



Judicial Responses to Pre-Trial Procedural Violations in International Criminal Proceedings

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# Summary

This thesis provides an in-depth examination of the judicial response at the international criminal tribunals (hereafter: ICTs) to procedural violations committed in the pre-trial phase of the proceedings, whereby the central question posed is how judges at the ICTs *should* respond to procedural violations committed in the pre-trial phase of international criminal proceedings. This normative question is prompted by the assumption that certain particularities of international criminal proceedings may warrant a different approach to the matter – how to address procedural violations committed in the pre-trial phase of criminal proceedings – than at the national level. While the potential for controversy when a court attaches legal consequences to the violation of procedural standards in the pre-trial phase of criminal proceedings is not unique to the context of the ICTs, the questions raised thereby – should the (predicted) public reaction to the judicial response be taken into account in the determination of how to address such violations? Should the seriousness of the offence with which the accused is charged inform the judge’s decision in this regard? – may take on a different meaning at the international level, in light of the fact that goals of international criminal justice include such ‘special’ goals as ‘reconciliation and restoration of peace and security’, ‘history-writing’, ‘promoting international rule of law’ and ‘justice for victims’, and in light of the ICTs’ *dependence* on state cooperation for their proper functioning (making them vulnerable to political backlash). Moreover, the fact that the ICTs do not have their own enforcement agencies, coupled with the fact that their governing documents are (largely) silent on how such activities are to be executed, may raise challenging questions on both a conceptual and practical level for a judge faced with an application for relief in respect of procedural violations committed in the pre-trial phase of international criminal proceedings.

This thesis is presented in eight chapters, including the introduction (Chapter 1) and the conclusion (Chapter 8). Before summarising the contents of each chapter, a general overview of the thesis is in order. In order to be able to argue how judges at the ICTs *should* respond to procedural violations committed in the pre-trial phase of international criminal proceedings, it is necessary to know what the law and practice

of the ICTs with respect to the question of how to address pre-trial procedural violations *is*. Chapters 5 and 6 set out the ICTs law and practice in this regard, with a view to assessing it in light of the analytical tools set out in Chapters 2, 3 and 4. Indeed, in order to be able to answer the aforementioned – normative – question (the central research question of this thesis), it is also necessary to know how ‘sound’ the existing law and practice is. For the purpose of this assessment, this thesis employs two analytical tools: human rights law (in particular, that pertaining to the position of the suspect or accused), and national criminal procedure. While it is widely accepted that the ICTs are *bound* by internationally recognized human rights norms, so that such norms constitute a suitable tool by which to critically *evaluate* the relevant law and practice of the ICTs, the ICTs are not bound by the procedural law and practice of domestic jurisdictions as such. Nevertheless, such law and practice provides a tool by which to assess the soundness of the relevant law and practice of the ICTs, in terms of cogency, coherence and consistency; moreover, it may serve as inspiration and guidance to the ICTs in the application of their own law. Chapter 2 sets out the human rights framework with respect to the question of how to address procedural violations committed in the pre-trial phase of criminal proceedings, while in Chapters 3 and 4 the national criminal procedure ‘parameter’ is set out, i.e. the relevant law and practice of two domestic jurisdictions: the Netherlands, and England and Wales. These jurisdictions have been selected on the basis of their instructiveness with regard to the issue under consideration, and on the basis that they are representative samples of the inquisitorial and adversarial models of procedure, whereby it may be observed that such models form the basis of international criminal procedure. Chapters 2 through 6 are *descriptive* in nature, not *normative*; indeed, the purpose of Chapters 2, 3 and 4 is not to argue what the human rights law, or what the law and practice in the domestic jurisdictions in question should be, but rather to set out what it *is* with a view to assessing the law and practice of the ICTs with respect to the question of how to address procedural violations committed in the pre-trial phase of the proceedings, as described in Chapters 5 and 6, in light thereof. That assessment lies at the heart of Chapter 7, and it is there that arguments are made as to what the law *ought* to be. In Chapter 8, the main points of analysis to have arisen from the examination (that is, the description and assessment of the existing law and practice of the ICTs, as well as the normative analysis thereof) are summarized, including the points of concern to have been identified and the suggestions made for improvement, in order to provide a more succinct answer to this thesis’ central research question.

Turning now to the individual chapters, in **Chapter 1** the central research question is introduced (how should judges at the ICTs respond to procedural violations committed in the pre-trial phase of international criminal proceedings?), as well as several sub-questions, concerning the proper rationale(s) for judicial responses to procedural violations committed in the pre-trial phase of international criminal

proceedings; the extent to which the determination of whether to attach legal consequences to established procedural violations should entail the exercise of judgement, whereby the judge has due regard to the particular circumstances of the case, i.e. about the extent to which it should be discretionary in nature (which may be contrasted to an approach whereby the judicial response is more or less automatic) and, on a related note, about the extent to which it should entail a ‘balancing’ approach, whereby the court (also) takes into account factors that seemingly have nothing to do with that which warranted the court’s attention in the first place, and which militate against a (potentially) far-reaching response thereto; and, finally, about who bears (and indeed, who *should* bear) responsibility for procedural violations committed in the pre-trial phase of international criminal proceedings – the state whose law enforcement authorities ‘actually’ committed the procedural violation or the international criminal tribunal that sought the cooperation of that state and now seeking to rely on the results of the measures executed by such authorities on their behalf. In addition to introducing the central research question and the aforementioned sub-questions, Chapter 1 delineates the scope of the study, whereby the object thereof is limited to the law and practice of the ad hoc Tribunals (the ICTY and ICTR) and the ICC (to the exclusion of the ‘hybrid’ or ‘mixed’ tribunals), and several definitions are provided. Pre-trial procedural violations are defined as encompassing not only those violations that at the national level would be described as ‘police’ illegality or unlawfulness, but also the violation by the prosecution of its pre-trial obligations, of which disclosure to the defence (of the case against the accused or of potentially exculpatory material) is a prime example.

**Chapter 2** sets out the human rights framework with respect to the question of how to address procedural violations committed in the pre-trial phase of criminal proceedings. In setting out this framework, reference is had to the International Covenant on Civil and Political Rights (hereafter: ICCPR), as well as to the European Convention on Human Rights (hereafter: ECHR). The standards contained in the ECHR (a *regional* human rights instrument), are included in this chapter in light of the fact that they largely reflect those contained in the ICCPR, so that the case law of the European Court of Human Rights (hereafter: ECtHR) can reasonably be regarded as providing authoritative interpretations of the norms that bind the ICTs. Moreover, the case law of the ECtHR is ‘over-represented’ in the case law of the international criminal tribunals, thereby confirming its value as an evaluative tool. Several rights enshrined in the comprehensive human rights treaties are relevant to this question. The right to a fair trial, provided for in Articles 14 and 6 of the ICCPR and ECHR, respectively, is an obvious starting point in this regard; it sheds light on when it is necessary to address procedural violations committed in the investigative phase *within the criminal trial*. In cases in which unlawfulness on the part of public authorities in the pre-trial phase of criminal proceedings is alleged to engage Article 6(1) of the

ECHR, the ECtHR attaches significant importance to the use of the evidence so obtained. Put differently, it is *the use of evidence* obtained unlawfully that triggers the protection of Article 6 of the ECHR; on its own, unlawfulness on the part of public authorities in the pre-trial phase, even in case of torture, is insufficient to do so.

While the use of evidence to have been obtained unlawfully triggers the protection of Article 6, it does not automatically result in a violation of Article 6 of the ECHR. Accordingly, under the ECHR, there is no automatic exclusion for evidence obtained by violation of the suspect's or accused's Convention rights, let alone for evidence obtained by pre-trial procedural violations more generally. Nevertheless, the ECtHR does recognize an automatic, or near automatic exclusionary rule for some rights violations. Thus, it recognizes an automatic exclusionary rule for evidence obtained by torture within the meaning of Article 3 of the ECHR, and a near automatic exclusionary rule for evidence obtained in violation of the right of access to a lawyer at the time of questioning under Article 6(3)(c). However, for other Convention violations committed in the pre-trial phase of criminal proceedings, the impact of the use of evidence obtained thereby on the fairness of the proceedings depends on such factors as whether the rights of the defence were observed, *how* it was used and the public interest in the investigation and prosecution of crime. The ECtHR's practice of taking into account such factors is often referred to as 'balancing'. In respect of evidence obtained by torture within the meaning of Article 3 of the ECHR, the ECtHR will *not* engage in balancing in order to determine whether its use amounted to a violation of Article 6 of the ECHR; the use of evidence obtained by torture will always do so. In respect of evidence obtained in violation of the right not to incriminate oneself, the ECtHR will similarly refrain from embarking on a balancing exercise for the purposes of the aforementioned determination (although in order to determine whether the right has been violated *in the first place*, the ECtHR may have regard to such factors as the use to which the material obtained was put and the public interest in the investigation and punishment of crime). In respect of evidence obtained by violation of the right of access to a lawyer at the time of questioning, it seems that it will do so only exceptionally. In respect of the prohibition of inhuman and degrading treatment within the meaning of Article 3 of the ECHR, the question of whether the use of evidence obtained thereby constitutes a violation of Article 6 depends firstly on whether the evidence obtained was confessional or real evidence, and, insofar as it concerns the latter, on whether the rights of the defence were observed – in particular, whether the defence could challenge the use of the evidence – and *how* it was used. Finally, in respect of violations of the right to privacy within the meaning of Article 8 of the ECHR, the ECtHR will also engage in balancing in order to determine whether the use of evidence obtained thereby amounted to a violation of Article 6; in this context, the ECtHR also expressly looks to, and attaches significant importance to, the probative value (or the 'quality') of the evidence. Accordingly, for the purposes of the balancing

exercise to be undertaken, i.e. the factors to be taken into account, in the determination of Article 6 of the ECHR (where such determination has been ‘triggered’ by (alleged) unlawfulness in the pre-trial phase of criminal proceedings), the ECtHR distinguishes between different forms of unlawfulness; the factors that may be taken into account and/or the extent to which importance may be attached to them differs as between Convention violations.

While on its own, unlawfulness on the part of public authorities in the pre-trial phase of criminal proceedings is not sufficient to trigger the protection of Article 6 of the ECHR, under the ECHR (and under the ICCPR) the victim of such unlawfulness nevertheless has remedies to pursue in this regard. Articles 2(3)(a) and 13 of the ICCPR and ECHR, respectively, provide for the right to an effective remedy, and Articles 9(5) and 5(5) of the ICCPR and ECHR, respectively, provide for the right to compensation in case of unlawful arrest or detention, whereby the latter right may be viewed as a specific manifestation of the former. While the latter requires a remedy before a court, the former does not.

In setting out the human rights framework with respect to the question of how to address pre-trial procedural violations, it is important to be mindful of the specific context in which the ICTs operate: they are largely dependent on state cooperation as regards such essential activities as the apprehension of persons suspected or accused of crimes falling within their jurisdiction and the carrying out of investigations. For this reason, the relevant human rights law and practice on inter-state cooperation in criminal matters is set out in Chapter 2; although inter-state cooperation in criminal matters differs from the cooperation between states and the ICTs, it seems that the former has had a substantial impact on the latter, so that the human rights law in respect thereof may be employed as an evaluative tool in this regard. Regarding procedural violations committed by public authorities in an international context, while the European Commission of Human Rights and the ECtHR recognise that the way in which evidence was gathered abroad may render the subsequent trial in the requesting state unfair, it seems that only flagrant rights violations (i.e. rights violations that, on their face, pose a high risk to the fairness of the proceedings or are obviously offensive to other fundamental values) are capable of doing so, where evidence obtained thereby is used at trial. This would include, most obviously, evidence obtained abroad by torture. As to what else might constitute a ‘flagrant rights violation’: a trial may be rendered unfair by the use (at trial) of evidence obtained abroad if the evidence was obtained in such a way as to *disrespect* the *defence rights* guaranteed in the Convention. This is likely to include a violation of the right of access to counsel in the investigative phase. In delay cases, the international dimension of the case, even when this is unrelated to the underlying offence, appears to be a factor militating against founding a violation of Article 6(1) of the ECHR. This, and the ECtHR’s application of a ‘qualified’ rule of non-inquiry in cases concerning the use of evidence obtained abroad

may well warrant the conclusion that the ECtHR attaches more importance to international cooperation than to the protection of individual rights.

Finally, in one of the domestic jurisdictions examined for the purpose of this thesis – the Netherlands – another aspect of human rights law has entered the discussion on how to address procedural violations committed by the police or the public prosecutor in the context of criminal proceedings: the positive obligations arising under the ECHR. The argument is that certain responses to such procedural violations, i.e. a stay of proceedings, the exclusion of evidence obtained thereby and a significant reduction of sentence, may be inconsistent with the positive obligations arising from, for example, Article 2 (which protects the right to life) and Article 3 (which prohibits torture and inhuman and degrading treatment and punishment) of the ECHR, because they prevent the court from ‘punishing effectively’ the person responsible. Proponents of this argument therefore read into such positive obligations a ‘duty to punish’. The question of whether a ‘duty to punish’ can be read into such positive obligations is also addressed in Chapter 2, as well as the question of whether any such duty can be said to apply *to the ICTs*. Turning first the question of whether there exists any such obligation under human rights law, it is asserted that there is indeed a duty under human rights law to prosecute *serious* human rights violations (as may be deduced from the case law of, among other bodies, the Human Rights Committee and the ECtHR), but that this duty is an obligation of means, not result, i.e. it does not entail an absolute obligation for the prosecution to result in criminal punishment. Nevertheless, in some cases, the fact that punishment, i.e. a criminal sanction, has not been imposed *will* mean a failure to discharge the duty to prosecute. The rationale of the duty to prosecute is general human rights protection, i.e. prevention of future human rights violations, rather than provision of a personal remedy to victims of crime or their next of kin; accordingly, in those cases in which the fact that a criminal sanction has not been imposed would amount to a failure on the part of the state in question to discharge the duty to prosecute, punishment is being required as a means of general human rights protection. In light of the fact that punishment is ‘only’ required as a matter of general human rights protection, the judge in criminal proceedings, seized with a case whereby the crime charged involves a serious human rights violation such that there is a duty to prosecute, and being called upon to provide relief in respect of pre-trial procedural violations, is (at most), it is asserted, required to make an assessment of whether, in not being able to punish the accused as a result of staying the proceedings or excluding unlawfully obtained evidence (where any remaining evidence is insufficient to found a conviction), or in imposing a lesser sentence, the deterrent value of the system would be undermined, whereby relevant considerations are whether the abuse in question forms part of a wider pattern of abuse, as well as whether the criminal law enforcement machinery already in place is sufficient to prevent similar human rights violations in the future. In other words, the

fact that a murder prosecution (whereby murder may be said to constitute a serious human rights abuse) has *not* resulted in the imposition of a criminal sanction will not necessarily amount to a failure to discharge the duty to prosecute serious human rights violations; it will not automatically undermine the deterrent value of the system already in place. As to the question of the applicability of the duty *under human rights law* to prosecute serious human rights violations *to the ICTs*, it is asserted in Chapter 2 that that duty does not apply to the ICTs, although the mandate of the ICTs to prosecute those alleged to be responsible for committing the crimes that fall within their jurisdiction might be construed as a ‘duty to prosecute’. This ‘statutory duty to prosecute’ is not absolute; it is subject to the condition that due process guarantees are observed, including the presumption of innocence.

Chapters 3 and 4 set out the law and practice with respect to the question of how to address procedural violations committed in the pre-trial phase of criminal proceedings in the Netherlands, and England and Wales, respectively. They do so by means of an overview of the consequences that the judge may attach to such procedural violations. In both chapters, consideration is given to the extent to which the determination of whether to attach legal consequences to established procedural violations entails the exercise of judgement, whereby the judge has due regard to the particular circumstances of the case, i.e. the extent to which it should be discretionary in nature (which may be contrasted to an approach whereby the judicial response is more or less automatic), and, in light of the context in which the ICTs operate, also to how courts respond to procedural violations committed in an international context. The examination in Chapters 3 and 4 is not limited to a description of the relevant law and practice, however; it also includes a description of the (possible) theoretical accounts thereof, as well as an assessment of the law and practice in light of such accounts.

As stated, **Chapter 3** sets out the *Dutch* legal framework governing the judicial response within the criminal trial to procedural violations committed by the police or public prosecutor in the course of the criminal investigation. According to Article 359a of the Dutch Code of Criminal Procedure (hereafter: CCP), the central provision for responding to pre-trial procedural violations within the criminal trial, there are three ways in which a court may respond to such violations: sentence reduction, exclusion of the evidence obtained thereby and declaring the prosecution inadmissible (a procedural step akin to a stay of proceedings). Moreover, according to the Dutch Supreme Court, that provision also allows a court to simply issue a declaration that a procedural violation has occurred without attaching any legal consequences to it. On the face of it, the Dutch judicial response within the criminal trial to pre-trial procedural violations is a matter of judicial *discretion*, in the sense that the consequence, if any, to be attached to such violations depends on the individual circumstances of the case, and whereby the trial judge is afforded a degree of freedom. Nevertheless, the judge’s room to manoeuvre in this regard, it is asserted, is extremely limited. It is not merely that the

court is required to take into account the factors set out in the second paragraph of Article 359a of the CCP (i.e. to expressly acknowledge them, and their capacity to 'guide' the court), and/or that it must be *seen* to do so (as it must). Rather, what is meant is that the response to a procedural violation committed by the police or public prosecutor in the course of the criminal investigation must be justified by a *combination* of the factors: the interest that the violated provision purports to protect, the seriousness of the violation and the prejudice caused by it. Certainly, the response to such violations must be justified by the existence of prejudice, whereby prejudice is defined precisely and narrowly, and does not encompass damage to the accused's ('illegitimate') interest 'not to be caught' or not to have incriminating evidence gathered against him or her. It is asserted that this raises questions as to *the extent to which* the Dutch judicial response within the criminal trial to procedural violations committed in the course of the criminal investigation can accurately be depicted as discretionary in nature. Indeed, the discretionary power conferred on judges by Article 359a of the CCP appears to be structured in such a way that the trial judge is strongly directed towards a certain response (*not* attaching a legal consequence to the procedural violation). Arguably, the requirement that there be actual prejudice to the accused does just that, and this may sit uneasily with the freedom seemingly conferred by the legislator on the trial judge to address procedural violations committed by the police or public prosecutor in the course of the criminal investigation in the context of Article 359a of the CCP (although this may depend on what the legislator had in mind when it did so).

Underlying the process of taking into consideration the individual circumstances of the case in the context of Article 359a of the CCP appears to be a *balancing* exercise, requiring the consideration of facts and circumstances that might militate against attaching a (certain) consequence to the procedural violation. This is expressly recognised in the context of the exclusion of evidence: under the second and third categories of exclusion to have been identified by the Dutch Supreme Court in its leading decision on Article 359a of the CCP of February 2013, both of which cite prevention or deterrence as the underlying rationale, the court is explicitly permitted or required (depending on the category) to undertake a cost-benefit analysis for the purpose of determining whether the violation concerned requires the exclusion of the evidence thereby obtained. Nevertheless, insofar as the Dutch judicial response within the criminal trial to pre-trial procedural violations can be depicted as a balancing discretion, it is important to note that this discretion is confined in at least one noteworthy way. There is little to no room to consider facts and circumstances that might militate against a (certain) response once it is established that the right of the accused to a fair trial, within the meaning of Article 6 of the ECHR and, importantly, as interpreted by the ECtHR, is at stake; this is the first category of exclusion to have been identified by the Dutch Supreme Court in its leading decision of February 2013. Regarding the court's *balancing* discretion to exclude evidence on the basis of a cost-

benefit analysis, it appears that the analysis envisaged by the Dutch Supreme Court entails the consideration of facts and circumstances relevant to the benefit side of the equation, *as well as* those relevant to the cost side thereof (that involve questioning the assumption on the benefit side of the equation that exclusion (always) has some significant deterrent effect and, on the cost side thereof, that exclusion (always) has the same societal costs: 'freeing the guilty'). This significantly widens the scope to *not* exclude unlawfully obtained evidence. Accordingly, the Dutch judicial response to pre-trial procedural violations may be said to be sensitive to public interest considerations related to the investigation and prosecution of (serious) crime. In terms of broader goals of criminal procedure, in light also of the overall restrictive application of the judicial response within the criminal trial to procedural violations committed by the police or public prosecutor in the course of the criminal investigation (as apparent from, among other things, the strictness of the criteria for each of the judicial responses, as set by the Dutch Supreme Court), it appears to give precedence to the goal of truth-finding, and, by extension, the crime control-objective, over that of individual legal protection (*individuele rechtsbescherming*), save in exceptional circumstances. At first glance such a conclusion may be surprising given that the aforementioned response is expressly underpinned by the need to ensure the accused's right to a fair trial within the meaning of Article 6 of the ECHR. In this regard it bears observing that in invoking this right as a (or rather: *the main*) rationale for responding to procedural violations committed by the police or public prosecutor in the course of the criminal investigation within the criminal trial, the Dutch Supreme Court draws heavily on the relevant case law of the ECtHR. In particular, it expressly relies on the ECtHR's position that reliance on evidence obtained through a violation of Article 8 of the ECHR does not necessarily render the trial unfair under Article 6.

In the Netherlands, the defence is required to motivate its applications pursuant to Article 359a according to (all three of) the factors set out in the second paragraph of Article 359a of the CCP and, in particular, how such factors warrant the relief sought. Only where the application is properly motivated is the court required to rule on it. Failure to do so means that the court may refuse to grant the relief sought or simply declare that an irreparable procedural violation has occurred without otherwise inquiring into the factual circumstances that, according to the defence, warrant such relief. This onerous substantiation requirement also applies to defence applications for relief in respect of alleged unlawful investigative activity carried out by public authorities outside of the Netherlands in the context of inter-state cooperation in criminal matters (whereby the Netherlands is the requesting/receiving state), regardless of who was responsible: the Dutch authorities or the foreign authorities. Unlawful investigative activity carried out by foreign public authorities outside of the Netherlands, for which the public prosecutor is not responsible, does not fall within the scope of Article 359a of the CCP. While this does not mean that Dutch criminal

courts may never attach legal consequences to such violations, the room to do so is (extremely) limited.

**Chapter 4** sets out the *English* legal framework governing the judicial response within the criminal trial to pre-trial procedural violations. In England and Wales, there are a number of ways in which pre-trial procedural violations may be addressed within the criminal trial. The trial judge may stay the proceedings on the ground that the prosecution amounts to an abuse of process of the court, exclude evidence obtained by the violation, take the violation into account at the sentencing stage or simply condemn the conduct in question. A court's power to stay the proceedings and to exclude evidence on grounds of unfairness entails the exercise of judicial *discretion*, which means, among other things, that the standard to be applied is 'open-textured' in nature, thereby allowing the court applying it to do justice according to the individual needs of the case. Discretions should be distinguished from rules, which also feature in the English judicial response within the criminal trial to pre-trial procedural violations. For example, Section 76(2) of the Police and Criminal Evidence Act 1984 (hereafter: PACE) provides for an exclusionary rule in respect of confessions. As to the discretions, under the first limb of the abuse of process doctrine, the trial judge is afforded a degree of latitude in determining whether the prejudice caused, in terms of the ability of the court to determine the guilt or innocence of the accused accurately, is such that the proceedings ought to be stayed, on account of it exposing the accused to an unacceptable risk of wrongful conviction. However, once the court decides that the prejudice is such that it does so, the proceedings must automatically, i.e. without further consideration or 'balancing', be stayed. Under the second limb, the overriding criterion is whether, if the proceedings were allowed to continue, the integrity of the adjudicative process, and, by extension, of the criminal justice system as a whole, would be undermined, a standard that is clearly open-textured in nature. The more specific rationale under this limb appears to be the 'public attitude variation' of the integrity rationale, pursuant to which the court must undertake a balancing exercise involving competing public interests (the public interest in the conviction of the 'factually guilty' against whom there is reliable evidence and the public interest in the judiciary not condoning the unlawful action of law enforcement agencies). Under this rationale, the court may take into account a variety of factors, as relevant to one or both of the competing public interests, including the seriousness of the police misconduct *and* the seriousness of the offence. The public attitude variation of the integrity rationale should be contrasted with the 'court-centred variation' thereof; under the latter, the judge acts for moral reasons stemming from his or her *own* conscience, rather than on the basis of predicted public reaction. The balancing exercise envisaged under the public attitude variation of the integrity rationale (which is not envisaged under the court-centred variation thereof) may create significant scope for a court *not* to stay the proceedings. In light of the conceptual difficulties involved in performing such a

balancing exercise, it is not surprising that calls have been made for more structured decision-making in the context of the second limb of the abuse of process doctrine, whereby the factors to which courts should attach importance are clearly identified and/or the discretion is confined.

Section 78(1) of PACE, pursuant to which a court has the power to exclude (prosecution) evidence on grounds of unfairness, also involves the exercise of judicial discretion. The overriding criterion of whether 'admission of the evidence would have *such* an adverse effect on the fairness of the proceedings that it ought not to be admitted' clearly allows the court a great deal of latitude in deciding whether or not to exclude the evidence. The trial judge exercising the discretion under Section 78 is required to make a judgment of degree; in other words, for unlawfully obtained evidence, the fact of the unlawfulness is not, in itself, sufficient to justify its exclusion. Even 'significant and substantial' breaches of PACE and/or its codes of practice do not lead to the automatic exclusion of evidence obtained thereby. In cases involving such a breach, the Court of Appeal of England and Wales has looked to whether the officials involved had acted in bad faith, and/or whether the accused had been prejudiced by the conduct concerned; such factors weigh in favour of exclusion. In cases concerning unlawfully obtained non-confession evidence (other than identification evidence), the appellate courts have attached importance to the fact that the (improper) manner in which the evidence was obtained will not have had an effect on its reliability or quality. This factor weighs against exclusion. The fact that the reliability of the evidence is considered to be a relevant factor (and apparently one to which significant weight may be attached) means that, in practice, exclusion of certain types of evidence is likely to be rare. Moreover, in a number of cases, the appellate courts have sanctioned consideration of the seriousness of the offence as a standalone factor. This factor, it seems, has been allowed to enter the analysis on the basis that, under Section 78, fairness is owed to 'both sides': the defence *and* prosecution. The appellate courts, then, have taken a variety of factors into account in the determination of whether the discretion under Section 78 was properly exercised. The wording of Section 78 would seem to support such an approach, and the appellate courts have sought to draw an analogy with the ECtHR's approach to the determination of Article 6 of the ECHR on this basis. However, this should not be taken to mean that they are seeking to adopt a rights-based approach to exclusion. In this regard it should be recalled that the appellate courts have consistently emphasized that a breach of Article 8 need not render the trial unfair, within the meaning of Article 6 of the ECHR. Further, in light of the fact that the appellate courts have not been consistent in their selection of the factors that they consider to be relevant under Section 78(1) of PACE, in this context also, calls have been made for a more structured approach to decision-making, whereby the factors to which the trial judge should attach importance are clearly identified, and for the discretion to be confined.

Chapters 5 and 6 set out the law and practice of the ICTs with respect to the question of how to address procedural violations committed in the pre-trial phase of international criminal proceedings. In **Chapter 5**, such law and practice is set out by means of an overview of the consequences that the judge may attach to such procedural violations which (potentially) have *general* application, i.e. are applicable in respect of a wider range of pre-trial procedural violations, including their general features. Those consequences are: a stay of proceedings, the exclusion of evidence, financial compensation, sentence reduction and ‘express acknowledgement’ of the violation. It also compares the law and practice of the ad hoc Tribunals to that of the ICC. The approaches of the ad hoc Tribunals and of the ICC to the question of how to address procedural violations committed in the pre-trial phase of international criminal proceedings are broadly similar, with a few notable differences. Turning first to the similarities, at both the ad hoc Tribunals and the ICC the test for a stay of proceedings consists of two non-cumulative limbs: the impossibility of a fair trial and the need to preserve the integrity of the proceedings. Further, at both the ad hoc Tribunals and the ICC, the ‘exclusion of evidence’ is characterized by the absence of a ‘blanket’ exclusionary *rule*, the existence of several specific, i.e. narrowly defined, exclusionary *rules* and (otherwise) broad *discretion* for the judges, whereby exclusion is a matter of fact and degree. And at both the ad hoc Tribunals and the ICC, there are two grounds on which to exclude evidence on account of the manner of its obtaining: substantial doubt as to reliability and serious damage to the integrity of the proceedings (whereby the room for a discretionary approach may differ as between the two grounds). Finally, at both the ad hoc Tribunals and the ICC, financial compensation and sentence reduction are available for rights violation committed in the pre-trial phase of the proceedings. As to the differences, the case law of the ad hoc Tribunals is clearer than that at the ICC as regards the circumstances that may lead to a permanent stay of proceedings. Further, while at the ad hoc Tribunals, involvement of the tribunal need not always be shown in order to justify the imposition of a stay of proceedings, there are (strong) indications that, at the ICC, attribution to an organ thereof must (always) be shown in order for the proceedings to be stayed. Regarding the exclusion of unlawfully obtained evidence, while Rule 95 of the ICTY and ICTR RPEs does not specify the norm that needs to be violated, Article 69(7) of the ICC Statute *does*; in order to trigger the exclusionary mechanism provided for under the latter provision, the evidence must have been obtained by violation of a provision of the ICC Statute, or of an internationally recognized human right. In addition, while at the ad hoc Tribunals chambers have allowed the determination to be made under Rule 95 of the RPE to be informed by the probative value of the evidence and the fact that crimes with which the accused is charged are very serious, at the ICC, chambers have held that these factors may *not* inform the determination to be made under Article 69(7) of the ICC Statute. Finally, while at the ad hoc Tribunals, financial

compensation may only be ordered upon acquittal of the accused, at the ICC, no such restriction appears to apply. And while the ICC provides for separate proceedings for requesting compensation, to be presided over by an altogether different panel of judges (designated by the Presidency especially for that purpose), at the ad hoc Tribunals, there is no such separation.

In **Chapter 6**, the law and practice of the ICTs with respect to the question of how to address procedural violations committed in the pre-trial phase of international criminal proceedings is addressed in two specific contexts: arrest and detention, and disclosure. In this regard it bears recalling that this thesis is not only concerned with what at the national level would be described as 'police' illegality or unlawfulness, of which unlawful arrest or detention is an obvious example, but also the violation by the prosecution of its pre-trial obligations, of which disclosure to the defence (of the case against the accused or of any potentially exculpatory material) is a prime example. The purpose of this 'contextual' chapter is to complement the overview provided in Chapter 5, by bringing to light important issues that might be overlooked by examining the ICTs' law and practice from the perspective of the consequences that may be attached to pre-trial procedural violations *only*, and thereby provide a fuller picture of the law and practice of the ICTs with respect to the question of how to address procedural violations committed in the pre-trial phase of international criminal proceedings. In this chapter also, the law and practice of the ad hoc Tribunals and that of the ICC are compared.

The context of *arrest and detention* provides an opportunity to consider how the ICTs (should) address procedural violations physically committed by organs that are not institutionally connected to them (in the sense that they, the ICTs, do not form part of the same legal system as the national law enforcement authorities who carry out coercive measures on their behalf). The ICTs, it may be recalled, do not have their own enforcement agencies and are dependent on state cooperation for the apprehension of persons suspected or accused of crimes falling within their jurisdiction. In the context of arrest and detention, the ICTs are prepared to entertain applications for relief in relation to an alleged illegal or unlawful deprivation of liberty carried out by *national authorities* at their request (although the conditions for doing so differ as between the ad hoc Tribunals and the ICC). However, it seems that they will not attach consequences to such violations when it cannot be shown that the relevant international criminal tribunal was somehow involved in the violation (the abuse of process doctrine being an exception to this rule at the ad hoc Tribunals). The threshold for enquiring into the circumstances surrounding an alleged illegal or unlawful deprivation of liberty *in the first place* for the purpose of determining an application for relief in this regard differs as between the ad hoc Tribunals and the ICC, as does what is understood by 'involvement' of the international criminal tribunal in the violation(s). Another point to emerge from the examination of the law and practice with respect to

the question of how to address procedural violations committed in the context of *arrest and detention* is that, in determining an application for a certain type of relief in respect of an alleged illegal or unlawful deprivation of liberty, for example a stay of proceedings, chambers have not always considered ‘alternative’ forms of relief in circumstances in which the impugned conduct, while not being grave enough to warrant the more far-reaching remedy, might have amounted to a violation of the accused’s rights such as to warrant the provision of a personal remedy in respect thereof.

Another important point to emerge more clearly in Chapter 6 than in Chapter 5, and in particular, in the context of arrest and detention, is that both the ad hoc Tribunals and the ICC are willing to attach consequences to procedural violations that do not impact on the accused’s right to a fair trial in the sense of being able to mount an effective defence. Cases involving long delays aside, the illegal or unlawful arrest or detention of a person suspected or accused of crimes falling within the jurisdiction of the relevant international criminal tribunal does not typically prevent such a person from being able to mount an effective defence. This point goes to the question of which rationale(s) should inform the determination of whether and how to address pre-trial procedural violations. Unlike illegal or unlawful arrest and detention (cases involving long delays aside), late or non-disclosure (i.e. procedural violations committed in the context of disclosure) raises issues with respect to the accused’s right to a fair trial *as well as* other fundamental values, such as respect for the rule of law and the preservation of the integrity of the proceedings, whereby different considerations are likely to apply under each. This may raise the question of which rationale should ‘prevail’, i.e. what the *primary* rationale should be when addressing such procedural violations (bearing in mind that to pursue one rationale may well be to give effect to another).

In the context of *late disclosure*, whereby the issue is that material that falls within the scope of a disclosure obligation on the part of the prosecution has been, or will have been, disclosed *outside of the time limits prescribed* or otherwise *out of time* (as opposed to *non-disclosure*, whereby the issue is that material that falls within the scope of such an obligation is being *withheld* in connection with some public or other interest), ensuring the accused’s right to a fair trial is the primary rationale for responding to the violation of procedural standards in this regard, which chambers have sought to achieve by remedying established prejudice to the accused, largely on a piecemeal basis. While other fundamental values, i.e. respect for the rule of law and the preservation of the integrity of the proceedings, may well be served by the more remedial measures (aimed at curing established prejudice to the accused), they do not appear to be at the forefront of the ICTs’ thinking with respect to the question of how to address procedural violations committed in the context of *disclosure*. While the ICTs have purported to impose sanctions against the prosecution for a failure to discharge its disclosure obligations, and have consistently mooted the possibility of

doing so, they have done so sparingly. An explanation for this may lie in chambers' findings that in failing to discharge its disclosure obligations, the prosecution did not act maliciously or in bad faith; in numerous decisions chambers have, in declining to sanction the prosecution for its failure to disclose in a timely manner, or in opting for a less far-reaching sanction, attached importance to this fact. Of course, the reluctance to impose more far-reaching sanctions may also be explained by a commitment to truth-finding, even if chambers do not always expressly acknowledge this. As to the issue of *non*-disclosure, it seems that while at the ad hoc Tribunals it is up to the prosecution *itself* to address a failure to discharge its disclosure obligations, at the ICC, this is a matter for the trial chamber.

In **Chapter 7**, the law and practice of the ICTs with respect to the question of how to address procedural violations committed in the pre-trial phase of international criminal proceedings, as set out in Chapters 5 and 6, is evaluated in light of the human rights standards set out in Chapter 2, and compared to and/or with the national law and practice (and the theoretical accounts thereof) set out in Chapters 3 and 4, in an assessment of its soundness: compliance with human rights law, and the quality of the ICTs' reasoning in this regard, in terms of cogency, coherence and consistency. Points of concern are identified and suggestions for improvement are made, and conclusions are drawn as to the most suitable rationale(s) for responding to procedural violations committed in the pre-trial phase of international criminal proceedings, the merits of a discretionary approach to the question of how to address such violations and to the impact of certain particularities of international criminal proceedings on the determination of this question.

Overall, the ICTs' law and practice is not incompatible with the relevant human rights standards (those pertaining to the position of the suspect or accused), i.e. the right to a fair trial (which sheds light on whether it is necessary to address pre-trial procedural violations *within the criminal trial*), the right to an effective remedy, the right to compensation in case of unlawful arrest or detention (which may be viewed as a specific manifestation of the right to an effective remedy) and the case law regarding the question of how to address procedural violations committed in the context of inter-state cooperation in criminal matters. However, there are several points of concern.

In conformity with human rights law, the ICTs recognize several specific, i.e. narrowly defined, exclusionary rules for certain, 'flagrant', rights violations – torture, oppressive conduct such as to violate the privilege against self-incrimination or violation of the right of access to a lawyer at the time of questioning – (while for other procedural violations exclusion is a matter of discretion for the judge), however it is a cause for concern that evidence obtained by such rights violations still seems to fall within the scope of Rule 95 of the ICTY and ICTR RPEs and Article 69(7) of the ICC Statute. Those provisions provide for an exclusionary *discretion*, whereby the determination to be made thereunder is a matter of fact and degree, entailing

consideration of the particular circumstances of the case (although the extent of the discretion may differ as between the two different grounds for excluding evidence: substantial doubt as to reliability and serious damage to the integrity of the proceedings). In order to remove any temptation on the part of judges to look beyond the fact that the evidence was obtained by such a violation, evidence obtained by such violations should be kept outside of the scope of the aforementioned provisions. This might be achieved by *codifying* the automatic exclusion of evidence obtained by torture, oppressive conduct such as to violate the privilege against self-incrimination or violation of the right of access to a lawyer at the time of questioning.

Although the ICTs have sought to provide, or have mooted the possibility of providing, accused persons with personal remedies (within the meaning of the right to an effective remedy) for rights violations committed by national authorities acting upon a request for cooperation by an ICT, in the form of financial compensation and sentence reduction, there are inconsistencies in the practice. Thus, the ICTs have seemingly provided (or otherwise mooted the possibility of providing) personal remedies for some rights violations but not for others, and the ad hoc Tribunals and the ICC seemingly require differing levels of involvement of the international criminal tribunal in question in the rights violation in order to justify the provision of a personal remedy in respect thereof. The fact that neither the ad hoc Tribunals nor the ICC seem willing to provide remedies for *any* rights violation to have been committed in the context of the execution of a request for cooperation does not appear to be incompatible with human rights law; after all, in the context of inter-state cooperation in criminal matters, it may be compatible with the right to an effective remedy for a state to refer a complaint regarding the lawfulness of the execution of a request for cooperation to the state whose authorities executed the request, provided that the allegation does not concern a flagrant rights violation such as to require a response within the trial (state) itself and provided, moreover, that a domestic remedy is available. Arguably, this last point regarding the availability of domestic remedies warrants a more 'willing' attitude on the part of the ICTs towards the issue of remedies, in order to ensure that the 'international division of labour in prosecuting crimes' does not operate to the disadvantage of the suspect or the accused. Therefore, in attaching importance to the involvement of the international criminal tribunal in question in the rights violation (which, it is asserted, the ICTs are entitled to do in light of the notion *shared responsibility* as between the ICTs and the national authorities that carry out requests for cooperation for ensuring that the suspect's or accused's rights are protected), a failure to exercise due diligence in ensuring that the case proceeds to trial in a way that respects the rights of the accused, and not a *higher* degree of involvement, should be sufficient in order to be able to attribute a rights violation to the ICTs such as to warrant the provision of remedy (within the meaning of the right to an effective remedy) in respect thereof. Other points of concern regarding the ICTs' practice

regarding the right to an effective remedy are the time that it takes to provide (personal) remedies (whereby it may be recalled that both the ad hoc Tribunals and the ICC consider *sentence reduction* to be capable of providing an effective, personal remedy for rights violations), which may undermine the effectiveness thereof, and the fact that the ICTs purport to provide such remedies within the trial itself. Regarding this last point, it is questionable whether the criminal trial is the right place to deal with the substance of the complaint, as is required under the right to an effective remedy; a separate procedure may be more appropriate, modelled on the procedure at the ICC for claiming compensation for unlawful arrest or detention.

A final point of concern in terms of human rights compliance relates to the ability of the defence to challenge evidence in the proceedings in which they are sought for admission. In some cases, the ICTs have, effectively, adopted a stance of non-enquiry, declining to enquire into the circumstances surrounding the execution of an investigative measure for the purpose of determining an application for relief in this regard. While there is human rights case law to support such an approach (at least insofar as what is not being alleged is that *defence rights* have been *disrespected*), that case law may *itself* be criticized on the basis that it is inconsistent with other case law addressing the fairness of the use at trial of evidence obtained unlawfully, whereby the ability of the defence to challenge the evidence is an important factor in the determination of whether the right to a fair trial has been violated. Non-enquiry may result in the provenance of the evidence remaining unaccounted for, and evidence whose provenance is unaccounted for, and which, by extension, cannot be challenged by the defence, should *not* be used. The issue is one of fundamental fairness.

As to the second part of the assessment undertaken in Chapter 7 – the comparison of the law and practice of the ICTs with respect to the question of how to address procedural violations committed in the pre-trial phase of international criminal proceedings to and/or with national law and practice (and theoretical accounts thereof) – the ICTs’ approach to unlawfully obtained evidence, characterized as it is by the absence of a ‘blanket’ exclusionary rule, the existence of several specific, i.e. narrowly defined, exclusionary rules and (otherwise) broad discretion for the judges, is not dissimilar to the respective approaches of the two jurisdictions examined for the purposes of this thesis – the Netherlands, and England and Wales – to such evidence. At the national level, calls have been made for a more ‘structured’ approach to the determination of applications to exclude evidence; in Chapter 7 it is asserted that the ICTs could also benefit from a more structured approach in this regard, particularly as regards the ‘serious damage to the integrity of the proceedings’ limb of the exclusionary discretion (provided for in Rule 95 of the ICTY and ICTR RPEs, and Article 69(7) of the ICC Statute), whereby the rationale being pursued would be defined more clearly, and the factors to which the court ruling on the application should attach significant importance identified. Regarding the rationale to be pursued, Chapter 7 asserts that

the court-centred variation of the integrity rationale, whereby the judge acts for moral reasons stemming from his own conscience and the focus of an approach based on the former rationale is the seriousness of the *procedural violation*, is to be preferred over the public attitude variation thereof, which requires the judge to perform a balancing exercise involving competing public interests (the public interest in the conviction of the ‘factually guilty’ against whom there is reliable evidence and the public interest in the judiciary not condoning the unlawful action of law enforcement agencies) and to consider factors relevant to each of the public interests involved, in this regard. While the ad hoc Tribunals’ case law is most in line with the public attitude variation of the integrity rationale (given that, there, chambers have allowed the determination to be made under Rule 95 of the RPE to be informed by the probative value of the evidence and the fact that crimes with which the accused is charged are very serious), the ICC’s case law is most in line with the court-centred variation thereof (given that, there, chambers have held that the probative value of the evidence and the seriousness of the offence with which the accused is charged may *not* inform the determination to be made under Article 69(7) of the ICC Statute). On the basis of the preferred rationale, the factors to which the court should attach importance may be identified. Under the court-centred variation of the integrity rationale it would be inappropriate to take the seriousness of the offence with which the accused is charged into account, but this factor, it is asserted, should not be allowed to guide the determination of an application for the exclusion of evidence *any way*, on the basis that it would open the door to, if not invite, consequentialist reasoning (and the same may be said of the probative value of the evidence). The factors to which chambers *may* have reference in the determination to be made under the ‘serious damage to the integrity of the proceedings’ limb of the exclusionary discretion are, it is asserted: whether there was a violation of an internationally recognized human right, whether there was concerted action between an organ of the international criminal tribunal in question and the national authorities (a question that the ICTs are entitled to ask given that the ICTs and the national authorities on which they are dependent for such activities as the apprehension of persons suspected or accused of crimes falling within their jurisdiction and the collection of evidence do not form part of the same legal system, on the assumption that they do not approach the issue too narrowly, i.e. disingenuously), whether the prosecution acted in good or bad faith and whether the evidence was obtained (unlawfully) in circumstances of urgency, emergency or necessity. Combined with a certain level of involvement on the part of the relevant international criminal tribunal therein, it is arguable that the violation of an internationally recognized human right should make a compelling case for exclusion.

At the ICTs, there are two, distinct, grounds for staying the proceedings: the impossibility of a fair trial and the need to preserve the integrity of the proceedings. In England and Wales also, there are two categories of case in which a court has a

discretion to stay the proceedings, on the ground that to try those proceedings will amount to an abuse of its process; by contrast, in the Netherlands there is, effectively, only one ground on which to declare that the prosecution is inadmissible: the impossibility of a fair trial. At the ICTs, then, as in England and Wales, the test for staying the proceedings reflects the notion that the court has responsibilities that go beyond reliably convicting the guilty and ensuring the protection of the innocent from wrongful conviction. The appellate case law at the ad hoc Tribunals is clearer than that at the ICC as regards the distinction between the two grounds for staying the proceedings, and the ICC Appeals Chamber's rationalization of a stay of proceedings solely in terms of 'fairness' is a cause for concern in this regard. In Chapter 7 it is asserted that the ICC Appeals Chamber should adopt clear and appropriate terminology in this regard, in order to ensure that the two grounds remain conceptually distinct. Regarding the 'impossibility of a fair trial' limb of the test for staying the proceedings, it may be more helpful to think of a stay of proceedings imposed on this basis as no more than a residual mechanism, than as a means of upholding rights. The question that a chamber should ask itself is whether the defence has been prejudiced to such an extent as to make a fair trial impossible, i.e. as to lead to the danger of a factually inaccurate verdict; while consideration of whether the accused's (defence or fair trial) rights have been violated may well assist a chamber in answering this question, it should not form the primary focus of the inquiry. Put differently, chambers should not approach the question too formalistically. Regarding the 'preservation of the integrity of the proceedings' limb, it is asserted that the ICTs could benefit from a more structured approach to the determination to be made thereunder, whereby the rationale being pursued would be defined more clearly, and the factors to which the court ruling on the application should attach significant importance identified. In this context also, the court-centred variation of the integrity rationale is to be preferred over the public attitude variation thereof, for the same reasons as under the exclusionary discretion. It bears observing that at both the ad hoc Tribunals and the ICC there is case law to suggest that the 'preservation of the integrity of the proceedings' limb of the test for staying the proceedings entails the performance of a balancing exercise, which is in line with the public attitude variation of the integrity rationale (although at the ad hoc Tribunals, some of the appellate case law is more in line with the court-centred variation thereof). The factors to which the court may have reference under the 'preservation of the integrity of the proceedings' limb of the test for staying the proceedings are: whether there was a violation of an internationally recognized human right, whether it can be said that, but for the human rights violation, the prosecution would not be taking place (a question which is distinct to this particular judicial response and would seem to require an affirmative answer in order to justify something so far-reaching as a stay or proceedings, i.e. a refusal to take cognizance of the case), whether the international

criminal tribunal in question was involved, whether the prosecution acted in bad or good faith and whether the impugned conduct took place in circumstances of urgency, emergency or necessity. Combined with a certain level of involvement on the part of the ICTs therein, it is arguable that the fact that, but for the human rights violation, the prosecution would not be taking place, should make for a compelling case for a stay. However, as with the exclusion of evidence, in the determination of an application for the proceedings to be stayed, chambers should not take into account the fact that the crime with which the accused is charged is a serious one.

It is asserted in Chapter 7 that the court-centred variation of the integrity rationale is not only to be preferred over the public attitude variation thereof, as far as the ‘non-epistemic’ limb of the exclusionary discretion and the tests for staying the proceedings are concerned; in the particular context of international criminal proceedings, it is to be preferred over other rationales also, such as the disciplinary or deterrence rationale and the protective rationale (which sees the judicial response to procedural violations as (a way of) protecting rights). The (court-centred variation of the) integrity rationale provides the best ‘fit’ for the context of the ICTs because it allows chambers to exclude evidence, or to stay the proceedings, when, despite the institutional disconnectedness between the ICTs and the national authorities who actually carry out investigations, their sense of justice is (nevertheless) offended by unlawful conduct on the part of such national authorities. This is due to the notion of ‘contamination’ that seems to underlie it. More generally, the integrity rationale, properly applied, requires internationally recognized human rights to be taken seriously, and best captures the ‘institutional’ harm that is caused when the rights of a person to have been drawn into the criminal process are violated.

Another feature of the court-centred variation of the integrity rationale is that it allows for a *discretionary* approach to the determination of an application for the exclusion of evidence on account of the manner of its obtaining, or, as the case may be, for the proceedings to be stayed. A discretionary approach, it is asserted in Chapter 7, has intrinsic value; it allows a judge to provide ‘individualized solutions’ to problems. Nevertheless, in order to ensure that the discretionary nature of the determination of applications for the exclusion of evidence and stays of proceedings does not give rise to uncertainty, unpredictability and/or arbitrary decision-making, *structure* is required. At the same time, care should be taken to not ‘over-structure’. The recognition of a limited number of specific, narrowly defined, exclusionary rules (which is appropriate insofar as the underlying procedural violation constitutes a flagrant rights violations, i.e. a rights violation that on its face poses a high risk to the fairness of the proceedings or is obviously offensive to other fundamental values) need not take away from the overall discretionary nature of the determination of the admissibility of evidence to have been obtained illegally or unlawfully, i.e. the ability of the judge to provide individualized solutions. Similarly, the recognition that certain combinations of

'factors' should make for a compelling case for exclusion, or, as the case may be, for a stay of proceedings, need not take away from the overall discretionary nature of the determination in question. What matters is attention to the circumstances of the individual case.

Finally, while several, distinctive features of international criminal procedure – the nature of the regulation of the investigation in international criminal procedure, the lack of an own enforcement agency to execute investigative measures (and the resulting reliance on state-cooperation) and the fragmentation of the investigation across several jurisdictions – raise challenging questions as regards the question of how judges at the ICTs should respond to procedural violations committed in the pre-trial phase of international criminal proceedings, such features can be factored into the 'equation' easily enough, due in no small part to the flexibility of the (court-centred variation of the) integrity rationale, and the notion of 'contamination' that would seem to underlie it. Accordingly, the fact that such features raise challenging questions should not be a reason to, at the outset, adopt a restrained or restrictive approach to the question of how to address procedural violations committed in the pre-trial phase of international criminal proceedings. It is, furthermore, difficult to see how *other* features of international criminal procedure, such as the formal recognition of victim participatory rights (at the ICC, at least), and the fact that the ICTs are dependent on state cooperation for such activities as the apprehension of persons suspected or accused of crimes falling within their jurisdiction and the carrying out of investigations, should lead to such an approach. The idea of judges taking into account the likelihood of 'political backlash' in the determination of an application for the proceedings to be stayed is deeply problematic, from the perspective of the presumption of innocence, and in light of the fact that the ICTs are supposed to be independent judicial bodies (and need to be perceived as such). As for the fact that the goals of international criminal justice are not limited to 'ordinary' goals of criminal justice (the conviction of the guilty and (correspondingly) the acquittal of the innocent), but include such 'special' goals as 'reconciliation', 'history-writing' and 'justice for victims', it is asserted in Chapter 7 that such 'special' goals do *not* warrant taking into account the seriousness of the offence with which the accused is charged as an argument *against* excluding unlawfully obtained evidence, or, as the case may be, staying the proceedings for serious misconduct. To allow such goals to enter the analysis in *any* way would seem to be inherently problematic, for suggesting that the criminal process may be utilized to pursue socio-political objectives.

Perhaps the most problematic aspect of the ICTs' case law regarding the question of how to address procedural violations committed in the pre-trial phase of international criminal proceedings is the lack of clarity as regards, and of due regard for, the rationale(s) to be pursued (particularly as regards the exclusion of evidence on account of the manner of its obtaining and the stay of proceedings) and the factors to be taken

into account. At the same time, it is relatively clear that at the ICTs, the determination of an application for the exclusion of evidence, or, as the case may be, for a stay of proceedings, is a matter of discretion, i.e. a matter of fact and degree. Such an approach lends itself to the provision of ‘individualized solutions’, and, to this extent, the ICTs’ approach is to be commended. What is required, however, is more ‘structure’ in the decision-making process, in order to ensure that the notion of judicial discretion does not become synonymous with vagueness, uncertainty and unpredictability. This calls for the clear identification of the rationale that is being pursued, and of the factors that may be taken into account. What should also be borne in mind is that discretion is *not* synonymous with ‘balancing’; the latter may be a manifestation of the former, but the exercise of judicial discretion need not entail the performance of a balancing exercise involving competing public interests. In this thesis it is asserted that, in the context of addressing procedural violations committed in the pre-trial phase of criminal proceedings, it *should* not.

Finally, **Chapter 8** – the conclusion – sets out the main findings of this study, thereby answering the central research question of this thesis.