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

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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 discretional 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.