The investigation phase in international criminal procedure: in search of common rules

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SECTION I: FRAMING THE RESEARCH

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I. THE INVESTIGATIVE DEFICIT

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

However, on 31 March 2000, in a bold move, the Appeals Chamber reconsidered its decision and concluded in light of several “new facts” presented by the Prosecutor that the violations of Barayagwiza’s rights were less “intense” and that the role played by the failings of the

2 Ibid., par. 8, 90, 104.
3 Ibid., par. 68.
Prosecutor was smaller. Hence, the remedy was disproportionate in relation to the events and a remedy should be fixed at the time of the first instance judgement.\(^4\)

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

\(^4\) ICTR, Decision (Prosecutor’s Request for Review or Reconsideration), Case No. ICTR-97-19-AR72, A. Ch., 31 March 2000.
\(^7\) Ibid., par. 45.
\(^8\) Ibid., par. 45.
\(^9\) Ibid., par. 45 - 46.
These two examples above indicate how pre-trial events and poor investigative practices may
lead to violations of the rights of suspects, accused, or other persons involved in the
investigations by international(ised) criminal courts and tribunals and how these violations
may seriously impact on the fairness of the trial. The Barayagwiza case illustrates how pre-
trial events may even cause the right to a fair trial to already be irreparably damaged prior to
the start of the trial. In addition, it shows how the fragmentation of the investigation over
several jurisdictions may be at the detriment of the suspect or accused person (in casu an issue
of contention was the exact period of time Cameroon was holding Barayagwiza at the behest
of the ICTR).\footnote{Consider the ‘Chronology of Events’ in ICTR, Decision, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-
AR72, A. Ch., 3 November 1999, Appendix A.} Above all, these examples illustrate how, notwithstanding the undeniable role
of these international(ised) criminal tribunals in the protection of human rights, these
institutions are at risk of violating international human rights norms themselves.\footnote{Consider e.g. F. MÉGRET, Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, p. 72 (noting that, at first, the international criminal tribunals were characterised “by the notion that ‘the international community can do no wrong’, perhaps leading tribunals to take liberties with rules based on a faith in the ethics and good faith of international judges and prosecutors, and the self-correcting virtues of the system. As it turns out, we now know this was a dangerous road to embark on”).}

However, the importance of investigative actions for the further proceedings is not yet
reflected to the full extent in academic writings on international criminal proceedings.
Recently, the number of books, chapters, articles and other academic writings on international
criminal procedure is growing rapidly. Nevertheless, it seems that the investigation phase has
received far less attention than the trial phase itself. For example, a number of recent books on
international criminal procedure law hardly pay any attention to the investigation phase of
proceedings.\footnote{L. CARTER and F. POCAR (eds.), International Criminal Procedure: The Interface of Civil Law and
Criminal Procedure: A Clash of Legal Cultures, The Hague, T.M.C. Asser Press, 2010. For an example to the
(whic book discusses the investigation stage of proceedings in a separate chapter).}

Furthermore, if one scrutinises the procedural frameworks and the practice of
international(ised) criminal tribunals, one notes a double ‘deficit’. First, there exists a
regulatory ‘deficit’ in the sense that the investigation phase in international criminal
procedure has been the subject of far less regulation than its trial counterpart.\footnote{Consider e.g. G. SLUITER, The Effects of the Law of International Criminal Procedure on Domestic Proceedings Concerning International Crimes, in G. SLUITER and S. VASILIEV (eds.), International Criminal}
different factors may explain this, it raises the question of whether or not it is necessary to regulate the investigation phase in more detail.\textsuperscript{15} For example, at most international(ised) criminal tribunals, the investigative powers of the Prosecutor seem very broadly formulated.

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

\section*{II. PURPOSE OF THIS STUDY}

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

\textsuperscript{15} Consider, among others, the discussion on the procedural principle of legality, \textit{infra}, Chapter 2, VI.

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

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

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

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

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


20 With regard to the ECCC, consider Article 12 (1) ECCC Agreement (“[w]here Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level” (emphasis added). In a similar vein, consider Article 20 new, 23 new, 33 new and 37 new ECCC Law. In turn, Article 28 (2) of the STL Statute establishes that the main source of procedural law are the RPE adopted by the Judges ‘who shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial’ (emphasis added). Finally, Section 54.5 TRCP provided that ‘[o]n points of criminal procedure not prescribed in the present regulation, internationally recognized principles shall apply’ (emphasis added).
investigation phase is fragmented over several jurisdictions.21 If any of the common rules which can be identified correspond to international human rights norms, then they should not only be upheld by the international criminal courts and tribunals, but also by states and/or other international actors involved in the investigation. In other words, these standards should be respected irrespective of the jurisdiction (the international criminal tribunal, national criminal justice system or international actor) which is responsible for conducting the investigative act. It follows that these human rights norms may to some extent prevent the fragmentation which results from the division of labour between the international and national level to be to the detriment of the suspect or accused person. It may be anticipated that if some common rules could be identified, they would be in accordance with international human rights law. It is recalled that the international(ised) criminal courts and tribunals were created as a response to egregious human rights violations and aim at ensuring and reaffirming human rights protection.22 In addition, they are occasionally referred to as ‘human rights tribunals’.23

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

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

21 See infra, Chapter 2, VII.2.
22 See infra, Chapter 2, V.
24 Consider e.g. Y. SHANY, Assessing the Effectiveness of International Courts: A Goal-Based Approach, in «American Journal of International Law», Vol. 106, 2012, p. 229 (“The current literature’s lack of clear,
whether efficiency and effectiveness should be assessed in light of the professed goals of international criminal justice and international criminal procedure.\textsuperscript{25} The following example illustrates how these goals may impact on the assessment of effectiveness. The goal of providing a historical record has been advanced as a potential goal of international criminal justice.\textsuperscript{26} If the assessment of the efficiency of international criminal proceedings is contingent on this goal, it would be less problematic if proceedings take a long time, provided that this length is necessary to clarify the historical facts.\textsuperscript{27} If these goals should be considered in assessing efficiency or effectiveness, the problem arises that some goals these institutions pursue are difficult to translate into indicators.\textsuperscript{28} Adding to the complexity, it will be explained in Chapter 2 how these goals of international criminal procedure and international criminal justice (including their relationship to each other) remain themselves uncertain.

While many academic writings use an ‘efficiency’ or ‘effectiveness’ perspective, they mostly fail to set out the conceptual parameters they rely upon. Some exceptions are noteworthy but not discussed here.\textsuperscript{29}

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

persuasive criteria for assessing the effectiveness of international adjudication bodies, coupled with the theoretical and methodological difficulties associated with actually measuring such criteria, generates unsatisfying results as well as misunderstandings about the effectiveness of international courts\textsuperscript{26}); M. HEIKKILÄ, The Balanced Scorecard of International Criminal Tribunals, in C. RYNGAERT, The Effectiveness of International Criminal Justice, Antwerp, Intersentia, 2009, p. 28 (“Effectiveness is thus something that is both difficult to define and to measure”).


\textsuperscript{26} See infra, Chapter 2, V.

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

\textsuperscript{28} Ibid., pp. 262 – 264.

\textsuperscript{29} M. HEIKKILÄ, The Balanced Scorecard of International Criminal Tribunals, in C. RYNGAERT, The Effectiveness of International Criminal Justice, Antwerp, Intersentia, 2009, pp. 27 – 54 (the author suggests to apply a tailor-made ‘balanced scoreboard’ perspective to measure the effectiveness of international(ised) criminal courts and tribunals); Y. SHANY, Assessing the Effectiveness of International Courts: A Goal-Based Approach, in «American Journal of International Law», Vol. 106, 2012, p. 229 (the author suggests that social sciences may provide a number of conceptual frameworks and empirical indicators that could be alternatively applied in order to assess the effectiveness of international courts and tribunals).
Which rules and/or practices regarding the investigation phase in international criminal procedure are commonly shared by the different international(ised) criminal courts and tribunals and what changes to these rules are necessary to guarantee the fairness of these investigations?

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

III. SCOPE OF THE STUDY

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

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

32 As far as the SCSL is concerned, the applicable procedural norms mainly follow from its Statute and RPE. Its Statute was annexed to the Agreement between the UN and Sierra Leone and is an integral part thereof. As far as the RPE are concerned, the RPE of the ICTR were applied mutatis mutandis, while Judges were given the authority to amend or supplement these (Article 14 SCSL Statute). Whereas, in doing so, the Judges ‘may be
Mechanism for International Criminal Tribunals (‘MICT’) was not included because its practice remains very limited and because, at the time of writing, only the Arusha branch had started its activities.33

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

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

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

33 As established pursuant to Security Council Resolution 1966, 22 December 2010.
35 See the definition of this term, infra, Chapter 3, I,3.
a broad sense. Among others, it should be understood as to also include the pre-investigative phase. Besides, at most tribunals under review, the collection of evidence may exceptionally extend beyond the start of the prosecution phase proper. Further, the arrest and detention, as custodial coercive measures, have been included in the scope of the investigation. It is clear that these measures extend beyond the investigation phase and into the pre-trial and trial phase. For example, at the ad hoc tribunals and the SCSL, the issuance of the arrest warrant is normally ordered by the Judge who has confirmed the indictment at the Prosecutor’s request. This step is part of the pre-trial phase and starts with the Prosecutor’s submission of the indictment. In turn, the ICC Prosecutor may first request a warrant of arrest or a summons to appear after the confirmation of the charges and after the trial phase has formally started.

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

IV. METHODOLOGY

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

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36 See the discussion thereof infra, Chapter 3, I.2.
37 See the discussion thereof, infra, Chapter 3, I.2.
38 Article 19 (2) ICTY Statute, Article 18 (2) ICTR Statute. No reference to arrest is made by the SCSL Statute, leaving the issue to be regulated by the RPE; Consider also Rule 47 (H) (i) ICTY, ICTR and SCSL RPE.
40 For example, since their adoption, the RPE of the ICTY, have been amended at 49 occasions, the RPE of the ICTR have been amended at 22 occasions, the RPE of the SCSL at 14 occasions, the RPE of the ECCC at 8 occasions and the RPE of the STL at 7 occasions.
courts and tribunals, as found in their judgments and decisions, was identified and examined. In a second step, a comparative evaluation of the procedural norms and practices of the tribunals and courts under review was conducted in order to determine whether any (emerging) rules of international criminal procedure could be discerned. A comparative research method was adopted for that purpose. In the absence of clear criteria for the ranking of the different international(ised) criminal courts and tribunals under review, all institutions were given the same weight in the comparative evaluation.41

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

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

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

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

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


47 In general, consider G. SHAFFER and T. GINSBURG, The Empirical Turn in International Legal Scholarship, in «American Journal of International Law», Vol. 106, 2012, pp. 1 – 46 (however, the authors acknowledge that empirical legal scholarship has its predecessors, including the New Haven School of policy science).
In particular, they refer to a number of socio-legal studies on the ICTY. In recent years, several legal scholars have sought to supplement their research on the law of international criminal procedure by data collected from interviews with participants in international criminal proceedings. For example, reference can be made to TURNER’s study which included field interviews in an academic article on defence counsels’ perspectives on the purposes of international criminal trials. In a similar vein, MÉGRET relied on data collected from interviews in an article on the ICTY’s legacy. Less ambitiously, and often in the absence of a clear methodological underpinning, other academics have relied on data gathered from some interviews in their writings on international criminal procedure. Further evidence of the growing interest among scholars in using empirical research can be found in the recent inclusion of a symposium on “Integrating a Socio-Legal Approach to Evidence in the International Criminal Tribunals”, in the Leiden Journal of International Law.

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

48 Ibid., p. 27.
50 F. MÉGRET, The Legacy of the ICTY as Seen Through Some of its Actors and Observers, in «Goettingen Journal of International Law», Vol. 3, 2011, pp. 1011 – 1052 (the author notes that “[t]he interview format was chosen as part of an effort to engage in more dialogical scholarship, and push the formal boundaries of what can be published in an international law journal […]]. But the interview format also seemed particularly suited to an article on a tribunal’s legacy” (emphasis in original)).
53 All questionnaires used are on file with the author and with the University of Amsterdam.
54 The author is grateful to Prof. Dr. Brainima, professor of legal sociology at the University of Utrecht who offered training in interview techniques for this purpose.
Positive answers were received from the ICTR, the SCSL and the ECCC. No request was sent to the SPSC as these panels had already suspended their operations. Staff who work with these institutions were then invited to participate in the research. While the participants came from different backgrounds (e.g. civil law or common law), such variables were not scientifically controlled.

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

All of the staff interviewed were working at these institutions at the time of their interviews. On some occasions, the assistance of an interpreter was required during the interview. The questionnaires were sent to the interviewees beforehand. While the interview in principle followed the order of the questions included in the questionnaire, some flexibility was allowed. Interviews were only semi-structured, implying that additional follow-up-questions were put to the participants and that the order of the questions sometimes differed, depending on the answers provided by the person interviewed. No questions pertaining to cases that the participant was or had been involved in at the time of the interview were included. Prior to the start of the interview, the participant was told that he or she had the possibility to say anything ‘off-the-record’, in which case the recording was switched off. Unless the participant later agreed to have the ‘off-the record’ statements included in the transcript, they were excluded.

The participants were offered the possibility of anonymity for their responses. The majority of interviewees preferred not to be identified by name. Hence, these interviews will be cited by referring to the participant’s affiliation (‘a staff member of the ICTR OTP’, ‘a Judge from the

55 All interview recordings and transcripts are on file with the author and with the University of Amsterdam.
SCSL’, etc.). Once the interviews had been transcribed, the interviewees were offered the possibility of revising the interview transcription and to introduce any corrections they considered necessary. The questions included in the questionnaire dealt with the law of international criminal procedure.

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

V. ORGANISATION OF THE CHAPTERS

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

56 See K. DE MEESTER, K. PITCHER, R. RASTAN and G. SLUITER, Investigation, Coercive Measures, Arrest and Surrender, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), International Criminal Procedure: Principles and Rules, Oxford, Oxford University Press, 2013, pp. 171 – 380. Because of a mistake made by the publisher, this chapter is presented as a co-authored chapter. However, part 3 of this chapter (‘Collection of Evidence’) is to be attributed to this author. This will be corrected with the next print.
Chapter 3 seeks to further define and delineate the investigation phase. Different sub-phases within the investigation phase will be identified and discussed. It will be noted how different courts and tribunals under review offer different answers to the question of when the investigation phase starts and when it ends. Determining the precise starting point of the investigation is important insofar that it determines the moment the full gamut of prosecutorial investigative powers becomes available. It needs to be examined whether a minimum threshold is required for the commencement of the investigation. In a similar vein, it needs to be assessed whether, and if so, under what conditions, international criminal procedure allows investigative efforts to continue after the end of the investigation phase proper. Subsequently, a great deal of attention will be given to the question of whether the international Prosecutor is guided by a principle of legality or whether he or she enjoys certain discretion in selecting cases for investigation and prosecution. This attention is justified since the answer to this question has important consequences for the organisation of the investigation. Finally, a number of normative principles that are relevant to the conduct of investigations before international(ised) criminal tribunals will be discussed in more detail. These include the prosecutorial principle of objectivity and the ethical duty of due diligence incumbent on the parties in international criminal proceedings.

This delineation and definition of the investigation phase in international criminal procedure forms the background for the discussion, in Section II, of the collection of evidence by the parties in the proceedings. Section II consists of Chapters 4 to 6. An important distinction will be drawn between non-coercive and non-custodial coercive investigative measures. Without any claim to exhaustiveness, investigative measures relevant to the collection of evidence have been included based on the criterion of their actual relevance according to the practice of the international(ised) criminal courts and tribunals. First, Chapter 4 discusses the interrogation of suspects and accused persons. Both the power-conferring rules relevant to this investigative act (sword dimension) as well as the relevant procedural safeguards and rules on the recording procedure (shield dimension) will be analysed. Where investigative measures can be executed by national law enforcement officials, by the Prosecutor him or herself or by a combination thereof, the determination of the applicable procedural regime will be important. Subsequently, and in a similar manner, Chapter 5 discusses the questioning of witnesses by the parties in the proceedings. The use to which statements resulting from pre-trial witness interviews are put at trial falls outside the scope of this study. However, the requirements for the admission of prior witness statements at trial may provide us with some
hints as to what procedural norms are to be upheld during the questioning of witnesses and on what the preferable standard for the recording of pre-trial witness statements is. Hence, this issue will be considered indirectly. Finally, Chapter 6 deals with non-custodial coercive measures. The first part of Chapter 6 is devoted to the identification of formal and substantial safeguards for the use of non-custodial coercive measures. The second part discusses some individual coercive investigative measures in detail, including search and seizures or the interception of communications. Where any use of coercive powers by an international Prosecutor on the territory of states is a delicate matter, attention will be paid to the question of whether and, if so, under what conditions, the international Prosecutor may directly execute coercive measures on the territory of a state.

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

Finally, the concluding Section IV will set out the main findings of the study. It will attempt to answer the question of whether any rules and/or practices on the investigation phase are
commonly shared by the different international(ised) courts and tribunals under review. In addition, in an attempt to answer the second part of the central research question, a number of general and more specific recommendations will be formulated that are necessary to ensure the fairness of investigations.