*, Communication No. 560/93, U.N. Doc. CCPR/C/59/D/560/1993, 3 April 1997

HRC, *Mc Lawrence v. Jamaica*, Communication No. 702/96, U.N. Doc. CCPR/C/60/D/702/1996, 18 July 1997

HRC, *Jones v. Jamaica*, Communication No. 585/1994, U.N. Doc. CCPR/C/62/D/585/1994, 6 April 1998

HRC, *McCordie Morrison v. Jamaica*, Communication No. 663/1995, U.N. Doc. CCPR/C/64/D/663/1995, 25 November 1998

HRC, *Brown v. Jamaica*, Communication No. 775/1997, U.N. Doc. CCPR/C/65/D/775/1997, 23 March 1999

HRC, *Freemantle v. Jamaica*, Communication No. 625/1995, U.N. Doc. CCPR/C/68/D/625/1995, 24 March 2000

HRC, *Kavanagh v. Ireland*, Communication No. 819/1998, U.N. Doc. CCPR/C/71/D/819/1998, 4 April 2001

HRC, *Cagas et al. v. the Philippines*, Communication No. 788/1997, U.N. Doc. CCPR/C/73/D/788/1997, 23 October 2001

HRC, *Simpson v. Jamaica*, Communication No. 695/1996, U.N. Doc. CCPR/C/73/D/695/1996, 31 October 2001

HRC, *Kennedy v. Trinidad and Tobago*, Communication No. 845/1998, U.N. Doc. CCPR/C/74/D/845/1998, 26 March 2002

HRC, *C. v. Australia*, Communication No. 900/99, U.N. Doc. CCPR/C/76/D/900/1999, 28 October 2002

HRC, *Casafranca de Gomez v. Peru*, Communication No. 981/2001, U.N. Doc. CCPR/C/78/D/981/2001, 22 July 2003

HRC, *Aliev v. Ukraine*, Communication No. 781/1997, U.N. Doc. CCPR/C/78/D/781/1997, 7 August 2003

HRC, *Baban v. Australia*, Communication No. 1014/2001, U.N. Doc. CCPR/C/78/D/1014/2001, 18 September 2003

HRC, *Kurbanov v. Tajikistan*, Communication No. 1096/2002, U.N. Doc. CCPR/C/79/D/1096/2002, 6 November 2003

HRC, *Lobban v. Jamaica*, Communication No. 797/1998, U.N. Doc. CCPR/C/80/D/797/1998, 16 March 2004

HRC, *Saidova v. Tajikistan*, Communication No. 964/2001, U.N. Doc. CCPR/C/81/D/964/2001, 20 August 2004

HRC, *Kulomin v. Hungary*, Communication No. 521/1992, U.N. Doc. CCPR/C/50/D/521/1992, 22 March 2006

HRC, *Mohammed Alzery v. Sweden*, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005, 10 November 2006

HRC, *Dudko v. Australia*, Communication No. 1347/2005, U.N. Doc. CCPR/C/90/D/1347/2005, 23 July 2007

IACommHR

IACommHR, *Giménez v. Argentina*, Case No. 11.245, OEA/Ser.L/V/II.91, 1 March 1996

IACtHR

IACtHR, *Habeas Corpus* in Emergency Situations (Arts. 27(2), 25(1) and 7(6) of the American Convention of Human Rights), Advisory Opinion OC-8/87, 30 January 1987

IACtHR, *Suárez-Rosero v. Ecuador*, Series C, No. 35, Judgment of 12 November 1997

IACtHR, *Case of Children's Rehabilitation*, Series C, No. 112, Judgment of 2 September 2004

IACtHR, *Case of Tibi v. Ecuador*, Series C, No. 114, Judgment of 7 September 2004

IACtHR, *Case of Acosta-Caldéron v. Ecuador*, Series C, No. 129, Judgment of 24 June 2005

IACtHR, *Case of Palamara Iribarne*, Series C, No. 135, Judgment of 22 November 2005

IACtHR, *Case of the Sawhoyamaya Indigenous Community*, Series C, No. 146, Judgment of 29 March 2006

IACtHR, *Case of the Ituango Massacres v. Colombia*, Series C, No. 148, Judgment of 1 July 2006

ICJ / PCIJ

PCIJ, S.S. 'LOTUS' (France v. Turkey), 7 September 1927, Series A, No. 10

ICJ, Corfu Channel (United Kingdom v. Albania), Merits, Judgment, 9 April 1949, ICJ Reports 1949

ICJ, Nuclear Test Case (Australia v. France), Judgment, 20 December 1974, ICJ Reports 1974

ICJ, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion of 20 November 1980, ICJ Reports 1980

ICJ, Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium), Judgment, 14 February 2000, ICJ Reports 2000

National Courts

England and Wales

Ex parte Scott [1829] 109 Eng. Rep. 166

Regina v. O./C. Depot Bataillon, R.A.S.C. Colcheter (Ex parte Elliott) [1949] 1 All E. R. 373 (K.B.)

R v. Prager [1972] 56 Cr. App. R. 151

Regina v. Bow Street Magistrates (Ex Parte Mackeson), High Court (Divisional Court) [1981] 77 I.L.R. 336

Alcom Ltd v. Republic of Columbia [1984] 74 ILR 170

R. v. Horseferry Road Magistrates' Court (Ex Parte Bennett), House of Lords [1993] 95 I.L.R. 180

R. v. Bartle [1994] 3 S.C.R. 173

R. v. Spencer [2007] 1 S.C.R. 500, 2007 SCC 11

France

Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie, Cour de Cassation (Criminal Law Chamber), 6 October 1983, 78 I.L.R. 128

Re Argoud, Cour de Cassation (Criminal Law Chamber), 4 June 1964, 45 I.L.R. 90

Decision on Request for Release, *Re: Laurent Bucyibaruta*, Case No. 2007/05293, Paris Court of Appeal, First Examining Chamber, 19 September 2007

Decision on Request for Release, *Re: Wenceslas Munyeshyaka*, Case No. 2007/05357, Paris Court of Appeal, First Examining Chamber, 19 September 2007

Germany

Bundesverfassungsgericht, *Philippine Embassy Bank Account case*, 13 December 1977, 65 ILR 146

Israel

The Attorney-General of the Government of Israel v. Eichmann, District Court of Jerusalem, Judgment, 12 December 1961, 36 I.L.R. 18

Adolf Eichmann v. The Attorney-General of the Government of Israel, Supreme Court of Israel, 1962, 36 I.L.R. 277

United States of America

Ker v. Illinois, 119 U.S. 436 (1886)

Holt v. United States, 218 U.S. 245 (1910)

Frisbie v. Collins, 342 U.S. 436 (1952)

John L. Brady v. State of Maryland, 373 U.S. 83 (1963)

Miranda v. Arizona, 384 U.S. 436 (1966)

Schmerber v. United States, 384 U.S. 757 (1966)

Katz v. United States, 389 U.S. 347 (1967)

Berger v. United States, 388 U.S. 41 (1967)

Gilbert v. California, 388 U.S. 263 (1967)

Smith v. Hooey, 393 U.S. 374 (1969)

United States v. White, 401 U.S. 745 (1971)

Bell v. Wolfish, 441 U.S. 520 (1979)

United States v. Hasting, 461 U.S. 499 (1983)

Maryland v. Buie, 494 U.S. 325 (1990)

United States v. Alvarez-Machain, 504 U.S. 655 (1992)

United States v. Toscanino, 500 F.2d 267 (Court of Appeals, 2nd Circuit), 15 May 1974

United States v. McCohany, 505 F.2d 770 (Court of Appeals, 7th Circuit), 5 November 1974

United States ex rel. Lujan v. Gengler, 510 F.2d 62 (Court of Appeals, 2nd Circuit), 8 January 1975

United States v. Yunis, 981 F. Supp. 909 (United States District Court, District of Columbia), 23 February 1988

In the Matter of SURRENDER of Elizaphan NTAKIRUTIMANA, 988 F. Supp. 1038, 17 December 1997

Elizaphan Ntakirutimana v. Janet Reno, 184 F.3d 419, 5 August 1999

South-Africa

State v. Ebrahim, Supreme Court (Appellate Division), 26 February 1991, 95 I.L.R. 417

Australia

Levinge v. Director of Custodial Services, New South Wales Court of Appeal, 23 July 1987, 9 N.S.W.L.R. 546

New Zealand

R. v. Hartley, Court of Appeal, 5 August 1977, [1978] 2 N.Z.L.R. 1999

TABLE OF INSTRUMENTS

International Treaties, Conventions and Agreements

European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5, 4 November 1950 (entry into force 3 September 1953)

Vienna Convention on Diplomatic Relations, 500 UNTS 95, Vienna, 18 April 1961 (entry into force 24 April 1964)

International Covenant on Civil and Political Rights, adopted by G.A. Resolution 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, 999 UNTS 171, 16 December 1966 (entry into force 23 March 1976)

American Convention on Human Rights, OAS Treaty Series No. 36, 22 November 1969 (entry into force 18 July 1978)

Vienna Convention on the Law of Treaties, 1155 UNTS 331, Vienna, 23 May 1969 (entry into force 27 January 1980)

African (Banjul) Charter on Human and Peoples' Rights, Organisation of African Unity, 1520 UNTS 217, 27 June 1981 (entry into force 21 October 1986)

Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984 (entry into force 26 June 1987)

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS No. 126, 26 November 1987 (entry into force 1 February 1989)

United Nations Convention Against Transnational Organised Crime, adopted by G.A. Resolution 55/25, U.N. Doc. A/RES/55/21, 8 January 2001 (entry into force 29 September 2003)

Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 2178 UNTS 90, 17 July 1998 (entry into force 1 July 2002)

Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 2178 UNTS 138, 16 January 2002 (entry into force 12 April 2002)

Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 2329 UNTS 117, 6 June 2003 (entry into force 29 April 2005)

Relationship Agreement between the International Criminal Court and the United Nations, 2283 UNTS 195, 4 October 2004 (entry into force 4 October 2004)

Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism of the Council of Europe, ETS No. 198, Warsaw, 16 May 2005 (entry into force 1 May 2008)

ICTY

Annual Reports

First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/49/342 - S/1994/1007, 29 August 1994

ICTY, Second Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/50/365 - S/1995/278, 23 August 1995

ICTY, Third Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/51/292 - S/1996/665, 16 August 1996

ICTY, Fourth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/52/375 - S/1997/729, 18 September 1997

ICTY, Seventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc A/55/271 - S/2000/777, 7 August 2000

ICTY, Eighth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/56/352-S/2001/865, 17 September 2001

ICTY, Ninth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/57/379 - S/2002/985, 4 September 2002

ICTY, Tenth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/58/297 - S/2003/829, 20 August 2003

ICTY, Twelfth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/60/267 - S/2005/532, 17 August 2005

Letters

Letter Dated 21 May 2004 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Addressed to the President of the Security Council, U.N. Doc. S/2004/420, 24 May 2004, Enclosure II: Assessment of Carla del Ponte, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, Provided to the Security Council Pursuant to Paragraph 6 of Security Council Resolution 1534 (2004)

Letter Dated 29 May 2006 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Addressed to the President of the Security Council, U.N. Doc. S/2006/353, 31 May 2006

Regulations

ICTY, Code of Professional Conduct for Counsel Appearing Before the International Tribunal, (IT/125 REV. 3), 6 August 2009

ICTR

Annual Reports

ICTR, First Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, U.N. Doc. A/51/399 - S/1996/778, 24 September 1994

ICTR, Fourth Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, U.N. Doc. A/52/375 - S/1997/729, 18 September 1997

ICTR, Sixth Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations Committed in the Territory of Neighbouring States

between 1 January and 31 December 1994, U.N. Doc. A/56/351 - S/2001/863, 14 September 2001

Letters

Completion Strategy of the International Criminal Tribunal for Rwanda, Annex to Letter Dated 30 April 2004 from the President of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of the Rwanda and Rwandan Citizens Responsible for Genocide and Other such Violations Committed in the Territory of the Neighbouring States between 1 January and 31 December 1994 Addressed to the President of the Security Council, U.N. Doc. S/2004/341, 3 May 2004

Regulations

Prosecutor's Regulation No. 2 of 1999, Standards of Professional Conduct – Prosecution Counsel

ICTR Code of Professional Conduct for Defence Counsel, 14 March 2008

ICC

OTP, Draft Regulations of the Office of the Prosecutor, 3 June 2003

OTP, Paper on Some Policy Issues before the Office of the Prosecutor, September 2003

OTP, Statement by Luis Moreno-Ocampo on the Uganda Arrest Warrants, 14 October 2005

OTP, Annex to Update on Communications Received by the Office of the Prosecutor: Iraq Response, 9 February 2006

OTP, Annex to Update on Communications Received by the Office of the Prosecutor: Venezuela Response, 9 February 2006

OTP, Report on the Activities Performed During the first three Years (June 2003 – June 2006), 12 September 2006

OTP, Report on Prosecutorial Strategy, 14 September 2006

OTP Policy Paper on the Interests of Justice, September 2007

Luis Moreno-Ocampo, Address: The Rome Statute of the International Criminal Court: Tenth Anniversary Commemoration, United Nations, July 2008 (to be found at: http://www.icc-cpi.int/iccdocs/asp_docs/Publications/ASP-PUB-10th-Ann-ENG.pdf, last visited 10 February 2014)

OTP, Prosecutorial Policy 2009 – 2012, 1 February 2010

OTP, Policy Paper on Victims' Participation, April 2010

OTP, Report on Preliminary Examination Activities, 31 December 2011

OTP, Policy Paper on Preliminary Examinations, 2013

OTP, Code of Conduct for the Office of the Prosecutor, 2013

ASP

ASP, Proposed Programme Budget for 2010 of the International Criminal Court, ICC-ASP/8/10, 30 July 2009

SCSL

SCSL, Code of Professional Conduct for Counsel with the Right to Audience before the Special Court of Sierra Leone, as adopted on 14 May 2005 and amended on 13 May 2006

STL

STL, Practice Direction on the Procedure for Taking Depositions under Rule 126 and 157 and for Taking Witness Statements for Admission in Court under Rule 155, 15 January 2010

Memorandum of Understanding between the Government of the Lebanese Republic and the Defence Office on the Modalities of their Cooperation, 28 July 2010

STL, Summary of the Accepted Rule Amendments and some Key Rejected Rule Amendment Proposals Pursuant to Rule 5 (I) of the Special Tribunal for Lebanon's Rules of Procedure and Evidence (Third Plenary of Judges), November 2010

STL Rules of Procedure and Evidence (as of 25 November 2010): Explanatory Memorandum by the Tribunal's President

STL, Code of Professional Conduct for Counsel Appearing before the Tribunal, STL-CC-2011-01, 28 February 2011

STL, Second Annual Report (2010 – 2011)

ECCC

ECCC Code of Judicial Ethics, 31 January 2008 (as amended on 5 September 2008)

Council of Europe

Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System, Committee of Ministers, 6 October 2000

European Guidelines on Ethics and Conduct for Public Prosecutors “The Budapest Guidelines”, as adopted by the Conference of Prosecutors General of Europe on 31 May 2005

HRC

HRC, CCPR General Comment No. 8: Right to Liberty and Security of Persons (Art. 9), U.N. Doc. HRI/GEN/1/Rev.9, 30 June 1982

HRC, CCPR General Comment No. 13: Article 14 (Administration of Justice), U.N. Doc. HRI/GEN/1/Rev.9, 13 April 1984

HRC, CCPR General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Article 17), U.N. Doc. HRI/GEN/1/Rev.6, 8 April 1988

HRC, CCPR General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32, 23 August 2007

HRC, Concluding Observations of the Human Rights Committee: Zimbabwe, U.N. Doc. CCPR/C/79/Add. 89, 6 April 1998

HRC, Concluding Observations of the Human Rights Committee: Italy, U.N. Doc. CCPR/C/79/Add.94, 18 August 1998

HRC, Concluding Observations of the Human Rights Committee: Lesotho, U.N. Doc. CCPR/C/79/Add.106, 8 April 1999

HRC, Concluding Observations of the Human Rights Committee: Poland, U.N. Doc. CCPR/C/79/Add.110, 29 July 1999

HRC, Concluding Observations of the Human Rights Committee: Denmark, U.N. Doc. CCPR/CO/70/DNK, 31 October 2000

HRC, Concluding Observations of the Human Rights Committee: Argentina, U.N. Doc. CCPR/CO/70/ARG, 15 November 2000

HRC, Concluding Observations of the Human Rights Committee: United Kingdom of Great-Britain and Northern Ireland, U.N. Doc. CCPR/CO/73/UKOT, 6 December 2001

HRC, Concluding Observations of the Human Rights Committee: South Korea, U.N. Doc. CCPR/C/KOR/CO/3, 28 November 2006

United Nations General Assembly

Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, G.A. Resolution 43/173, U.N. Doc. A/RES/43/173, 9 December 1988

United Nations Model Treaty on Extradition, U.N. Doc. A/RES/45/116, 14 December 1990

United Nations, G.A. Resolution 45/121, U.N. Doc A/RES/45/121, 14 December 1990, adopting the UN Basic Principles on the Role of Lawyers, as adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990

Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, U.N. Doc. A/54/634, 22 November 1999

Report of the International Commission of Inquiry on East-Timor to the Secretary-General, U.N. Doc. A/54/726 - S/2000/59, 31 January 2000

Comments on the Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, U.N. Doc. A/54/850, 27 April 2000

Comprehensive Report on the Results of the Implementation of the Recommendations of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, U.N. Doc. A/56/853, 4 March 2002

United Nations, Resolution Adopted by the General Assembly – Khmer Rouge Trials, G.A. Resolution 57/228, U.N. Doc. A/RES/57/228B, 27 February 2003

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Resolution 60/147, U.N. Doc. A/RES/60/147, 16 December 2005

United Nations, Model Treaty on Mutual Assistance in Criminal Matters, G.A. Resolution 45/117, U.N. Doc. A/RES/45/117, 14 December 1990, as amended by G.A. Resolution 53/112, U.N. Doc. A/RES/53/112, 19 September 2011

United Nations Security Council

U.N. Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993

U.N. Security Council Resolution 827 (1993), U.N. Doc. S/RES/827, 25 May 1993

U.N. Security Council Resolution 955 (1994), U.N. Doc. S/RES/955, 8 November 1994

UN Security Council Resolution 1272 (1999), U.N. Doc. S/RES/1272, 25 October 1999

UN Security Council Resolution 1470 (2003), U.N. Doc. S/RES/1470, 28 March 2003
UN Security Council Resolution 1478 (2003), U.N. Doc. S/RES/1478, 6 May 2003
U.N. Security Council Resolution 1503 (2003), U.N. Doc S/RES/1503, 28 August 2003
U.N. Security Council Resolution 1534 (2004), U.N. Doc. S/RES/1534, 26 March 2004
UN Security Council Resolution 1638 (2005), U.N. Doc. S/RES/1638, 11 November 2005
UN Security Council Resolution 1966 (2010), U.N. Doc. S/RES/1966, 22 December 2010

United Nations Secretary-General

Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993

Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 to Investigate Violations of International Humanitarian Law in the Former Yugoslavia, U.N. Doc. S/1994/674, 27 May 1994

Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935, U.N. Doc. S/1994/1405, 9 December 1994

Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, U.N. Doc. S/1999/231, 16 March 1999

Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, 4 October 2000

Letter Dated 22 December 2000 from the President of the Security-Council Addressed to the Secretary-General, U.N. Doc. S/2000/1234, 22 December 2000

Letter Dated 12 January 2001 from the President of the Security-Council Addressed to the Secretary-General, U.N. Doc. S/2001/40, 12 January 2001

Letter Dated 31 January 2001 from the President of the Security-Council Addressed to the Secretary-General, U.N. Doc. S/2001/95, 31 January 2001

Letter Dated 12 July 2001 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/2001/693, 12 July 2001

Letter dated 17 June 2002 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/2002/678, 19 June 2002, and the attached Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts

Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, U.N. Doc. S/2004/616, 23 August 2004

Summary of the Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999 (Annex I), attached to the Letter Dated 24 June 2005 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/2005/458, 15 July 2005

Report of the Secretary-General on the Establishment of the Special Tribunal for Lebanon, U.N. Doc. S/2006/863, 15 November 2006

International Commission of Inquiry on Darfur

Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005

International Independent Investigation Commission

Fourth Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005) and 1644 (2005), U.N. Doc. S/2006/375, 10 June 2006