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

de Meester, K.F.G.

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I. INTRODUCTION

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

¹ Consider e.g. S. BIBAS and W.W. BURKE-WHITE, International Idealism Meets Domestic-Criminal Procedure Realism, in «Duke Law Journal», Vol. 58, 2010, p. 637 (the authors note that scholarly writings have neglected “institutional design and procedure questions” and should learn more from their domestic
Not too long ago, SCHWARZENBERGER concluded that “[t]he Law of International Criminal Procedure, as with International Criminal Law in any substantive sense, does not exist in the international customary law of unorganized international society.” SCHWARZENBERGER argued that the Charters of the IMT and IMTFE were nothing more than a joint effort by the cobelligerents of what they could do separately under the laws of war: exercising extraordinary jurisdiction against persons accused of being war criminals. Therefore, international criminal procedure, like international criminal law, could not be unequivocally established as a separate branch of law.

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

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

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


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


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

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


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

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

See e.g. C. BROWN, The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals, in «Loyola of Los Angeles International and Comparative Law Review», Vol. 30, 2008, pp. 221 – 222 (“A review of the practice of international courts and tribunals on a range of issues relating to procedure and remedies reveals evidence suggesting that there is a tendency, or at least an instinct, on the part of international courts and tribunals to adopt common approaches. These universal approaches have led to increasing commonality in the case law of international courts. This commonality concerns both the existence of procedural and remedial powers and the manner in which those powers are exercised. The practice has given rise to the emergence of what might be called a “common law of international adjudication”).
should start with a discussion of its sources. Secondly, it will be asked what role international human rights norms play in international criminal procedure. The exact relationship between human rights norms and international criminal procedure will be clarified. Thirdly, another useful parameter to discover the nature of international criminal procedure is by enquiring into what goals it is intended to serve. Attention will be paid to the goals of international criminal procedure and of international criminal justice more general. Fourthly, it will be clarified whether, and, if so, to what extent, international criminal procedure can be qualified in terms of the ‘adversarial’ and ‘inquisitorial’ models of criminal procedure; models which are used in comparative criminal procedure scholarship and are often applied to the procedures of the international(ised) criminal courts and tribunals. Fifthly, it will be asked whether the ‘sketchy’ or ‘rudimentary’ character of at least some parts of international criminal proceedings, and in particular of the investigation phase, is problematic and whether or not international(ised) criminal courts and tribunals are bound by a procedural principle of legality. Consequently, several particular features of investigations before international(ised) criminal courts and tribunals will be scrutinised. These particular features distinguish investigations conducted by international(ised) criminal courts and tribunals from their municipal counterparts. The discussion of these aspects should allow us to, in a final part, identify the normative parameters which will further be employed in this study.

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

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

16 See infra, Chapter 2, III.
is concerned, it is evident that these tribunals apply in the first place their own Statutes and RPE’s, which set forth the applicable procedural rules. Here, a tendency towards more detailed procedural rules can be noted.\(^\text{18}\) When the \textit{ad hoc} tribunals were set up, only the broader lines were set out, leaving it to the Judges to further define the details of the procedure.\(^\text{19}\) This was even more the case at the IMT and the IMTFE.\(^\text{20}\)

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

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

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


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

\(^\text{22}\) D. AKANDE, Sources of International Criminal Law, in A. CASSESE (ed.), The Oxford Companion to International Criminal Justice, Oxford, Oxford University Press, 2009, p. 44 – 45 (holding that these principles should limit the application of the VCLT methods of interpretation, insofar as these enable reference to the \textit{travaux préparatoires} in case the interpretation under Article 31 leaves the meaning ambiguous or obscure. In such situation, the meaning most favourable to the accused should be adopted (cf. Article 22 (2) ICC Statute). Consider also the recent discussion thereof at the EJIL: Talk! Weblog, http://www.ejiltalk.org/treaty-interpretation-the-vclt-and-the-icc-statute-a-response-to-kevin-jon-heller-dov-jacobs/, 25 August 2013 (last visited 10 February 2014).
discussion whether this principle also applies to procedural issues, a liberal approach suggests that it does. 23 Besides these being international courts, the international criminal courts and tribunals are bound to apply the extraneous categories of sources which can be found in Article 38 ICJ Statute (which reflects customary international law). All categories of sources of international law (treaties, customary international law and general principles of law) have been applied by international criminal tribunals. 24 Much has been written on the use of these sources of law by the tribunals. 25 Occasionally, the ad hoc tribunals have referred to categories of sources additional to the ones set forth in Article 38 ICJ Statute. 26

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


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


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

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


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


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

33 In case of a conflict between the ICC Statute and the RPE or the Elements of Crimes, the Statute prevails. See Articles 51 (5) and Article 9 (3) ICC Statute respectively.
had to other sources of law. This understanding is confirmed by the ICC Appeals Chamber, which held that if a matter is exhaustively dealt with by the ICC Statute or the RPE, then “no room is left for recourse to the second or third source of law to determine the presence or absence of a rule governing a given subject.” 34 In other words, if an issue is dealt with exhaustively by Article 21 (1) (a) ICC Statute, then there is no need to look to Article 21 (1) (b) and (c). From this consultation order, and contrary to the ad hoc tribunals’ jurisprudence, it seems to follow that statutory provisions cannot be disregarded if they would, for example, be inconsistent with a rule of international customary law. On the other hand, if one distinguishes, as indicated above, between several hierarchies of sources in Article 21 (a consultation order and a normative hierarchy), this is not necessarily the case. 35 This would bring Article 21 in line with the jurisprudence of the ad hoc tribunals. 36 However, as acknowledged by VERHOEVEN, “the rarity of general international law rules governing

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

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

36 Consider e.g. ICTR, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, Prosecutor v. Kanyabashi, A. Ch., 3 June 1999, Joint Separate and Concurring Opinion of Judge Wangh and Judge Nieto-Navia, par. 20 (“certain general principles of law, recognised by all major legal systems but not explicitly provided for by the Statute, would always, we submit, assume precedence over the need to incorporate in the Rules a new practice that may appear to the Judges to be useful”)
either the functioning of courts or the punishment of crimes considerably limits [...] the practical relevance of this point.” In this respect, one commentator notes a certain tendency in the case law of the ICC “to treat the sources enumerated in article 21(1) as a complete codification, especially with respect to procedural issues.”

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

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


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


40 Ibid., pp. 763 - 764.

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

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

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

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

45 See e.g. A. PELLET, Applicable Law, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court, Oxford, Oxford University Press, 2002, p. 1071 (“In reality, there is little doubt that this provision refers, exclusively, to customary international law, of which the ‘established principles of the international law of armed conflict’ clearly form an integral part”); C. PAULUSSEN, Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court, Antwerp, Intersentia, 2010, p. 796 (“It may indeed be the case that the “principles and rules of international law” are broader than mere customary international law, but many agree that the principles and rules of international law, in any case, cover customary international law”).
46 M.M. EL ZEIDY, Critical Thoughts on Article 59(2) of the ICC Statute, in «Journal of International Criminal Justice», Vol. 4, 2006, p. 462: “Although Article 21 does not state clearly whether decisions of the other international judicial bodies is considered an applicable source of law, arguably the phrase ‘principles and rules of international law’ mentioned in Article 21(1)(b) covers those decisions as a secondary source.”
47 ICC, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-1049, T. Ch. I, 30 November 2007, par. 44 – 45 (“the Chamber does not consider the procedural rules and jurisprudence of the ad hoc Tribunals to be automatically applicable to the ICC without detailed analysis”); ICC, Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, Situation in Uganda, Case No. 02/04-01/05-60, PTC II, 28 October 2005, par. 19 (“Accordingly, the rules and practice of other jurisdictions, whether national or international, are not as such "applicable law" before the Court beyond the scope of article 21 of the Statute. More specifically, the law and practice of the ad hoc tribunals, which the Prosecutor refers to, cannot per se form a sufficient basis for importing into the Court's procedural framework remedies other than those enshrined in the Statute.”).
principle of legality. However, apart from human rights norms, customary international law is only of limited relevance for international criminal procedure. Indeed, different from substantive international criminal law, customary international law is of limited value in resolving procedural issues.

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

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

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

52 See e.g. ICTR, Decision on Appropriate Remedy, Prosecutor v. Rwamakuba, Case No. ICTR-98-44C-T, T. Ch. III, 31 January 2007, par. 27 (“On the basis of the above, the Chamber considers that there is insufficient evidence of State practice or of the recognition by States of this practice as law to establish that customary international law provides for compensation to an acquitted person in circumstances involving a grave and manifest miscarriage of justice”) and par. 31 (“For the above reasons, while the Chamber acknowledges the importance of the principle provided for in Article 85(3) of the ICC Statute, it does not find that at present customary international law provides for a right to compensation for an acquitted person in circumstances involving a grave and manifest miscarriage of justice”); ICTR, Judgment and Sentence, Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, T. Ch. II, 1 December 2003, par. 41 (on the finding that corroboration of evidence does not constitute customary law).
(c) ICJ Statute.\textsuperscript{53} The inclusion of general principles of law originates in the understanding that it was impractical, if not impossible, to foresee every eventuality when drafting the Statute.\textsuperscript{54} It is an auxiliary source which mainly fulfils a gap-filling function.\textsuperscript{55} It is known that the identification of general principles consists of three steps: to know (1) a comparison between national systems, (2) the search for ‘common principles’ and (3) the transposition thereof to the international echelon.\textsuperscript{56} It follows from the wording of the provision (‘national

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

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


\textsuperscript{56} See e.g. A. PELLET, Applicable Law, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court, Oxford, Oxford University Press, 2002, p. 1073. With regard to this last step, Judge Fulford emphasised that “a Chamber should undertake a careful assessment as to whether the policy considerations underlying the domestic legal doctrine are applicable at this Court, and it should investigate the doctrine’s compatibility with the Rome Statute framework. This applies regardless of whether the domestic and the ICC provisions mirror each other in their formulation. It would be dangerous to apply a national statutory interpretation simply because of similarities of language, given the overall context is likely to be significantly different.” See ICC, Judgement pursuant to Article 74 of the Statute, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, Separate Opinion of Judge Adrian Fulford, par. 10. Consider also ICTY, Judgment, Prosecutor v. Erdemović, Case No. IT-96-22-A, A. Ch., 7 October 1997, Separate and Dissenting Opinion of Judge Cassese, par. 2-5, where CASSESE held that “legal constructs and terms of art upheld in national law should not be automatically applied at the international level. They cannot be mechanically imported into international criminal proceedings. The International Tribunal, being an international body based on the law of nations, must first of all look to the object and purpose of the relevant provisions of its Statute and Rules.” According to him, three considerations are important: (i) one should explore all the means available at the international level before turning to national law; (ii) it would be inappropriate mechanically to incorporate into international criminal proceedings ideas, legal constructs, concepts or terms of art which only belong, and are unique, to a specific group of national legal systems, say,
laws of legal systems of the world’), that a comparison of all legal systems is not required.\textsuperscript{57} It is unclear whether the reference to the laws of the legal systems of the world also includes case law.\textsuperscript{58} Also the ad hoc tribunals’ case law occasionally referred to general principles. It was emphasised by the ICTY Trial Chamber in \textit{Furundžija} that care must be taken whenever international criminal tribunals resort to ‘general principles’. First, care must be taken that reference is only made to “general concepts and legal institutions common to all the major legal systems of the world” (‘common denominators’).\textsuperscript{59} Furthermore, “since international trials exhibit a number of features that differentiate them from national criminal proceedings’, account must be taken of the specificity of international criminal proceedings when utilising national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided, as well as the attendant distortions of the unique traits of such proceedings.”\textsuperscript{60}

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

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


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

\textsuperscript{60} ICTY, Judgement, \textit{Prosecutor v. Furundžija}, Case No. 95-17/1-T, T. Ch., 10 December 1998, par. 178.

\textsuperscript{61} G. BITTI, Article 21 of the Statute of the ICC and the Treatment of Sources of Law in the Jurisprudence of the ICC, in C. STAHL and G. SLUITER (eds.), The Emerging Practice of the International Criminal Court, Leiden, Koninklijke Brill, 2009, p. 300 (noting that considerable differences exist, even within states. Besides the author adds that even in case such general principle of law could be identified, it would be difficult to apply it before an international criminal tribunal, considering the very different structure of these courts); S. VASILIEV, General Rules and Principles of International Criminal Procedure, in G. SLUITER and S. VASILIEV (eds.), International Criminal Procedure: Towards a Coherent Body, Cameron May, London, 2009, p. 70 (“given that national legal systems demonstrate a strong divide between common law, civil law, and other legal traditions; the establishment of common grounds is a methodologically difficult and often unfeasible task. This is especially
DELMAS-MARTY, seem more enthusiastic about the use of general principles to fill gaps or to resolve ambiguities in international criminal procedure. However, it seems difficult to imagine any such general principles, apart from very abstract ones. MALANČUK only identifies a number of abstract procedural general principles: to know the right to a fair hearing, *in dubio pro reo* and denial of justice. It was previously noted how the ICTY jurisprudence has sought to further distinguish between general principles of international law, general principles of international criminal law and general principles of criminal law. Whereas a distinction between general principles of international law and general principles of law seems acceptable, on the basis of the distinct methodology for their identification, it is unclear what the legal basis is to further distinguish general principles of international criminal law.

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

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


Consider D. AKANDE, Sources of International Criminal Law, in A. CASSESE (ed.), The Oxford Companion to International Criminal Justice, Oxford, Oxford University Press, 2009, pp. 51 – 52 (who explains that general principles of law require a comparative analysis of national law and the transposition of principles to the international echelon, whereas general principles of international law are based on the fundamentals and basic requirements of international criminal justice). In addition, he argues that “it is difficult to see that there is a separate category of general principles of ICL which does not fall into the other two categories” (*ibid.*., p. 52).

Contra, consider CASSESE, who holds that in case the Statute (or other treaties to which it refers) and customary international law do not solve a problem, or do so in an ambiguous, contradictory or unclear manner, the tribunals can refer to (1) general principles of international criminal law or (2) general principles of international law. Finally (3) if these principles are absent or incomplete, reference may be had to a secondary source of law, to know general principles of (criminal) law recognized by the major legal systems of the world. See A. CASSESE, The Influence of the European Court of Human Rights on International Criminal Tribunals – Some Methodological Remarks, in M. BERGSMO, Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide, Leiden, Martinus Nijhoff Publishers, 2003, p. 20.
The reference, in the second part of Article 21 (1) (c), to the national states that would normally exercise jurisdiction, distinguishes it from Article 38 ICJ Statute. It has been argued that this latter part (unlike the first part) only refers to substantive criminal law, not to procedural law.\textsuperscript{67} The inclusion of the latter part is rather controversial and to some extent contradictory.\textsuperscript{68} DEGUZMAN suggests that the Judges ought to avoid referring to these particular national laws, where "[t]he less often the Court considers such reference appropriate, the more likely it will be to develop a cogent body of international law".\textsuperscript{69}

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

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

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


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

\textsuperscript{72} ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, \textit{Situation in the Republic of Kenya}, Case No. ICC-01/09-19, PTC II, 31 March 2010, Dissenting Opinion of Judge Hans-Peter Kaul, par. 29 - 30 (relying to Article 20 (3) SCSL Statute and holding that the jurisprudence of other courts and tribunals may be referred to within the confines of Article 21, and more precisely in order to identify principles and rules of international law); ICC, Judgement pursuant to Article 74 of the Statute, Prosecutor v. Lubanga Dyilo, \textit{Situation in the DRC}, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 603 (“the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute”); ICC, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, \textit{Situation in the Republic of Kenya}, Case No. ICC-01/09-01/11-373, PTC II, 23 January 2012, par. 289 (“The jurisprudence of other international or hybrid tribunals is not, in principle, applicable law before the Court and may be resorted to only as a sort of persuasive authority, unless it is indicative of a principle or rule of international law”).
For internationalised criminal tribunals, things are more complicated. The description of the sources of international criminal procedure described above cannot simply be transposed. This is easily understood if one considers that in the case of a norm conflict, domestic courts cannot always apply international law and therefore disregard the conflicting national norms. As far as the SPSC are concerned, it followed from Section 3 TRCP that if an issue was not regulated by the TRCP, then a list of sources which resembles Article 21 ICC Statute, albeit with modifications, was inserted in Section 3 of UNTAET Regulation 2000/15. From this provision, read in conjunction with Section 3 of the TRCP and Sections 2 and 3 of UNTAET Regulation 1999/1, it followed that if an issue was not regulated by the TRCP, then the panels had to apply ('shall apply') (i) ‘internationally recognized human rights standards’ as well as (ii) the applicable laws in East-Timor (as determined by Section 3 of UNTAET Regulation 1999/1 (Indonesian law previously in force, until replaced by any UNTAET regulations or subsequent legislation74)), to the extent that these are in conformity with ‘international human rights standards’. In addition, Article 3.1 (b) UNTAET Regulation 2000/15 referred to extraneous sources and added that the Panels had to apply, ‘where appropriate,’ ‘applicable treaties and recognised principles and norms of international law, including the established principles of the international law of armed conflict’. No reference to ‘general principles of law’ (cf. Article 21 (1) (c) ICC Statute) was included and no hierarchy of sources was expressly provided for. In a similar vein, the SCSL RPE incorporated sources of international (criminal law) through Rule 72bis RPE. It resembles Article 21 ICC Statute, with some minor modifications. The STL, as far as substantive law is concerned, needs to apply Lebanese law, as interpreted and applied by Lebanese Courts. According to the STL Statute, the main source of procedural law are the RPE adopted by the

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75 Section 3 TRCP juncto Section 3.1 UNTAET Regulation 2000/15 juncto Section 2 - 3 UNTAET Regulation 1999/1.  
76 As adopted on 29 May 2004.  
77 Among others: whereas Article 21 (1) (b) ICC Statute refers to ‘principles and rules of international law’, Rule 72bis (ii) refers to ‘principles and rules of international customary law’ (emphasis added). Moreover, and logically, the reference to ‘the national laws of States that would normally exercise jurisdiction over the crime’ was replaced by a reference to the ‘national laws of the Republic of Sierra Leone’. Further, it is not clear from the provision whether a hierarchy of sources was intended.  
Judges ‘who shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial’. 79 Similarly, the Secretary-General’s Report mandates the application of the ‘highest standards of justice’ and holds that the STL’s procedural and evidentiary rules “are to be inspired, in part, by reference materials reflecting the highest standards of international criminal procedure.” 80 This leaves the door open for the consideration of extraneous sources. Furthermore, in line with the Appeals Chamber’s argument relating to substantive law, given that the STL is an international or internationalised criminal tribunal, the sources of international law may ‘correct’ Lebanese criminal procedure when the application and interpretation of this law “appears to be unreasonable, or may result in a manifest injustice, or is not consonant with international principles and rules binding upon Lebanon.” 81 Lastly, the ECCC should apply Cambodian law. However, it follows from Article 12 (1) ECCC Agreement that:

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


81 Consider, mutatis mutandis, STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I, A. Ch., 16 February 2011, par. 39 (emphasis in original) (see the references in accompanying footnotes). Confirming, consider K. AMBOS; Judicial Creativity at the Special Tribunal for Lebanon: Is there a Crime of Terrorism under International Law?, in «Leiden Journal of International Law», Vol. 24, 2011, p. 657. The STL Appeals Chamber seems to have accorded an even broader function to international law. The Appeals Chamber first held that, despite the existence of a customary international law definition of the crime of terrorism, and the consideration that, in the absence of any domestic provision, the Lebanese courts regularly apply international customary law (albeit not in penal matters), this definition could not be applied where Article 2 requires that codified Lebanese law is applied to the substantive crimes prosecuted by the STL (STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I, A. Ch., 16 February 2011, par. 117 – 123). However, it then concluded that such does not imply that the customary international law definition should completely be disregarded in interpreting and applying relevant provisions of Lebanese law where these international standards specifically address transnational terrorism and are binding on Lebanon. This is so where the events within the jurisdiction of the STL have been considered by the UNSC to be a “threat to international peace and security” and have justified the establishment of an international tribunal (ibid., par. 124). Such interpretation is open to criticism. Consider e.g. K. AMBOS; Judicial Creativity at the Special Tribunal for Lebanon: Is there a Crime of Terrorism under International Law?, in «Leiden Journal of International Law», Vol. 24, 2011, p. 660 (who argues, among others, that the qualification of the events as ‘threats to international peace and security’ only served to trigger the establishment of the Court under Chapter VII of the UN Charter but did not lead to the inclusion of international crimes in the STL Statute. Besides the transnational character of a crime does not as such make international law applicable, not even as a means of interpretation).
“[w]here Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.” 82

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

82 See also Article 20 new, 23 new, 33 new and 37 new ECCC Law as well as Rule 2 ECCC IR.
83 Preamble to the Internal Rules.
84 G. ACQUAVIVA, New Paths in International Criminal Justice: The Internal Rules of the Cambodian Extraordinary Chambers, in «Journal of International Criminal Justice», Vol. 6, 2008, p. 132 (“at least the international staff and the internationally appointed Judicial Officers will likely work on the assumption that the Internal Rules form a sort of ‘code’ of its own, which delineates the efforts to find complex compromises between the Cambodian and the international components of the ECCC”).
85 ECCC, Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, Nuon Chea et al., Case No. 002/19-09-2007-ECCC/OJIC (PTC06), PTC, 26 August 2008, par. 14. This holding was later adopted by the ECCC Trial Chamber. See ECCC, Decision on Nuon Chea’s Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules, NUON Chea et al., Case No. 002/19-09-2007/ECCC/TC, T. Ch., 8 August 2011, par. 7.
87 Ibid., par. 15.
From the above, it can be concluded that when the procedural framework becomes more detailed, the importance of other extraneous sources of law declines. Furthermore, since only a limited number of customary rules and general principles of law relevant to international criminal procedure can be discerned, it could be concluded that domestic law and case law will only be of limited value in the determination of international criminal procedural law. Nevertheless, MÉGRET argues that domestic practice is an important ‘source of inspiration’. In this manner, domestic practices “are in a sense in objective competition and often exert a stronger pull than actual sources of international law.” Through autonomous interpretation at the international level, these domestic practices assist in the construction of international criminal procedure. However, it may be noted that some risks are inherent in such methodology.

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

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

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

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89 Ibid., p. 70 (the author adds that “resort to such domestic sources […] is most likely to be part of a pragmatic exercise in cherry-picking elements of rules that are at any one point seen as most conducive to the goals of international criminal justice”); ibid., p. 72 (the author refers to the “pragmatic approach” which conceives of domestic criminal procedure as a “vast reservoir of possible solutions that can be combined in more or less creative ways to accomplish international criminal justice’s goals”).
91 Consider e.g. ZAPPALÀ, who considers human rights to be an ‘ideal lens’ or ‘interpretative tool’ to observe the system of international criminal tribunals. See S. ZAPPALÀ, Human rights in International Criminal Proceedings, Oxford, Oxford University Press, 2003.
same token, it is important that the most important shortcoming of using human rights as an evaluative tool is acknowledged. Human rights are not sufficiently detailed to determine the manner in which international criminal proceedings ought to be organised and what system is to be preferred.93 Different procedural solutions may be considered that are in conformity with these more abstract minimum rules. Human rights law will not always allow us to clearly choose between procedural set-ups.94 This equally holds true for the organisation and structure of the investigation phase.95

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

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

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

94 Consider e.g. L. GRADONI, The Human Rights Dimension of International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), International Criminal Procedure: Principles and Rules, Oxford, Oxford University Press, 2013, p. 74 (noting that human rights “are in most cases compatible with more than one cluster of procedural rules”. The author adds that the relationship between rules of criminal procedure and human rights norms can be described in terms of ‘ends’ and ‘means’, where full respect of human rights can be achieved through various solutions). Some authors have noted the Court’s “lack of coherent theorizing about the connection between the form of the trial and the investigation and the consequent differences in the nature of the rights that are required in the respective phases.” See J.D. JACKSON and S.J. SUMMERS, The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions, Cambridge, Cambridge University Press, 2012, p. 100.


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

§ Human rights clauses

In the first place, several provisions of the Statutes of all international(ised) criminal tribunals under review repeat international human rights provisions almost verbatim. In particular, Article 21 ICTY Statute, Article 20 ICTR Statute and Article 17 SCSL Statute reflect Article 14 ICCPR. Furthermore, several provisions of the Statute and the RPE highlight the
importance of a fair trial and demand respect for the rights of the accused person.  The same can be said about the ICC Statute. Among others, Articles 67 (rights of the accused), 55 (rights of persons during investigations) and 66 of the ICC Statute (presumption of innocence) have directly been inspired by human rights norms. However, as will be discussed in chapters to come, it is clear these provisions are more elaborate than the parallel provisions at the ad hoc tribunals and the SCSL. In particular, and unlike other tribunals under review, Article 21 (3) ICC Statute contains an explicit reference that decisions of all Court organs should be consistent with internationally recognized human rights. Where appropriate, applicable treaties can be applied pursuant to Article 21 (1) (b), including the ICCPR or ECHR.

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

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


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

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

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

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\(^{107}\) Articles 15 and 16 STL Statute.

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


\(^{110}\) Compare Article 149 (A) and (B) STL RPE.

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

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

\(^{113}\) Emphasis added.
Finally, the ECCC agreement goes one step further in referring directly to the ICCPR. More precisely, Article 12 (2) of the ECCC Agreement contains an express reference to the ICCPR in holding that ‘The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party’. To this, Article 13 (1) adds that ‘[t]he rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process’. Further conformity with international human rights norms is ensured by the fact that the ECCC may, under certain conditions, seek guidance in procedural rules established at the international level.

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

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

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

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

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

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

117 Ibid., p. 80.
the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights.\footnote{Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, par. 106.}

It follows that these human rights are part of the tribunal’s legal framework.\footnote{C. DEFRANCIA, Due Process in International Criminal Courts, in «Virginia Law Reviews», Vol. 87, 2001, p. 1393.} In practice, in applying human rights, Judges of the ad hoc tribunals occasionally suffice with a simple reference to this statement.\footnote{Consider e.g. ICTY, Decision on Momčilo Krajišnik’s Motion to Self-Represent, on Counsel’s Motions in Relation to Appointment of Amicus Curiae, and on the Prosecution Motion of 16 February 2007, Prosecutor v. Krajišnik, Case No. IT-00-39-A, A. Ch., 11 May 2007, par. 12; ICTR, Decision on Appropriate Remedy, Prosecutor v. Rwamukuba, Case No. ICTR-98-44C-T, T. Ch. III, 31 January 2007, par. 48.} However, several aspects of this phrase remain unclear. For example, it remains unresolved what human rights standards exactly are included (‘internationally recognized standards’). Arguably, it does not only refer to customary law, but also encompasses conventional sources of law.\footnote{L. GRADONI, The Human Rights Dimension of International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), International Criminal Procedure: Principles and Rules, Oxford, Oxford University Press, 2013, p. 83 (“The Secretary-General had emphasized in his Report, […] the necessity to abide by ‘internationally recognized’ human rights standards, an expression by which he might have meant something more than custom”).} Furthermore, the phrase fails to clarify the relevance of the interpretation of international human rights norms by (quasi-) judicial bodies.\footnote{ICTY, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Prosecutor v. Tadić, Case No. IT-94-1, T. Ch., 10 August 1995, par. 19 (“The Report of the Secretary-General gives little guidance regarding the applicable sources of law in construing and applying the Statute and Rules of the International Tribunal. Although the Report of the Secretary-General states that many of the provisions in the Statute are formulations based upon provisions found in existing international instruments, it does not indicate the relevance of the interpretation given to these provisions by other international judicial bodies”).} On the one hand, this statement provides further proof that the adherence to international human rights norms was intentional and not a mere ‘policy choice’.\footnote{L. GRADONI, International Criminal Courts and Tribunals: Bound by Human Rights Norms…or Tied Down?, in «Leiden Journal of International Law», Vol. 19, 2006, p. 852.} On the other hand, the reference above is not instructive regarding the binding force of international human rights norms. In other words, it does not tell us anything on the extent to which the ICTY is internally bound to respect these norms. VASILIEV argues that the report in any case expresses the tribunal’s legislator intent, allowing for it to be used as a “normative shortcut”.\footnote{S. VASILIEV, Fairness and Its Metric in International Criminal Procedure, 2013, (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2253177, last visited 14 February 2014), p. 9 (noting that
Thirdly, with regard to the \textit{ad hoc} tribunals, it has been argued that as subsidiary organs of the UN Security Council, they inherit their obligations from the United Nations. Underlying this reasoning is the understanding that the parent body cannot transfer more powers to the subsidiary organs than it possesses itself. Where respect of human rights follows from the goals of the UN under Articles 1 (3) and 55 (c) of the UN Charter and from the fact that many human rights documents were adopted under the auspices of the UN, it then also follows that powers conferred to the \textit{ad hoc} tribunals by the UNSC are also delimited by the respect of human rights. In other words, the Security Council cannot exempt subsidiary organs from the respect of human rights.\textsuperscript{126}

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

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

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

\textsuperscript{128} Consider e.g. Article 4 (1) ICC Statute.


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

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

\textsuperscript{133} SCSL, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Prosecutor v. Norman, Case No. SCSL-04-14-AR72(E), A. Ch., 31 May 2004, par. 43: “The Special Court cannot ignore whatever the Statute directs or permits or empowers it to do unless such provisions are void as being in conflict with a peremptory norm of general international law.” According to GRADONI, “\textit{jus cogens}” is not indispensable in this context: the Security Council cannot effectively exempt its subsidiary organs from observing generally recognized human rights norms. Even if one were to argue that the Special Court is a hybrid court, and thus not bound by the general rules of international law, it follows from Article 72bis SCSL RPE on
derive from the reference to human rights in the Secretary-General’s report and should be grounded in sources of law which are hierarchically superior to the tribunals’ Statutes.134

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

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

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


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

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

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


139 Ibid., p. 873.
main purpose, which is to redress the most grievous violations of human rights.\textsuperscript{140} Related to this is the argument that the apparent paradox in promoting human rights through criminal law enforcement “would be unsustainable were it not accompanied by respect for the rights of the accused to the greatest extent possible.”\textsuperscript{141}

§ Practice

The practice of the international criminal tribunals confirms the binding character of human rights norms. It is known that the ICTY first addressed the issue of the binding character of international human rights law in the \textit{Tadi\'c} Protective Measures Decision. In the often cited wording of the tribunal:

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

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

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


\textsuperscript{142} ICTY, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, \textit{Prosecutor v. Tadi\'c}, Case No. IT-94-1, T. Ch., 10 August 1995, par. 28.

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

\textsuperscript{144} For example, the ICTY Appeals Chamber stated in the \textit{Tadi\'c} case that: “For the reasons outlined below, Appellant has not satisfied this Chamber that the requirements laid down in these three conventions must apply not only in the context of national legal systems but also with respect to proceedings conducted before an
held that while regional and universal human rights instruments are not applicable as such, the Court “must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.”¹⁴⁵ A similar approach is to be found in the case law of the ICTR. Its case law confirmed that:

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

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

international court. This Chamber is, however, satisfied that the principle that a tribunal must be established by law, as explained below, is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting. It follows from this principle that it is incumbent on all States to organize their system of criminal justice in such a way as to ensure that all individuals are guaranteed the right to have a criminal charge determined by a tribunal established by law. This does not mean, however, that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be "established by law.” See ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadić, Case No. IT-94-1, A. Ch., 2 October 1995, par. 42. ¹⁴⁵ ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadić, Case No. IT-94-1, A. Ch., 2 October 1995, par. 45. ¹⁴⁶ ICTR, Decision, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 40, as acknowledged by Trial Chamber III in Rwamukamba: ICTR, Decision on Appropriate Remedy, Prosecutor v. Rwamukamba, Case No. ICTR-98-44-C-T, T. Ch. III, 31 January 2007, par. 48. ¹⁴⁷ ICTY, Decision Granting Provisional Release to Enver Hadžihasanović, Prosecutor v. Hadžihasanović, Case No. IT-01-47-PT, T. Ch. II, 19 December 2001, par. 4. Similarly, see ICTY, Decision Granting Provisional Release to Amir Kubura, Prosecutor v. Hadžihasanović et al., Case No. IT-01-47-PT, T. Ch. II, 19 December 2001, par. 4. A more or less similar argumentation is to be found in other cases. For example, ICTY, Decision on Darko Mrđa’s Request for Provisional Release, Prosecutor v. Mrđa, Case No. IT-02-59-PT, T. Ch. II, 15 April 2003, par. 21 – 26 (here, the Trial Chamber additionally notes, without further explaining, that the ICCPR and the ECHR are part of public international law).
Finally, internationalised criminal courts and tribunals also have accepted that they should comply with human rights norms which are part of general international law. 148

§ Persuasiveness of the jurisprudence of human rights supervisory bodies

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

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

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

This understanding was confirmed by all Judges and legal officers who were interviewed. It would only be binding insofar as it is an authoritative body, and the courts may, after careful consideration, come to a different conclusion; M. FEDOROVA and G. SLUITER, Human Rights as Minimum Standards in International Criminal Proceedings, in «Human Rights & International Legal Discourses», Vol. 3, 2009, p. 27; J.K. COGAN, International Criminal Courts and Fair Trials: Difficulties and Prospects, in Yale Journal of International Law, Vol. 27, 2002, p. 117.

Interview with Judge Weinberg de Roza of the ICTR, ICTR-01, Arusha, 19 May 2008, p. 2 (“we are not bound by the jurisprudence of the international courts, but we do not ignore it”); Interview with Judge De Silva of the ICTR, ICTR-06, Arusha, 2 June 2008, p. 3 (“We are not bound by their decisions [decisions by human rights courts such as the ECtHR and the IACtHR, as well as by monitoring bodies such as the HRC]. Sometimes, they have persuasive authority. You see, we consider them. We consider them because they are reasoned decisions. We cannot simply ignore them”); Interview with a Legal Officer of the ICTR, ICTR-29, Arusha 5 June 2008, p. 3 (“I think it is persuasive. That is what the law says. It is just there for persuasive effect. They do not bind the Tribunal. Invariably, the Tribunal follows good law and good precedent. I do not think that they should be binding, but I think that they are persuasive, and they should remain persuasive so as to allow the Judges to look at them and use them as the justice of individual cases demand”); Interview with a Legal Officer of the ICTR, ICTR-28, Arusha, 30 May 2008, p. 3 (“I think it is difficult de dire qu’elle est contraignante en soi, c’est-à-dire que les juges y seraient tenus et s’ils ne la suivraient pas, il y aurait une sanction. Mais, il est clair que les normes établies par d’autres organes en matière de droits de l’homme s’imposent implicitement. [M]ême si elle ne dit pas qu’elle est tenue par cette jurisprudence, dans la mesure où elle applique le principe qui est têti de cette jurisprudence, cette jurisprudence est intégrée comme faisant partie de la jurisprudence internationale que le tribunal suit”); Interview with Judge Mose, ICTR-03, Arusha, 20 May 2008, pp. 3 – 4 (“I think it is common ground that a supervisory body under one convention is not bound by the interpretation of another organ set up under a different instrument. This said, I consider them very authoritative”); Interview with Judge Short of the ICTR, ICTR-04, Arusha, 23 May 2008, p. 3 (“They are not binding. They are of a persuasive nature. Generally speaking, most Chambers rely on jurisprudence of the ad hoc Tribunals and only refer to international human rights law where the ad hoc Tribunal’s jurisprudence is deficient. The approach varies from Bench to Bench and depends also on the human rights issue at stake. With my human rights background, I am in favour of greater reliance on international human rights law as interpreted by the ECtHR and monitoring bodies when dealing with human rights issues such as the right to a fair trial and the right to a speedy trial”); Interview with a Legal Officer of the ICTR, ICTR-08, Arusha, 19 May 2008, p. 3 (“Definitely they will be guided. The authority of judgments and decisions of the other courts will have persuasive effect, they will guide other Judges who have not had a lot of time dealing with all sorts of issues. There is a matter of expertise that recommends looking at those authorities. But they can never be binding. They can have great weight depending on a number of factors – correct reasoning, for example”); Interview with a Legal Officer of the ICTR, ICTR-30, Arusha, 30 May 2008, p. 4 (“But, you know, it’s something that’s not necessarily – a Human Rights Committee or the Inter-American Court issues a decision, we’re not necessarily following. Obviously if it’s a well-reasoned, persuasive opinion”); Interview with a Legal Officer of the ICTR, ICTR-36, Arusha, 4 June 2008, p. 3 (“I think that it is just a source of guidance. It cannot bind this Tribunal. [...] But it can be very persuasive, and relevant whenever needed”); Interview with a Legal Officer of the ICTR, ICTR-31, Arusha, 2 June 2008, p. 2 (“The Tribunal is independent, it is not bound by any other court. It cannot be. But, certainly, decisions by the European Court of Human Rights have influenced, and have been taken into consideration”); Interview with Judge Egorov of the ICTR, ICTR-39, Arusha, 20 May 2008, p. 3 (“As far as the value and legal force of precedential law is concerned, I would not say the jurisprudence of, for example, the European Court is of a strictly binding character. This depends on the situation”); Interview with a Judge of the ICTR, ICTR-02, Arusha, 16 May 2008, p. 2 (“I think they are a source of guidance, but the case law of human rights courts will be a ground to understand our case whenever human rights issues arise”); Interview with a Judge of the SCSL, SCSL-10, The Hague, 16 December 2009, p. 5 (“Others, are not binding on us, but they are persuasive if reasoned and in accordance with the law and our Rules”); Interview with a Legal Officer of the SCSL, SCSL-12, The Hague, 4 February 2010, p. 4 (“I think the way that we approach it is that it would be persuasive”); Interview with a Judge of the SCSL, SCSL-09, The
Nevertheless, as argued by CASSESE, occasionally the ad hoc tribunals have attributed too much weight to the international (and national) case law, and directly applied precedents by human rights courts and bodies, using a ‘wild’, rather than a ‘wise’ approach.154 In a wise approach, national and international case law is only considered by the Judges of the international criminal tribunals in clarifying a rule of customary international law or a general principle of international law, as described above,155 or to consider the interpretation of an international rule by an another Judge to assess whether it may be applied by the Judge. It follows that the laws of the international criminal courts themselves prevail (pre-eminence) over the laws of other international legal systems. According to CASSESE, this approach respects the methods of law interpretation and better protects the (fair trial) rights of the accused by reducing the arbitrariness of decisions taken by the international Judge (arbitrium judicis).156 In turn, the direct application of the case law of other international or national courts disregards (1) the fact that international tribunals “belong to a totally distinct legal system from that of national courts” and, (2) in applying the case law of other international courts, it also ignores that international criminal proceedings display their own specific characteristics.157

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


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


157 Ibid., pp. 20 - 21. The wild approach “tends to place law that is “external” to the international criminal court on the same level as the law governing that court” (ibid., p. 24).
Moreover, a prevalence of references to regional human rights courts can be noted. Several reasons have been advanced for this recourse to the case law of these courts, and in particular of the ECtHR. These include: (i) the greater value of such international cases vis-à-vis national cases, (ii) the quantitative and qualitative value of the case law of the ECtHR, (iii) the resemblances of statutory provisions and provisions of regional human rights treaties and (iv) the extent to which the regional character of this case law assists in the clarification of general principles, since it reconciles the common law and civil law traditions on the European continent. It may be surprising that the STL relies on the jurisprudence of regional human rights courts such as the IACtHR or the ECtHR. However, this approach has been defended by the STL President on the basis that “it spells out notions and legal consequences of provisions that are to a large extent similar to those of the ICCPR, a treaty that is binding on Lebanon.”

III.2. Human rights as a source of interpretation

As already indicated above, the procedural rules of several tribunals under review envisage human rights norms as a source of interpretation. The best example is Article 21 (3) ICC
Statute. The wording of this provision reveals that, unlike the preceding Article 21 (1) and (2), this provision does not refer to a source of law which is to be applied by the Court as such. Rather, it implies that the interpretation and the application of the law (which is found in the first two paragraphs) ought to be consistent with internationally recognized human rights. 164

Although this provision has occasionally been referred to as a “general principle of interpretation”, this description is too narrow because it leaves out the ‘application’ of the sources of law in a manner consistent with internationally recognized human rights. 165 There should be a distinction between these two elements. 166 Article 21 (3) ICC Statute implies an obligation of result in that the application of the sources under Article 21 should result in a result in conformity with international human rights law. 167

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

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

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


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

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

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

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


171 Ibid., p. 47.


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

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

175 Ibid., p. 381 (“If the drafters had intended “internationally recognized human rights” to equal “customary international law,” “customary rights,” or “general principles of law derived from national laws,” presumably,
The jurisprudence has so far avoided to precisely outline its understanding of ‘internationally recognized human rights’. For our purposes, it is necessary to clarify what rights are included in the phrase ‘internationally recognized human rights’ at the investigation stage of proceedings. In the first place, it is clear that the general right to a fair trial is to be included.\(^{177}\) The importance of this right follows from several statutory provisions (consider e.g. Articles 64 (2), 67 and Article 69 (4) ICC Statute) and the ICC Appeals Chamber also confirmed that this right is to be included.\(^{178}\) Considering the broad nature of this right, it follows that all proceedings, including those at the investigation stage\(^{179}\), should be in full conformity with fair trial rights, even if they are not explicitly mentioned in the Statute or the RPE. In the second place, the ICC’s jurisprudence has confirmed that the rights to privacy and to dignity fall within the ambit of ‘internationally recognized human rights’.\(^{180}\) The clarification that the right to privacy is included in the notion of ‘internationally recognized human rights’ is important, since the statutory documents of the Court do not expressly acknowledge the existence of such a right.\(^{181}\)

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\(^{178}\) For a discussion of the notion of a ‘fair trial’ under human rights law, see infra, Chapter 2, III.4.

\(^{179}\) ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 37. Consider also ICC, Decision on the “Defence request for a permanent stay of proceedings”, Prosecutor v. Callixte Mbarushimana, Situation in the Democratic Republic of the Congo, ICC-01/04-01/10-264, PTC I, 1 July 2011, p. 4; ICC, Decision on the Prosecutor's Application for Leave to Appeal Pre-Trial Chamber III's Decision on Disclosure, Prosecutor v. Bemba Gombo, Situation in the DRC, Case No. ICC-01/05-01/08-75, PTC III, 25 August 2008, par. 13; ICC, Decision on the Prosecutor’s “Application for Leave to Reply to ‘Conclusions de la défense en réponse au mémoire d’appel du Procureur’”, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06, A. Ch., 12 September 2006, Separate Opinion of Judge Georgios M. Pikis, par. 3.

\(^{180}\) ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 37 (the Appeals Chamber argues that the right to a fair trial is a broad concept, “embracing the judicial process in its entirety”).

\(^{181}\) ICC, Decision on the Prosecutor’s Request Relating to three Forensic Experts, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. ICC- 01/04-01/07-988, T. Ch. II, 25 March 2009, par. 5.
It should equally be determined what *instruments* are relevant with regard to the phrase ‘internationally recognized human rights’. Divergent views persist in the literature.\(^{182}\) While it seems to follow from the wording of Article 21 (3) ICC Statute that regional human rights instruments are less relevant (‘universally recognized human rights’), it has been argued that they can play a role because of the highly developed character of certain of these regional systems (ECHR).\(^{183}\)

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

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


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

\(^{185}\) D. SHEPPARD, *The International Criminal Court and “Internationally Recognized Human Rights”: Understanding Article 21 (3) of the Rome Statute*, in «Journal of International Criminal Justice», Vol. 10, 2010, p. 64. The author provides a concrete example: under the ECHR, the right to a fair trial may be derogated from in times of emergency, whilst the ACHPR does not allow for such derogations. The author suggests that a solution to this problem may be found in a ‘contextual’ approach, which seeks to only apply a subset of these regional human rights norms. In making the determination what selection criteria are to be employed, the Court would consider the specifics of the case before the Court. In such scenario, a specific right under a regional instrument would be considered under Article 21 (3) where such right would have been applicable to the individual case were it to be prosecuted at the national level. Consequently, where human rights are better protected in the state that would otherwise exercise jurisdiction as a consequence of regional human rights instruments, these should be complied with by the Court. The author finds support in the opaque addition in Article 21 (1) (c) that in identifying general principles of law, the Court may ‘as appropriate’, consider ‘the national laws of States that would normally exercise jurisdiction over the crime’. In this manner, it may guarantee the principle that the Court, having an obligation to respect human rights, should not withhold rights from an accused which he or she would otherwise have enjoyed at the national level. This conforms to the principles that the state that would otherwise exercise jurisdiction has also an interest in, and an obligation to ensure that the person is not worse of at the ICC. Nevertheless, as acknowledged by the author, difficulties may arise to identify ‘the state that would otherwise exercise jurisdiction’, especially in case different states could exercise jurisdiction (*ibid.*, pp. 65 – 66).
instruments are included, such as the UDHR\textsuperscript{186}, the ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International humanitarian Law’ or the ‘Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power’.\textsuperscript{187} The inclusion of such non-binding instruments does not seem to be prevented by the wording of Article 21 (3) ICC Statute. It even finds some, albeit limited, support in the \textit{travaux préparatoires}.\textsuperscript{188} The case law of the Court also considers the case law of regional human rights supervisory bodies such as the ECtHR\textsuperscript{189}, the IACtHR\textsuperscript{190} or the IACommHR on a regular basis.\textsuperscript{191}

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


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

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

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

As indicated above, the jurisprudence to date failed to define what are to be considered ‘internationally recognized human rights’. Only Judge PIKIS provided an overall definition of the term. According to him, “[i]nternationally recognized may be regarded those human rights acknowledged by customary international law and international treaties and conventions.”

However, this definition does not resolve the question as to the extent to which regional

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


196 See supra, fn. 175 and accompanying text.


198 Ibid., p. 50.

199 ICC, Decision on the Prosecutor’s “Application for Leave to Reply to ‘Conclusions de la défense en réponse au mémoire d’appel du Procureur’”, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06, A. Ch., 12 September 2006, Separate Opinion of Judge Georgios M. Pikis, par. 3.
human rights norms are to be included. Where Judge PIKIS provides the example of the right to a fair trial, he also refers to such regional instruments. Hence, it seems that Judge PIKIS would favour their inclusion.

To date, the Court has applied and interpreted many procedural provisions which are relevant to the investigative and pre-trial phase in light of Article 21 (3). This illustrates the enormous potential of this provision. Among others, the Court has construed the ‘substantial grounds to believe’ evidentiary standard for the confirmation of charges under Article 61 (7) ICC in light of internationally recognized human rights\(^ {201} \), the ‘reasonable grounds to believe’ standard for the issuance of a warrant of arrest (Article 58 (1) (a) ICC Statute)\(^ {202} \) as well as the identical threshold for a summons to appear (Article 58 (7) ICC Statute).\(^ {203} \) It further relied upon these internationally recognized human rights in applying and interpreting the right of the accused to legal representation by counsel,\(^ {204} \) the presumption of innocence under Article 66\(^ {205} \) or the provisions on provisional detention and interim release.\(^ {206} \)

\(^{200}\) Ibid, par. 3.
\(^{203}\) ICC, Decision on the Prosecution Application under Article 58 (7) of the Statute, Prosecutor v. Harun and Kushayb, Situation in Darfur, Sudan, Case No. ICC-02-05-01-07, PTC I, 27 April 2007, par. 28.
\(^{204}\) ICC, Reasons for “Decision of the Appeals Chamber on the Defence Application ‘Demande de suspension de toute action ou procédure afin de permettre la designation d'un nouveau Conseil de la Défense' Filed on 20 February 2007” Issued on 23 February 2007, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01-04-01-06-844 , A. Ch., 9 March 2007, par. 12 (“Such a right is a universally recognized human right (see article 21 (3) of the Statute) that finds expression in international and regional treaties and conventions”).
\(^{205}\) ICC, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings, Prosecutor v. Mbarushimana, Situation in the DRC, Case No. ICC-01-04-01-10-51, PTC I, 31 January 2011, par. 9.
\(^{206}\) Consider e.g. the interpretation of Article 60 (2) ICC Statute (ICC, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire, Case No. ICC-02/11-01-11-728 (OA), A. Ch., 26 October 2012, Dissenting Opinion of Judge Anita Usacka, par. 8; ICC, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 28 July 2010 Entitled “Decision on the Review of the Detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118 (2) of the Rules of Procedure and Evidence”, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01/08-1019 (OA 4), A. Ch., 19 November 2010, par. 49) or the interpretation of Article 60 (3) (ICC, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa, Prosecutor v. Bemba Gombo, Situation in the Central African Republic, Case No. ICC-01/05-01-08-475, PTC II,
The above offers proof of the privileged position human rights norms have acquired within international criminal law and international law. Commentators refer to the “quasi-constitutional”

\(^{207}\), “international super- legality”\(^{208}\) or “permeating role” of human rights.\(^{209}\)

§ Methodology

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

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


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

\(^{211}\) ICC, Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Situation in the DRC, Case No. ICC-01/04-101, PTC I, 17 January 2006, par. 81.
More complicated is the situation where the sources under Article 21 (1) (a) are silent on a certain issue. Should the Judges in such a case immediately proceed to apply the sources under Article 21 (1) (b) or should they rather first try to see whether such lacuna can be filled through the interpretation and application of the sources under Article 21 (1) (a) in light of Article 21 (3)? The Court has adopted the latter approach. Hence, one can only resort to Article 21 (1) (b) and (c) if there is a lacuna in the law under Article 21 (1) (a) which cannot be filled by treaty interpretation (VCLT) and by article 21 (3) ICC Statute. To a certain extent, this understanding interferes with the hierarchy provided for under Article 21 insofar as it implies that when those sources under (b) and (c) represent internationally recognised human rights, they become already relevant when assessing Article 21 (1) (a). This is important because if a human rights norm is applied pursuant to Article 21 (1) (b), then some discretion is built in when it is applied by the Court ('where appropriate'). Taking the right to privacy as an example, there would be more flexibility for the Judges to adapt the right to the needs of the Court under Article 21 (1) (b) ICC Statute. In the manner outlined above, a gap-filling or generative power has been attributed to Article 21 (3) ICC Statute. This power has been criticised by some commentators, on the basis that it over stretches Article 21 (3) and fails to neatly distinguish between sources of law and sources of interpretation.

Nevertheless, the wording of Article 21 (3) (‘the application and interpretation of law’) seems to support a broader reading. According to SHEPPARD, this interpretation “avoids

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


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

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

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

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

216 Ibid., p. 60.
217 Ibid., judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision on the defence challenge to the jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 37 – 39. See also e.g. ICC, decision on the “Corrigendum of the Challenge to the Jurisdiction to the International Criminal Court on the Basis of Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)”, Prosecutor v. Gbagbo, Situation in the Republic of Côte d’Ivoire, Case No. ICC-02/11-01/11-212, PTC I, 15 August 2012, par. 89.
218 Ibid., judgment on the appeal of the prosecutor against the decision of trial chamber I entitled “Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008”, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-1486 (OA 13), A. Ch., 21 October 2008, par. 77 – 85.
219 Ibid., par. 77; ICC, judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision on the defence challenge to the jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-772 (OA4), A. Ch., 14 December 2006, par. 34 – 39. See also D. SHEPPARD, The International Criminal Court and “Internationally Recognized Human Rights”: Understanding Article 21 (3) of the Rome Statute, in «Journal of International Criminal Justice», Vol. 10, 2010, p. 62 (on the Appeals Chamber decision of 21 October 2008: “The Court did not simply relinquish jurisdiction though [sic] non-application of the Statute, but rather found a power to temporarily suspend proceedings while retaining jurisdiction, and a corresponding power to re-institute them, neither of which existed in the Statute’s text. Indeed, based on the judgment of the Appeals Chamber in the jurisdiction challenge, such powers were implicitly excluded by the Statute, precluding reliance on Article 21 (1) (b) or (c) to ground the authority. They were freestanding powers that arose entirely out of Article 21(3), illustrating judicial acceptance of its generative content”).
220 S. VASILIEV, Proofing the Ban on ‘Witness Proofing’: Did the ICC get it right?, in «Criminal Law Forum», Vol. 20, 2009, pp. 218 – 219 (“Even where not explicitly foreseen in the Statute or Rules, the said remedy will certainly lie in the broad competences of the judges and/or the relevant rights of the participants (for example, the duty to ensure and the right to receive a fair trial). Thus, the ‘revelation of a potential remedy would not be gap-filling by way of direct application of the standards specified in Article 21(3), but rather a logical corollary of the interpretation and application of the proper law of the ICC in light of those standards”).
Additionally, when provisions leave a certain amount of discretion to the Judges, the factors that are to be considered in exercising such discretion should be interpreted and applied in a manner consistent with internationally recognised human rights. One clear example is again Article 64 (2) ICC Statute, which mandates the Trail Chamber to “ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.” It was confirmed by the Appeals Chamber that the different factors and competing interests should be considered in light of Article 21 (3).\(^\text{221}\)

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

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

\(^\text{222}\) Rule 3 (A) STL RPE.

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

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

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

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

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


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


229 As argued above, Chapter 2, III.1, fn. 93 and accompanying text.
actions are conducted by the national authorities or by the staff of international organisations. Insofar as the national authorities and international organisations conducting investigative acts are bound by international human rights norms, these human rights may assist in preventing any gaps in the protective regime.

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

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

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

230 See infra, Chapter 2, VII.2.
231 See infra, Chapter 2, VII.2.
233 Article 14 of the ICCPR, Article 6 ECHR, Article 8 ACHR; Article 7 ACHPR; Articles 10 and 11 UDHR.
234 C. SAFFERLING, International Criminal Procedure, Oxford, Oxford University Press, 2012, pp. 60 – 61 (the author distinguishes between (1) institutional guarantees (e.g. independence and impartiality of the court); (ii) moral principles that should preside over every step of the proceedings (presumption of innocence or equality of arms) and (iii) legal claims to be free from something or to be given something (some of them have overall validity and are precise enough to be called ‘self-executing’ (e.g. right to counsel, right not to be arbitrarily detained))).
236 ECtHR, Papon v. France, Application No. 54210/00, Judgment of 25 July 2002, Reports 2002-VII, par. 98 (”As to the Government's argument based on the extreme seriousness of the offences of which the applicant stood accused, the Court does not overlook the fact. However, the fact that the applicant was prosecuted for and convicted of aiding and abetting crimes against humanity does not deprive him of the guarantee of his rights and freedoms under the Convention”); ECommHR, Koch v. Federal Republic of Germany, Application No. 1270/61, Decision of 8 March 1962, Recueil 8, pp. 91-97 (“Considérant que la requérante se trouve détenue en exécution d'une condamnation qui lui a été infligée à raison de crimes perpétrés au mépris des droits les plus élémentaires...
The right to a fair trial as laid down in human rights instruments refers to the ‘hearing’ and is silent on its application or not to the investigative or pre-trial phase. However, it cannot be doubted that it applies to all stages of criminal proceedings, including investigations. Admittedly, the enjoyment of the right to a fair trial in criminal matters under Article 14 ICCPR or Article 6 ECHR, requires the presence of a ‘criminal charge’. It follows that investigations preceding the existence of a ‘charge’ or measures outside the determination of a criminal charge fall outside their ambit. On the other hand, the jurisprudence of the ECtHR has clarified that this concept should be given an autonomous interpretation. The Court explained that ‘whilst ‘charge’, for the purposes of Article 6 (1), may in general be defined as ‘the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence’, it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect.’ Such autonomous interpretation is important, since it prevents the postponement of the moment a person becomes formally charged. While the criterion offered by the Court (‘substantially affected’) remains somewhat vague, it has been argued that the starting point may well be when defendants “are held to account for allegations.”

The HRC has yet to fully clarify the concept of ‘criminal charge’. On one occasion, the Committee held with regard to Article 14 (3) (a) ICCPR that it “applies to all cases of criminal charges, including those of persons not in detention, but not to criminal
investigations preceding the laying of charges.” 242 At least one distinguished commentator has argued that the HRC should adopt a similar autonomous interpretation of “criminal charge” as the ECtHR. 243

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

243 M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR commentary (2nd edition), Kehl am Rein, Engel, 2005, pp. 318 – 319 (referring to “the date on which State activities substantially affect the situation of the person concerned.” “This is usually the first official notification of a specific accusation, but in certain cases, this may also be as early as the arrest”).
244 ECtHR, Imbrioscia v. Switzerland, Application No. 13972/88, Series A, No. 275, 24 November 1993, par. 36 (the government had argued that Article 6 (1) and (3) did not apply to preliminary investigations). However, it is surprising that the investigation phase is absent from the wording of Article 6 ECHR. For a critical assessment, see S.J. SUMMERS, Fair Trials: the European Criminal Procedural Tradition and the European Court of Human Rights, Oxford, Hart Publishing, 2007, pp. 163 – 166 (the author refers to the “investigation phase lacuna”).
245 See e.g. ECtHR, Imbrioscia v. Switzerland, Application No. 13972/88, Series A, No. 275, 24 November 1993, par. 36 (emphasis added); ECtHR, Murray v. the United Kingdom, Application No. 14310/88, Series A, No. 300-A, Judgment of 28 October 1994, par. 62; ECtHR, Shubelnik v Ukraine, Application No. 16404/03, Judgment of 19 February 2009, par. 52.
The benefit of the above interpretation of the right to a fair trial is that it does not conceive of the investigation as a distinct, separated phase in the criminal process.247 Underlying this interpretation is the understanding that there exists a de facto continuum from investigation to trial: the regulation of the investigation is an important aspect of the regulation of the trial process.248 Hence, one cannot pretend that the trial process was fair unless the investigative actions are also conducted in accordance with those fair trial norms.249

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

249 Ibid., p. 8. This was also the view held by a minority of judges in the Gäfgen case before the ECtHR, where they held that “criminal proceedings form an organic and inter-connected whole. An event that occurs at one stage may influence and, at times, determine what transpires at another.” They criticised the majority who, “[i]nstead of viewing the proceedings as an organic whole”, sought to “compartmentalise, parse and analyse the various stages of the criminal trial, separately, in order to conclude that the terminus arrived at was not affected by the route taken.” They added that “[s]uch an approach […] is not only formalistic; it is unrealistic since it fails altogether to have regard to the practical context in which criminal trials are conducted and to the dynamics operative in any given set of criminal proceedings.” See ECtHR, Gäfgen v. Germany, Application No. 22978/05, Reports 2010, Judgment (Grand Chamber) of 1 June 2010, Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Ziemele, Bianku and Power, par. 5-6.
251 ECtHR, Othman (Abu Qatada) v. United Kingdom, Application No. 8139/09, Reports 2012, Judgment of 17 January 2012, par. 259. From the case law of the Court, several examples can be derived: (i) a conviction in absentia with no possibility subsequently to obtain a fresh determination of the merits of the charge; (ii) a trial which is summary in nature and conducted with a total disregard for the rights of the defence; (iii) detention without any access to an independent and impartial tribunal to have the legality of the detention reviewed; (iv) deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country and (v) when evidence obtained by torture is admitted in the proceedings.
guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.”\textsuperscript{252} It follows that this entails “a stringent test of unfairness” which “goes beyond mere irregularities or lack of safeguards in the trial procedures.”\textsuperscript{253} Such a risk of a flagrant denial of justice in the country of destination must, according to the Court, in the first place, be assessed “by reference to the facts which the Contracting State knew or should have known when it extradited the persons concerned.”\textsuperscript{254} However, only in two cases (\textit{Soering} and \textit{Abu-Qatada}), the Court found an extradition decision to violate Article 6. The risk of unfair trial upon expulsion also came up in \textit{Alzery v. Sweden} before the HRC but the issue was not addressed by the Committee.\textsuperscript{255}

\section*{III.5. Contextualisation of human rights norms}

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

\textsuperscript{252} Ibid., par. 260.

\textsuperscript{253} Ibid., par. 259.


\textsuperscript{256} One of the consequences thereof is that the applicable enforcement mechanism targets states.


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

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

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

From this understanding, it follows that the adherence of international criminal tribunals to existing human rights norms should be assessed on its own merits. One commentator describes this contextual application as “the transposition of the normative propositions identified as relevant and valid in human rights law […] into the unique legal and institutional context of the tribunals, subject to the necessary and appropriate modifications.”

The need for adjustment is easily understood. For example, the derogation clauses, often found in human rights instruments, do not apply to international criminal tribunals. Moreover, it will be argued in chapters to come that it is difficult to see how the legality requirement (‘prescribed by law’) which is commonly found in limitation clauses of human rights instruments, is to be translated to the context of international criminal tribunals, where a detailed regulation of investigative measures is often lacking.

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

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

265 See Annex I (‘Discussion of the Decision on the Final System of Disclosure’) to ICC, Decision on the Final System of Disclosure and the Establishment of the Timetable, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06-102, PTC I, 15 May 2006, par. 4 (“Furthermore, the single judge considers that the need to safeguard the uniqueness of the criminal procedure of the International Criminal Court ("the Court") is one of the primary considerations in contextual interpretation of the relevant provisions. It can be met by addressing ‘possible tensions among those provisions so as to ensure consistency, and full expression to the meaning of each’”).
In particular, the Judges held that the procedural framework of the ICTY required the Judges to take the obligation to protect witnesses and victims into consideration. In turn, neither Article 14 ICCPR nor Article 6 ECHR includes the protection of victims and witnesses as relevant considerations. The Trial Chamber added that the case law of the HRC and the ECtHR (and ECommHR) “is only of limited relevance in applying the provisions of the Statute and Rules of the International Tribunal, as these bodies interpret their provisions in the context of their legal framework, which do not contain the same considerations.” Therefore, “[i]n interpreting the provisions which are applicable to the International Tribunal and determining where the balance lies between the accused’s right to a fair and public trial and the protection of victims and witnesses, the Judges of the International Tribunal must do so within the context of its own unique legal framework.”

According to the Trial Chamber, further ‘unique features’ warranting contextual interpretation, include the fact that the tribunal operates in an ongoing conflict; that it does not possess its own police force or witness protection programme; that it is required to rely on cooperation by states and/or international bodies and, more controversial, that the interpretation of Article 6 by the ECtHR is meant to apply to ordinary criminal adjudications, not to crimes warranting universal jurisdiction.

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

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266 ICTY, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadić*, Case No. IT-94-1, T. Ch., 10 August 1995, par. 26
267 Ibid., par. 26-27.
268 Ibid., par. 27. Hence, the Trial Chamber did not consider the jurisprudence of the human rights supervisory bodies to be necessarily relevant. See ibid., par. 30 (“While the jurisprudence of other international judicial bodies is relevant when examining the meaning of concepts such as “fair trial”, whether or not the proper balance is met depends on the context of the legal system in which the concepts are being applied”).
269 Ibid., par. 27.
270 Ibid., par. 28. On the application of Article 6 to crimes warranting universal jurisdiction, see supra fn. 235, 236 and accompanying text.
271 Consider e.g. ECtHR, *Dombo Beheer B.V. v. The Netherlands*, Application No. 14448/88, Series A, No. 274, Judgment of 27 October 1993, par. 33 (“‘equality of arms’ implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent”); ECtHR, *Bulut v. Austria*, Application No. 17358/90, Reports 1996-II, Judgment of 22 February 1996, par. 47. Consider also HRC, *Dudko v. Australia*, Communication No. 1347/2005, U.N. Doc. CCPR/C/90/D/1347/2005, 23 July 2007, par. 7.4. Note that at least some case law of the ECommHR seems to go further in not only demanding formal equality between the parties, but also, in light of
However, the ICTY Appeals Chamber then argued that since the tribunal must rely on state cooperation, and having no power to compel states to cooperate, the principle does not have the same scope in international criminal proceedings as before national courts. Rather, the principle of equality of arms should be given a more liberal interpretation in international criminal procedural law than it is given in proceedings before domestic courts. The parties should be equal before the Trial Chamber and be provided with “every practicable facility [the Trial Chamber] is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case.” Thus, the autonomous interpretation of the right leads to ‘more liberal’ interpretation of the equality of arms principle in international criminal proceedings. It follows that when assistance offered by Judges is not effective this does not necessarily make the trial unfair. Nevertheless, the Appeals Chamber conceded that there could be situations when a fair trial is no longer possible if witnesses central to the defence case cannot appear because of lack of cooperation the unequal resources available to the Defence and the Prosecution, that Article 6 (3) (b) includes the right of the accused to have all relevant information at his disposal that has been or could have been collected by the competent authorities. See ECommHR, Jespers v. Belgium, Application No. 8403/78, Report of 14 December 1981, par. 58.

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


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

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

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

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

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

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


280 Ibid., pp. 723 – 724 (the factors considered were the mixed nature of international criminal procedure; the role of the hierarchy of norms, the non-state nature of the Court; its ‘universal’ character; the gravity of the offences dealt with; the fragmentation of international criminal proceedings and the impact of politics).
factors cannot convince. For example, the author concludes that the ‘hybrid nature of the law’ of international criminal procedure (in the sense of it being a mix of inquisitorial and accusatorial elements), is “detrimental” to the general level of individual protection that is granted before the Court.\textsuperscript{281} In particular, the author refers to the ‘regime of evidence’ as an example how this mixed nature of proceedings leads to a reduced level of protection. The author holds that “as the Office of the Prosecutor is part of the Court and can rely on a large staff, it benefits from a clear structural advantage in terms of investigative resources, which would normally require a strict ban on unchallenged statements collected before trial (\textit{i.e.} hearsay evidence) in order to maintain the equality of arms.”\textsuperscript{282} Hence, there exists a mismatch with the flexible rules on the admissibility of evidence before the ICC which, it is argued, threatens the integrity of the law of evidence and the right to a fair trial.\textsuperscript{283} Nevertheless, while it may rightly be argued that the law of evidence and the procedural design more broadly is incoherent, the author fails to explain \textit{how and to what extent} this mismatch results in a reduction of the level of human rights protection (the author’s hypothesis). In other words, such an example does not support the author’s conclusion that the mixed nature of the procedure before the ICC “can –at least in part- have a reductive impact on the scope of human rights protection”.\textsuperscript{284} This conclusion requires an explanation as to the reasons why this evidentiary system fails to uphold human rights norms. For example, it should be assessed whether and to what extent this procedural design conflicts with the traditional ‘hands-off’ approach of the case law of the ECtHR with regard to the admissibility of evidence.\textsuperscript{285} In addition, it should be assessed in how far such procedural set-up can be reconciled with the requirement that each party is afforded a reasonable opportunity to present his case, under conditions that do not place him at a (substantial) disadvantage \textit{vis-à-vis} of his opponent.\textsuperscript{286}

\textsuperscript{281} \textit{Ibid.}, p. 726.
\textsuperscript{282} \textit{Ibid.}, p. 726.
\textsuperscript{283} \textit{Ibid.}, pp. 726 - 727. The author also provides a second example, to know the non bis in idem – double jeopardy principle. Nevertheless, in a similar vein, whereas the author points out the different understanding of this principle in common law and civil law criminal justice systems, it is unclear where this leaves us in terms of the “reductive impact on the scope of human rights protection”.
\textsuperscript{284} \textit{Ibid.}, p. 727.
\textsuperscript{285} Consider e.g.: ECtHR, Schenk v. Switzerland, Judgment, Application No. 10862/84, 12 July 1988, par. 46: “While Article 6 […] of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. The Court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr. Schenk’s trial as a whole was fair.”
\textsuperscript{286} See discussion supra, fn. 274 and accompanying text.
Similarly unconvincing is the conclusion reached that the seriousness of the crimes allegedly committed negatively affects the level of human rights protection. According to DEPREZ, this is evidenced, among others, by the tribunals’ pre-trial detention regime. He argues that the ICC’s relevant procedural provisions on pre-trial detention evidence that pre-trial detention is the rule and liberty the exception. From there, the author concludes that such diminishing of the level of human rights protection “can in particular be explained (though not justified) by the gravity of the crimes at hand.” This cursory argumentation can by no means uphold the conclusion reached (that the seriousness of the crimes alleged is responsible for the reduction of human rights protection). It fails to consider other factors which, as will be explained in Chapter 8, may (and do) at least partly explain the different procedural presumption with regard to pre-trial detention (e.g. the difficulties in finding a host state willing to receive the person provisionally released on its territory or the fact that these tribunals lack their own police force). Furthermore, it will be shown how the gravity of the crimes is often a factor which is considered by the international criminal courts in deciding on provisional detention/release, but not in isolation. It will be concluded that such jurisprudence does not per se violate human rights law.

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

288 Ibid., p. 735.
289 Ibid., p. 735.
290 See infra, Chapter 8, II.2.6.1.
291 G. MCINTYRE, Defining Human Rights, in G. BOAS and W.A. SCHABAS (eds.), International Criminal Law Developments in the Case Law of the ICTY, Brill Academic Publishers, Leiden, 2003, p. 204. It is clear that the author conflates two distinct rights: (i) the right to be informed, at the time of arrest, of the reasons for his arrest and to be promptly informed of any charges against him and (ii) the right of anyone charged with a criminal offence to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him. See ibid., p. 202: “A fundamental universally recognized right of any person accused of a criminal offence is the right to be informed at the time of the arrest of the “nature and cause” of the charges against him or her. This right is enshrined in Article 21(4) of the Statute of the Tribunal, which mirrors Article 14(3)(a) of the ICCPR and Article 5(2) of the ECHR” (emphasis added).
Appeals Chamber in Kovačević where it relied on human rights jurisprudence in determining whether a person has been promptly informed of the reasons of his or her arrest, and concluded that the authorities cited by the Defence alleging a breach of Article 9 (2) ICCPR did not concern the situation where an arrest was based on an indictment which was subsequently sought to be amended to add new charges.292 This leads the author to argue that the reliance on human rights authorities “may be misplaced”, considering the different context in which the ICTY operates.293 However, it will be explained how the case law of human rights monitoring bodies in this regard allows for flexibility. For example, the right to be informed, at the time of the arrest, of the reasons thereof only requires that general information should be conveyed, enabling the person to exercise his or her right to challenge its lawfulness.294 Furthermore, it follows from this jurisprudence that the degree of specificity needed depends on the particularities of the case.295 Further, when a person is arrested by national authorities at the behest of an international criminal court, the information which should be conveyed may even be less precise.

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

293 G. MCINTYRE, Defining Human Rights, in G. BOAS and W.A. SCHABAS (eds.), International Criminal Law Developments in the Case Law of the ICTY, Brill Academic Publishers, Leiden, 2003, p. 204 (emphasis added). The author clarifies that “[t]he context in which the human rights regime has determined that the right of an accused to be informed of the charges at the time of arrest will only be violated where no reasons are given for that arrest at all, is one in which an individual is arrested within a domestic jurisdiction to answer charges alleged to have been committed within that jurisdiction. This is a very different situation to arrests by the Tribunal. Accused who appear before the Tribunal are arrested in their country of residence and then removed, thousands of miles from that place of arrest, to be prosecuted at The Hague”).
294 See infra, Chapter 7, V.2.1.
295 See infra, Chapter 7, V.2.1.
296 Consider e.g. ECtHR, Van der Tang v. Spain, Application No. 19382/92, Judgment of 13 July 1995, par. 75.
proceedings, such as (1) the fact that crimes happened long time ago, (2) the fact that numerous victims were involved and the necessity “to clarify the whole historical complex” to make a proper assessment of the individuals involved and their degree of participation and guilt, (3) the number of witnesses and suspects, (4) the fact that witnesses are scattered and need to be interviewed abroad or (5) the fact that the crime scene was abroad. Thus, the specific nature of the crimes within the ambit of the jurisdiction of the international criminal tribunals already allows for extended pre-trial detention.

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

301 See e.g. ibid., p. 34 (“contextual interpretation of the ICTs’ provisions in light of their object and purpose should not be used in effect to diminish the minimum protection of individuals offered by internationally recognized human rights”).
international criminal tribunal instead of a national one. It is important to appreciate the flexibility of human rights norms as well as the limitations to the interpretative function of decisions offered by its monitoring bodies. One can agree that such flexibility is evidenced by the ECHR’s margin of appreciation doctrine as well as by the principle of subsidiarity, from which it originates. Furthermore, the weighing (against each other) or the balancing of different interests at stake is central to the interpretations given by monitoring bodies. This method could allow for the factoring in of at least some of the characteristics of international criminal proceedings. Hence, it is only logical to assume that the peculiar goals and context of international criminal proceedings would be considered by human rights supervisory bodies. This is what is probably meant by GRADONI when he mentions that human rights norms possess an “inbuilt situational, 


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

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


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

It follows that international criminal procedure, in considering its specific characteristics as well as the goals it is meant to serve, should not be bound by human rights standards which are ‘identical’ or ‘higher’ than those at the national level. 310 Standards offered may be ‘lower’ in comparison with national criminal justice systems and still be in conformity with international human rights norms, because of the latter’s in-built flexibility. If so considered, one could agree with the, admittedly provocative, argument by DAMAŠKA for a ‘fair enough’ standard of fairness in international criminal justice. 311 His proposition is that international criminal tribunals should not strive to surpass or even meet 312 the most demanding standards set by national criminal justice systems. 313 He argues that:

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

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310 Ibid., p. 76.

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


multiplicity of their goals, some departures from domestic conceptions of fairness should be expected and accepted.\textsuperscript{314} DAMAŠKA is convinced that “international criminal courts cannot successfully pursue their manifold objectives by strictly abiding by most demanding domestic rules of procedure.”\textsuperscript{315} While he holds that fair trial rights apply to international and national criminal justice systems, these rights are couched in broad terms and allow for different procedural designs.\textsuperscript{316} Therefore, they leave sufficient room for different procedural arrangements and for adjustments to the unique context of international criminal tribunals and courts.\textsuperscript{317} Thus, deviations of the most demanding domestic standards of criminal justice must be allowed for insofar as they are justified by the specific needs of international criminal justice. One could argue that such proposition is nothing more than an illustration of the in-built flexibility of human rights norms. However, that is not the case. By making the argument for a ‘fair enough’ standard, DAMAŠKA effectively raises the bar. Indeed, since fair trial rights do allow for different procedural arrangements and allow national criminal justice systems some flexibility, the ‘fair enough’ approach takes this flexibility away by requiring that a deviation from the most demanding domestic standards of criminal justice be justified by the specific needs of the international criminal courts.\textsuperscript{318}

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

\textsuperscript{314} Ibid., p. 612.
\textsuperscript{315} Ibid., p. 612.
\textsuperscript{318} Ibid., p. 615 (“If [international criminal courts] where then to depart from the most demanding standards of fairness, these departures per se would not present a problem, provided, of course, that they are justified by the special needs of international criminal justice” (emphasis added)). Similarly, consider M. DAMAŠKA, The Competing Visions of Fairness: The Basic Choices for International Criminal Tribunals, in «North Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2010 – 2011, p. 380 (”some departures by international criminal tribunals from domestic standards of fairness can be justified, given their sui generis goals, the complexity and the atrocity of crimes they process, and the innate weaknesses of these tribunals” (emphasis added)).
Solange II case\(^{319}\) which was developed in the ECtHR’s case law in the context of the relationship between the ECtHR and the EU and which demands for equivalent (rather than identical) protection of human rights by international organisations.\(^{320}\) It implies that once the ECtHR has established such ‘equivalent protection’, a presumption follows that the state acted in conformity with the ECHR when it did nothing more than complying with obligations that followed from its membership to that international organisation.\(^{321}\) Transposing this equivalent protection doctrine to international criminal procedure, if at all possible, is unwelcome. It lacks the sufficient clarity to be a useful tool in the contextualisation process of human rights norms to international criminal tribunals. What is clear is that ‘equivalent protection’ means something different than ‘identical protection’.\(^{322}\) The presumption that it installs places a tremendous duty on the person alleging that the action was a breach of human rights.\(^{323}\) It can be rebutted, in the event that the protection offered is “manifestly deficient” in the particular circumstances of the case.\(^{324}\) It remains unclear, however, as to what that exactly means.\(^{325}\) It provides for a low bar of protection which may be at odds with the idea that rights should be practical and effective.

\(^{319}\) BVerfGE 73, 339 2 BvR 197/83, 22 October 1986 (Solange II).

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

\(^{321}\) Ibid., par. 156; ECtHR, Waite and Kennedy, Application No. 26083/94, Reports 1999-I, Judgment of 18 February 1999, par. 66.

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


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

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

It is the purpose of this research to compare the procedural constellations of the different courts and tribunals under review in order to determine the law of international criminal procedure. In this regard, it is legitimate to ask how far the common law and civil law models of criminal justice may be useful explanatory tools for better understanding the differences between the procedural frameworks of the included jurisdictions and to better understand the nature of international criminal procedure. It is clear that many commentators have sought to describe international criminal law in common law and civil law terms. They either sought to deconstruct international criminal procedure in these terms or to explain the dynamics of international criminal procedure as a ‘debate’ or a ‘conflict’ or a ‘competition’ between two ‘systems’ or ‘styles of proceedings’. In turn, it is widely acknowledged that blending the
features of these two systems in international criminal procedure has led to the development of a ‘sui generis’ system. Its sui generis character refers to the fact that in transposing a feature from one particular system to the realm of international criminal procedure, it undergoes a transformation, whereby it is adapted to the specific needs and context of international criminal tribunals.

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

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335 Consider the First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/49/342-S/1994/1007, 29 August 1994, par. 71 (“Based on the limited precedent of the Nürnberg and Tokyo trials, the statute of the Tribunal has adopted a largely adversarial approach to its procedures, rather than the inquisitorial system prevailing in continental Europe and elsewhere”). It is known that the first version of the ICTY RPE was to a large extent based on the U.S. federal law of criminal procedure. This can be explained by the fact that the US administration submitted a report with a set of procedural rules which was to a large extent modelled upon the U.S. law, the fact that the ABA supported this report and made some comments thereto, as well as by the fact that the majority of judges favoured the adversarial system. See V. MORRIS and M.P. SCHARF, An Insider Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis (Vol. I), Ardsley, Transnational Publishers, 1995, p. 177.
such adversarial proceedings was already predetermined by the respective Statutes of the ICTY and the ICTR.\textsuperscript{337} For example, the Statute provides the Prosecutor with full responsibility over the investigation and prosecution.\textsuperscript{338} However, civil law elements have gradually been adopted by the \textit{ad hoc} tribunals to allow, among other things, much greater judicial control over the pre-trial stage (\textit{sensu stricto}).\textsuperscript{339} Today, one can speak of a mixed or ‘sui generis’ procedure.\textsuperscript{340}


\textsuperscript{338} Article 16 (1) ICTY Statute and Article 15 (1) ICTR Statute.

\textsuperscript{339} These civil law amendments were to a large extent based on the report of the expert group which was tasked with reviewing the operation and functioning of the ICTY and ICTR. See U.N., Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, U.N. Doc. A/54/634, 22 November 1999. As an example, this report pleaded for a more interventionist role for the Pre-Trial Judge (par. 83). This led to several amendments, including the possibility, under Rule 65ter ICTY RPE, for the delegation of powers by the Pre-Trial Judge to a senior legal officer. See U.N., Comprehensive Report on the Results of the Implementation of the Recommendations of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, U.N. Doc. A/56/853, 4 March 2002, par. 36. Further amendments were proposed in the Report of the ICTY Working Group on Speeding Up Trials of February 2006. See U.N., Letter Dated 29 May 2006 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, U.N. Doc. S/2006/353, 31 May 2006, par. 19. Note that neither the RPE of the SCSL nor the RPE of the ICTR formally include a Pre-Trial Judge but the powers under Rule 73bis and 73ter RPE can be exercised by a Single Judge. Consider further C. SCHUNO, International Criminal Procedure: A Clash of Legal Cultures, The Hague, T.M.C. Asser Press, 2010, p. 307 (concluding specifically with regard to the ICTY’s rules on disclosure, evidence rules and the role of the judge that these have all evolved towards a civil law model of criminal procedure, as this has proven to accommodate the specific needs and tasks of international criminal
In a similar vein, the first draft of the ICC Statute was largely inspired by the adversarial system. The consensus that was reached contains elements of both traditions. It is held to be more civil law oriented than the ad hoc tribunals, while the adversarial style still prevails. Important civil law features, which will be discussed in the subsequent chapters, include the principle of objectivity or the judicial overview by the Pre-Trial Chamber over prosecutorial discretion. It must be emphasised that the decision of choosing the adversarial model was, of course, largely political. It was not based on any agreement regarding the theory that should actually underlie international criminal procedure.

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


342 See e.g. C. SCHUON, International Criminal Procedure: A Clash of Legal Cultures, The Hague, T.M.C. Asser Press, 2010, p. 308 (noting that there are many ambiguities where the procedural framework leaves open the question whether a civil law or a common law approach is to be followed). Compare F. ROCAR and L. CARTER, The Challenge of Shaping Procedures in International Criminal Courts, in L. CARTER and F. ROCAR (eds.), International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems, Cheltenham, Edward Elgar Publishing, 2013, pp. 12 - 13 (noting that the number of exceptions to the adversarial approach increased over the years through the adjustment by the Judges of the rules to the exigencies of the Court).

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

344 F. MÉGRET, Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, pp. 68 – 69; M. LANGER, The Rise of Managerial Judging in International Criminal Law, in «American Journal of Comparative Law», Vol. 53, 2005, p. 837 (arguing that the “initial predominance of common law actors” may partly explain why the ICTY originally adopted an adversarial system); J. JACKSON, Finding the Best Epistemic Fit for International Criminal Tribunals, in «Journal of International Criminal Justice», Vol. 7, 2009, pp. 18 - 19 (noting that “[t]o some extent, it was inevitable that the political drive for the creation of international criminal tribunals would mean that the synthesis achieved would be more the result of “compromise and pragmatism” than of any movement towards a “new, fused procedural tradition”).


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

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

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\textsuperscript{347} P.L. ROBINSON, Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY, in «Journal of International Criminal Law Review», Vol. 6, 2006, p. 615 (noting that any mixture of the common law and civil law system is “a delicate and potentially highly damaging exercise”).

\textsuperscript{348} J. JACKSON, Finding the Best Epistemic Fit for International Criminal Tribunals, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 34 (noting that a hybrid procedure which seeks to satisfy both dominant legal traditions may result in a “skewed procedure”);


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

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


\textsuperscript{354} Ibid., pp. 10 – 11.
was to respect the rights of every person subject to a criminal investigation and those of alleged victims of the crimes under investigation.\textsuperscript{355} In general, while the procedural frameworks of the internationalised criminal courts are less informative for determining the ideal organisation of international criminal proceedings, they offer examples of alternative solutions on how proceedings should be designed for the crimes within the jurisdiction of these tribunals.

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

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

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

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

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

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


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

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

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

362 S.J. SUMMERS, Fair Trials: the European Criminal Procedural Tradition and the European Court of Human Rights, Oxford, Hart Publishing, 2007, pp. 3 - 10 (the author advances an approach whereby the focus is not on differences between European criminal justice systems, but on standards common to all European justice systems. She rejects the common law – civil law dichotomy not only because of descriptive shortcomings (inter alia because of lack of consensus on the meaning of the terms and problems of classification), but also because of its lack of normative force. “[T]he comparative criminal procedure law scholarship has been preoccupied with the descriptive classification of systems. This has not only served to cast doubt on the merits of comparative criminal procedure law as a legitimate discipline, but has also meant that the merging case law and principles of the ECHR in the field of criminal procedure have not properly been evaluated” (ibid., pp. 3 – 4). “The problematic nature of this approach is confounded by the fact that the methodology dictates the nature of the conclusions which are to be reached. Consequently, the determination of whether the system can be classed as ‘accusatorial’ or ‘inquisitorial’, or as moving towards one or the other of the procedural forms, often becomes the goal of the study. This is in spite of recognition of the fact that it is highly unlikely that a legal system will
dissatisfaction with applying the common law – civil law dichotomy to international criminal procedure stems from the belief that scholarly writing should move away from a descriptive to a normative approach (what international criminal procedure ‘ought to be’) to international criminal procedure. Thereby, the focus should be to identify the procedural constellation best suited to the unique context and the specific goals that international criminal tribunals are intended to serve.363

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

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

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

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

365 Ibid., p. 63.

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

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

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


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

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

372 Ibid., pp. 23 – 24.
373 See supra, Chapter 2, III.
375 M.R. DAMAŠKA, The Faces of Justice and State Authority: A Comparative Approach to the Legal Process, New Haven and London, Yale University Press, 1986, pp. 161-162 (DAMAŠKA adds that ‘officials in charge of the proceedings will refuse to rely exclusively, or even principally, upon informational channels carved by persons whose interests are affected by the prospective decision’).
378 But consider on Germany: T. WEIGEND and F. SALDITT, The Investigative Stage of the Criminal Process in Germany, in E. CAPE, J. HODGSON, T. PRÄKKEN and T. SPRÖNKEN (eds.), Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union, Antwerpen – Oxford, Intersentia, 2007, p. 91 (noting that, although the criminal code is silent on this issue, the Defence is not prevented from conducting its own investigations, may interview witnesses before trial or summon them at trial. Where compulsory measures are required, the Defence may request the Ermittlungsrichter or the Prosecutor to take evidence).
Rather than expecting the Defence to organise a full-fledged investigation, the Defence’s role during the investigation is restricted to safeguarding the interests of the suspect or accused person and checking whether state officials stick to these rules. Often, the Defence can request the Prosecutor or Investigating Judge to conduct a particular investigative act.\textsuperscript{379} Whereas the defendant only represents his or her own personal interest, the Prosecutor represents the public interest.\textsuperscript{380} The Prosecutor fulfils a leading role in the investigation as well as in the prosecution of the crimes.\textsuperscript{381} Some criminal justice systems reserve a role for an investigating magistrate for the most serious crimes. However, when the investigating magistrate takes the lead over the investigation, he or she often does not participate from the very beginning of the investigation. Likewise, the judicial investigation is normally preceded by a preliminary investigation.\textsuperscript{382} Overall, in civil law criminal justice systems, the pre-trial investigative process is considered the best way to discover the truth.\textsuperscript{383} A written dossier connects the officials working on the case and documents all stages of the proceedings.\textsuperscript{384}

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


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


\textsuperscript{385} See infra, Chapter 3, I.3.3.
Judges. In addition, the confidential character of the judicial investigation prevents the public from observing and learning from the proceedings. Furthermore, it is alleged that such a style of proceedings is not suitable because of the political dimension involved in the cases these international institutions are dealing with.

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

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388 Interview with a Defence Counsel at the SCSL, SCSL-04, Freetown, 19-20 October 2009, pp. 8-9 (“Because I did not grow up with it, I do not necessarily understand why people think that it would be fair, when it seems to hinge very much on the Co-Investigating Judges. I would be unwilling to trust an Investigating Judge, because the truth is, as you can see from the Special Court, that Judges do have bents to them”).
391 As far as defence investigations are concerned, it should be noted that the ‘expectation’ that the defence conducts a separate investigation, does not mean that such corresponds to the actual practice. Consider in that regard: S. FIELD and A. WEST, Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pre-Trial Criminal Law Process, in «Criminal Law Forums», Vol. 14, 2003, pp. 261 – 262 (referring to research conducted in England showing a failure by defence counsel “to play the extensive, autonomous investigative role the adversarial system demanded of them”). See M. MCCONVILLE, J. HODGSON, L. BRIDGES and A. PAVLOVIC, Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain, Oxford, Clarendon Press, 1994.
investigative powers and, in general, do not have authority over the police investigations, they may suggest or advise certain lines of investigation. In turn, investigative powers for the defence are nowhere explicitly provided for. While the defence holds the power to conduct its own investigations, corresponding formal powers are lacking and public funding is limited.

Judicial intervention only takes place at the pre-trial stage when the person’s interests cannot be protected in another way. Foremost, the judge intervenes when coercive measures are needed in the course of the investigation. No judicial control is exercised over the quality of the evidence gathered at the pre-trial stage.

V. A MYRIAD OF PROFESSED GOALS

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

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394 Intersentia, 2007, p. 59. The conduct of investigations is regulated by the Police and Evidence Act (PACE) of 1984 and the Codes of Conduct supplementing it.
395 Ibid., p. 61.
396 Ibid., p. 76 (noting that defence investigations are normally limited to the interviewing of witnesses who are willing to cooperate); J.R. SPENCER, Evidence, in M. DELMAS-MARTY and J.R. SPENCER (eds.), European Criminal Procedure, Cambridge, Cambridge University Press, 2002, p. 626 (in referring to the position of the defence in English criminal proceedings, the author notes that “in theory the two parties, the police and defence, are able to dig out their own evidence; but in reality it is only the police who have any spades with which to dig.” SPENCER adds that “in the great majority of cases the defence have too little money to carry out their own investigations, even if they obtain legal aid.” “The truth, unfortunately, is that in England the duty to look for evidence for the defence belongs to nobody.” The author notes that the creation of a public defender may resolve the inequality between the parties in the conduct of investigations). In a similar vein, P.C. KEEN, Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals, in «Leiden Journal of International Law», Vol. 17, 2004, p. 771.
398 Although a judicial authorisation is not always required for coercive measures, e.g. under English law, obtaining a judicial authorisation is normally a requirement for the execution of searches. However, there are many exceptions to that rule, for example section 17 PACE 1984 (arrestable offences), section 18 PACE 1984 or section 32 (2) (b) PACE 1984.
399 However, arguably, indirect control exists by the application by judges of evidence rules in preparation of the trial or at trial. Consider S. GLESS, Functions and Constitution of the Court at the Pre-Trial and Trial Phase, in ESER and RABENSTEIN (eds.), Strafjustiz im Spannungsfeld von Effizienz und Fairness, Berlin, Dunker & Humblot, 2004, p. 346.
400 As argued by SWART, Damaška’s ‘Faces of Justice’ may be instructive in this regard where it argues that a “direct and reciprocal relationship is posited to exist between ends and means in the conflict-solving and policy implementing ideals types of proceedings.” See B. SWART, Damaška and the Face of International Criminal Justice, in «Journal of International Criminal Justice», Vol. 6, 2008, p. 99.
international criminal procedure. The intended objectives of international criminal justice and international criminal procedure are discussed below; not how these objectives ought to be considered by the Judges or other actors in the interpretation and application of the law.\textsuperscript{401} The exact goals that international criminal justice is intended to serve remain open to debate.\textsuperscript{402} While the official documents of international criminal courts only contain limited references to the goals of these institutions, long lists of goals that these courts are expected to fulfil can be found elsewhere.\textsuperscript{403}

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

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


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

\textsuperscript{404} M. DAMAŠKA, What is the Point of International Criminal Justice, in «Chicago-Kent Law Review», Vol. 83, 2008, p. 331 (who contends that “[u]nlike Atlas, international criminal courts are not bodies of titanic strength, capable of carrying on their shoulders the burden of so many tasks”); M. DAMAŠKA, The International Criminal Court between Aspiration and Achievement, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, p. 22 (referring to the “almost grandiose” ambitions of international criminal law). For a long list of goals pursued by the ICTY, see M. SCHRAG, Lessons Learned from ICTY Experience,
relation to the ICTY’s procedural legacy, questioned the scarcity of scholarly evaluations of the ICTY’s procedures in light of the purposes of international criminal justice.\textsuperscript{405} It is argued here that the answer to this question lies in the evaluative shortcomings of these goals. Indeed, the usefulness of these goals of international criminal justice as a measure to evaluate international criminal procedure and the extent to which the procedural lay-out fits the objectives of these tribunals is limited. Therefore, these goals do not allow us to say much regarding the form that the proceedings should take in order to serve these goals. They also don’t allow us to make firm choices regarding the procedural design of international criminal proceedings.\textsuperscript{406}

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

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

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

\textsuperscript{408} Consider e.g. J.D. OHLIN, Goals of International Criminal Justice and International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), International Criminal Procedure: Principles and Rules, Oxford, Oxford University Press, 2013, p. 56 (“There is disagreement over which goal or goals should be primary and over the inclusion of some objectives on the list, although there is probably broad agreement over the outer contours of the list. The disagreement shows up primarily when one attempts to place a certain objective at the top of the list as the central objective of international criminal law”).
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other. The different aims may well all require distinct procedural constellations. A clear ranking order and understanding on the compatibility of different goals would facilitate the tailoring of the courts’ procedural set-up to match the most important goals these courts are set to achieve. To further complicate matters, the objectives may even vary according to the stage of the proceedings.

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

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

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

412 M. KLAMBERG, What are the Objectives of International Criminal Procedure? – Reflections on the Fragmentation of a Legal Regime, in «Nordic Journal of International Law», Vol. 79, 2010, pp. 285, 294 - 296 (the author speaks of a “differential functional approach”, which implies that “[t]he relevant objective which may determine the outcome of a hard case varies depending on the procedural stage, and in each procedural stage there is a structural bias towards one or several objectives.” He proposes a division between the collection of evidence, arrest proceedings, the proceedings prior to confirmation of the charges and the presentation of evidence. According to the author, “there is a structural bias for a certain objective in relation to a given procedural stage”).
Notwithstanding these various uncertainties related to the goals of international criminal justice---and while a deficit still remains to be filled\textsuperscript{413}---, it is comforting to see that scholarly writing has begun to address the relationship between goals and international criminal procedure.\textsuperscript{414} Besides, several authors have attempted to structure these different goals. The benefit of such undertakings is in their structuring capacity.\textsuperscript{415} Firstly, many commentators distinguish between those goals that international criminal justice has in common with domestic criminal justice systems and those goals that are peculiar to international criminal justice.\textsuperscript{416} The former category includes the goals of holding the perpetrator accountable, retribution,\textsuperscript{417} deterrence (special and general),\textsuperscript{418} and rehabilitation.\textsuperscript{419} Since these traditional goals are shared by virtually all national criminal justice systems, they do not allow us to say much on how international criminal investigations and proceedings should be designed. Among others, they do not allow us to choose between a civil law or common law style of proceedings.\textsuperscript{420}

The latter category of objectives is of greater interest.\textsuperscript{421} These goals are far more ambitious. While there is no agreement as to what goals are to be included in this category, it includes the goals of changing a culture of impunity, re-establishing the rule of law\textsuperscript{422}, contributing to

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

\textsuperscript{414} See the references in the footnotes of this section.


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

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

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


\textsuperscript{422} Consider e.g. ICTY, Sentencing Judgement, Prosecutor v. Nikolić, Case No. IT-02-60-1-S, T. Ch. I (Section A), 2 December 2003, par. 89 (“it is hoped that the Tribunal and other international courts are bringing about the
the restoration and maintenance of (international) peace and security\textsuperscript{423}, providing a complete historical record\textsuperscript{424}, promoting (national) reconciliation\textsuperscript{425}, giving a voice to the victims\textsuperscript{426},

development of a culture of respect for the rule of law and not simply the fear of the consequences of breaking the law, and thereby deterring the commission of crimes\textsuperscript{427}). See also X, The Promises of International Prosecution, in «Harvard Law Review», Vol. 114, 2001, p. 1966.

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

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

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

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

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

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

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


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


are identical.\footnote{Ibid., p. 83; N. WEISBORD and M.A. SMITH, The Reason Behind the Rules: From Description to Normativity in International Criminal Procedure, in «North-Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2011, p. 2067 ("It makes intuitive sense that the purposes of international criminal procedure should be derivable from the purposes of international criminal justice"). See also the distinction made by SAFFERLING between purposes of international criminal substantive law and purposes of international criminal procedure: C. SAFFERLING, International Criminal Procedure, Oxford, Oxford University Press, 2012, pp. 64 – 80. Note that not all authors make such distinction. Consider e.g. M. DAMASKA, What is the Point of International Criminal Justice, in «Chicago-Kent Law Reviews», Vol. 83, 2008, pp. 331 – 339 (the author argues that the reconsideration of the goals of international criminal justice as a whole is required, rather than the goals of international criminal procedure more specific).} Clearly, the goals of international criminal procedure should be well-suited for the goals of international criminal justice.\footnote{H. TAKEMURA, Prosecutorial Discretion in International Criminal Justice: Between Fragmentation and Unification, in L. VAN DEN HERIK and C. STAHN (eds.), The Diversification and Fragmentation of International Criminal Law, Leiden, Martinus Nijhoff Publishers, 2012, p. 634.} Besides, and contrary to national criminal procedure where the purpose of criminal procedure lays in the execution of substantive criminal law, the goals of international criminal procedure surpass its purely instrumental function.\footnote{Consider OHLIN, who argues that a purely instrumental view to international criminal procedure is too narrow and downplays its ‘rule of law’ aspect. See J.D. OHLIN, A Meta-Theory of International Criminal Procedure, Vindicating the Rule of Law, in «UCLA Journal of International Law and Foreign Affairs», Vol. 14, 2009, p. 81; J.D. OHLIN, Goals of International Criminal Justice and International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), International Criminal Procedure: Principles and Rules, Oxford, Oxford University Press, 2013, p. 55. Compare C. SAFFERLING, International Criminal Procedure, Oxford, Oxford University Press, 2012, p. 64 (“It would be wrong to presume […] that its [procedural law] only meaning lies in the mere execution of the substantive law”).} While its instrumental value depends on the extent to which it serves the achievement of the goals of international criminal justice, the intrinsic value of international procedure refers to “benefits” of international criminal procedures that are “purely inherent and more or less independent of the larger goals of international criminal law”.\footnote{J.D. OHLIN, Goals of International Criminal Justice and International Criminal Procedure, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV and S. ZAPPALÀ (eds.), International Criminal Procedure: Principles and Rules, Oxford, Oxford University Press, 2013, p. 55.} These objectives may be particularly useful as indicators of how international criminal proceedings should be designed, insofar as they can assist in choosing the most appropriate structure for international criminal investigations and for proceedings in general.\footnote{J. JACKSON, Finding the Best Epistemic Fit for International Criminal Tribunals, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 20 (“In the absence of international structures of government that might assist in the choice of procedure, one has to develop structures that accord best with the objectives that have been set by the international community for international criminal justice”).} OHLIN distinguishes between two subcategories: (i) those that are instrumental and serve the objectives of international criminal justice (‘direct procedural aims’\footnote{Compare C. SAFFERLING, International Criminal Procedure, Oxford, Oxford University Press, 2012, p. 74.}) and (ii) those that refer to the intrinsic value of international criminal proceedings. The former category has been said to include such goals as the instrumental value of the procedure in determining the guilt or...
innocence through a fair procedure\textsuperscript{439}, historical truth finding\textsuperscript{440}, due process protection\textsuperscript{441}, structured victim participation\textsuperscript{442} and standard setting for national jurisdictions.\textsuperscript{443} It has been said to even include such rights as the right to an efficient trial,\textsuperscript{444} to expeditious proceedings,\textsuperscript{445} or state sovereignty.\textsuperscript{446} In turn, the latter category refers to the re-establishment of the rule of law by ending impunity and reaffirming human rights norms.\textsuperscript{447} This reaffirmation of respect for the rule of law is closely related to the establishment of a historical record or any didactic function of international criminal justice.\textsuperscript{448}

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


\textsuperscript{440} Ibid., p. 62.


\textsuperscript{444} Ibid., p. 66.

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

\textsuperscript{446} Ibid., p. 292.


\textsuperscript{448} Ibid., p. 173.

\textsuperscript{449} A. ESER, Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY, in B. SWART, A. ZAHAR and G. SLUITER (eds.), The Legacy of the International Criminal Tribunal for the Former Yugoslavia, Oxford, Oxford University Press, 2011, pp. 111, 132 (“fairness and expediency are merely the modes in which the proceedings are conducted and not their true aims. Trials are not performed for the sake of
ESER may be useful. He distinguishes between aims (ends for which international criminal tribunals are established), means (measures and instruments by which these goals are to be reached) and modes (the way this is to be done).450

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


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

453 See R.A. WILSON, Judging History: The Historical Record of the International Tribunal for the Former Yugoslavia, in «Human Rights Quarterly», Vol. 27, 2005, pp. 908 – 942; H. ARENDT, Eichmann in Jerusalem: A Report on the Banality of Evil, London, Penguin Books, 1994, p. 253 (“The purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes – “the making of a record of the Hitler regime which would withstand the test of history,” as Robert G. Storey, executive trial counsel at Nuremberg, formulated the supposed higher aims of the Nuremberg Trials — can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgement, and to mete out due punishment”). Consider also B. SWART, Damaška and the Face of International Criminal Justice, in «Journal of International Criminal Justice», Vol. 6, 2008, p. 102; C. SAFFERLING, International Criminal Procedure, Oxford, Oxford University Press, 2012, p. 79 (“the truth, which is being pursued in a criminal trial, is different from the historical truth in the sense of an accurate record of the conflict […] the scope of the trial is limited as the presentation of the evidence mirrors the charges and the individual guilt of the accused and is not directed towards establishing historic facts”); S. BIBAS and W.W. BURKE-WHITE, International Idealism Meets Domestic-Criminal Procedure Realism, in «Duke Law Journal», 2010, p. 653 (“Trials cannot create comprehensive historical records; historians, truth commissions, and commissions of inquiry are far better at that”). The findings of research by COMBS, suggesting that more than 50% of the prosecution witnesses testified in a manner inconsistent with their pre-trial witness statements may call into doubt the aptness of these proceedings for history recording. See N.A. COMBS, Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions, Cambridge, Cambridge University Press, 2010.
place to discuss this issue in detail. Suffice to say that the recording of the history can only be a by-product of the criminal proceedings.\textsuperscript{454} In general, some of the peculiar goals of international criminal justice, such as that of giving a voice to the victims, risk mixing retributive and restorative justice principles which do not fit well together.\textsuperscript{455}

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

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

\textsuperscript{459} Ibid., p. 357. Among others, allowing the Defence to mount its own case may weaken the didactic message and offers plenty of possibilities (in case of pro se defence) to mount ideas contrary to human rights. Besides, the
should be placed on creating an accurate historical record. Nevertheless, it has been indicated that even if such a goal has value in itself, “the record’s greater value lies in its importance for achieving other goals of the tribunal.” For example, it may help reconciliation and peace and security by preventing future conflicts. The other goals benefit from a process that can establish the historical truth as accurately as possible.

From the above, it can be concluded that the evaluative potential of the goals of international criminal procedure is limited which is highly regrettable. In the substantive chapters to follow, it will be shown how the design of the procedural framework of international criminal investigations, every aspect of it, should be informed by the goals of international criminal justice.

This understanding is shared by a growing amount of scholarly writing. Consider e.g., in relation to the issue of provisional release: L. DAVIDSON, No shortcuts on Human Rights: Bail and the International Criminal Trial, in «American University Law Review», Vol. 60, 2010, p. 10 (“The law of provisional release at international criminal tribunals demonstrates the need to identify and prioritize achievable objectives of international criminal law. This decision on priorities should shape the provisional release regime used. If the primary objective of tribunals is to give victims a voice and to validate their suffering, then a very strict detention regime may be appropriate—the presumption of innocence and defendants’ rights to liberty and a fair trial be damned. If human rights are the top priority, then the detention regime may look somewhat different”). Consider also, in general: J.I. TURNER, Policing International Prosecutors, in «International Law and Politics», Vol. 45, 2013, pp. 175 – 258 (on the procedural issue of how remedies and sanctions for prosecutorial misconduct should be adapted to the competing goals international criminal justice is intended to serve). More generally, consider N. WEISBORD and M.A. SMITH, The Reason Behind the Rules: From Description to Normativity in International Criminal Procedure, in «North-Carolina Journal of International Law and Commercial Regulation», Vol. 36, 2011, p. 257 (“In order to avoid entangling the ICC in rules that are not tailored to fit its specific goals and institutional context, the normative purposes underlying procedural rules derived from domestic institutions should be re-examined. Where these premises do not match the specific situation of international tribunals, they and the rules based upon them should be discarded and replaced with new, deliberately defined premises and rules that owe their origins not to national systems, but to the dynamically evolving context of international criminal tribunals”).
served by an investigation shaped as an official inquest. 465 If the investigation is left in the hands of the parties, they might want to conceal the truth. 466 For example, when the parties gather evidence and identify and interview their witnesses, there is an inherent risk of ‘evidence-selection’ during the investigation phase in that unfavourable witness evidence is disregarded and no statement is recorded. 467 As noted by DAMAŠKA, large and complex cases in particular are prone to such evidence-selection. 468 If this is so, facts that are relevant from a historical perspective may remain unexamined. 469 In this manner, the aim of history-recording may be hampered by a two-case approach since the truth might not always come out (because of incapability or unwillingness). 470 As DAMAŠKA pointed out: “A legal process aimed at maximizing the goal of dispute resolution [as adversarial systems do] cannot simultaneously aspire to maximize accurate truth-finding.” However, whether the above holds true for all of the peculiar goals of international criminal justice is open to discussion. For example, the aim of giving a voice to the victims may be better served by the oral presentation of evidence, which is more associated with the adversarial style of proceedings. 471

467 A. ESER, Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY, in B. SWART, A. ZAHAR and G. SLUITTER (eds.), The Legacy of the International Criminal Tribunal for the Former Yugoslavia, Oxford, Oxford University Press, 2011, p. 123; Compare C. SCHUON, International Criminal Procedure: A Clash of Legal Cultures, The Hague, T.M.C. Asser Press, 2010, p. 9 (noting that civil law lawyers are critical about the fact that the ICTY’s procedural framework may result in important witnesses not being called, or in important questions not being asked because the parties fear that such might discover facts which are not beneficial for their cases).
469 Ibid., p. 337. DAMAŠKA notes that “the more complex the investigated question, the more partisan polarisation becomes a straightjacket to historians. This is because each party attempts to present and emphasize only evidence favorable to its claims, while playing down the rest. Now, as the pool of data of interest to a historian grows in size and complexity, so does the partisans’ opportunity to select from the growing pool only data fitting their particular thesis.”
471 Ibid., p. 21. Nevertheless, on the other hand, guilty pleas may lead to the voices of the victims being left out. Similarly, the chance to tell their story may be hampered by the rules of examination and cross-examination (ibid., p. 22).
VI. VAGUENESS, BROAD POWERS AND THE PROCEDURAL PRINCIPLE OF LEGALITY

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

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

472 See e.g. Chapter 5, V.1.1.; Chapter 6, II.1. A tendency towards more detailed regulation can be noted.
474 Which will be discussed, infra, Chapter 3, II.
activities have a strong and sufficiently precise legal basis.\textsuperscript{476} It is unknown to common law jurisdictions, which are characterised by less emphasis on codification and a greater role for ‘judge-made law’. Besides, in common law criminal justice systems, the trial phase is considered the most important phase of the proceedings with the investigation typically being unregulated. In these criminal justice systems, it is reasoned that a detailed legal framework is not always required for the protection of the rights and freedoms of individuals.\textsuperscript{477} Investigative methods that are not explicitly prohibited can be relied upon.\textsuperscript{478} However, it is clear that this picture needs a greater deal of nuance. For example, the Strasbourg jurisprudence led to the increased regulation of investigative powers in England and Wales.\textsuperscript{479}

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

\textsuperscript{476} Ibid., p. 588.
\textsuperscript{479} See infra, Chapter 6, I.3.2.
\textsuperscript{480} In Dutch criminal procedure, the ‘principle of legality in criminal procedural law’ (‘of procedural principle of legality’) is to be found in Article 1 of the Dutch CCP.
against vague, unclear and overly broad procedural regulations. It follows that a qualitative aspect is included in this notion. It requires a solid legal basis for all investigative powers which is sufficiently clear for individuals to know under what circumstances state authorities may use investigative powers against them. This includes, for example, a detailed regulation as to the officials empowered to conduct certain investigative measures, the duration thereof, etc. This principle is connected to the ‘codification principle’. Nevertheless, it has been noted that the principle has been given different interpretations in the literature and case law. HIRSCH BALLIN notes that, insofar as the Dutch principle of procedural legality reflects the rule of law by requiring a legal basis for government action that interferes with the rights and freedoms of individuals, it could be argued that only those governmental actions which interfere with rights and liberties are included. However, such a narrow conception entails, for example, that there would be no need to further define the investigative powers of the Defence or the participatory rights of victims during the investigation stage of proceedings. It is clear that in order to ensure legal protection and the integrity of the whole investigation phase, all aspects should have a legal basis.

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

484 Ibid., p. 15.
487 P.A.M. MEVIS, Capita Strafrecht, Nijmegen, Ars Aequi, 2009, pp. 198, 200 (referring to the procedural principle of legality and the codification principle as the two important pillars underpinning the system of Dutch criminal procedure); M.F.H. HIRSCH BALLIN, Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States, The Hague, T.M.C. Asser Press, 2012, p. 44.
488 Ibid., p. 45.
489 Ibid., p. 45.
490 Ibid., p. 45.
491 B. DE SMET, Internationale samenwerking in strafzaken tussen Angelsaksische en continentale landen, Intersentia, Antwerpen – Groningen, 1999, p. 178 (in relation to the law of evidence, the author notes that this rule is linked to the flexible rules on evidence in these countries).
prohibited is permitted.\footnote{493} Hence, in investigating crimes and gathering evidence and information, law enforcement officials may, in principle, use all means that are not prohibited.\footnote{494} As far as Belgian criminal procedure is concerned, there is a tension with Article 12 of the Belgian Constitution, according to which “[n]o one can be prosecuted except in the cases provided for by the law, and in the form prescribed by the law.”\footnote{495} The notion is linked to the existence of implied powers. Such implied powers may encompass coercive measures. For example, the Belgian Cour de cassation held that the Prosecutor may trace a mobile phone by using geolocalisation in the absence of a judicial warrant and notwithstanding the absence of a legal basis to do so.\footnote{496}

However, this permissive rule in Belgian criminal procedural law is limited by other principles including principles of due administration of law (‘beginselen van behoorlijk strafprocesrecht’).\footnote{497} Besides, Article 1 (3) of the Police Law (‘Wet op het politieambt’ – ‘Loi sur la fonction de police’) stipulates that the police can only use coercive measures as they have been defined by law. Furthermore, the jurisprudence of the Strasbourg Court should be interpreted as implying the abolition of the permissive rule regarding investigative powers insofar as they interfere with the rights and freedoms of individuals.\footnote{498} Other authors even hold that a procedural principle of legality clearly emanates from the constitutional provisions outlined above and from the Police Law.\footnote{499} In this regard, GOOSENS pleads for the abolition of the permissive rule and the replacement thereof by a prohibiting rule.\footnote{500}
It follows that there is no uniform approach towards the requirement of procedural legality within national criminal justice systems. However, in the absence of a clear guiding principle of procedural legality, a requirement that procedures are established by law follows from human rights law. This study will show how the lawfulness requirement under human rights law (‘in accordance with the law’) implies that there should be (i) legislation fulfilling certain conditions and (ii) an interference in accordance with this legislation if investigative activities infringe upon the rights of the individual(s) concerned. Human rights norms require sufficient procedural safeguards. In requiring an adequate legal basis for investigative acts that infringe upon the rights and liberties of the affected individual(s) (e.g. the right to respect for private life), the lawfulness requirement under human rights law overlaps with the principle of procedural legality and shields against arbitrary interferences. Additionally, on several occasions, the ECtHR referred to the requirement that procedural law is laid down by law (‘nullum judicium sine lege’) which it labelled a ‘general principle of law’. According to the Court, respect for the principle of procedural legality is required to ensure the right to a fair trial and equality of arms. Its primary purpose lays in the protection against the abuse of state authority.

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

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

See infra, Chapter 6, I.3.1.

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

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

ECtHR, Coëme and Others v. Belgium, Judgement, Application Nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgment of 22 June 2000, par. 102 (“The Court reiterates that the principle that the rules of criminal procedure must be laid down by law is a general principle of law. It stands side by side with the maxim ‘nullum judicium sine lege’. It imposes certain specific requirements regarding the conduct of proceedings, with a view to guaranteeing a fair trial, which entails respect for equality of arms […] The Court further observes that the primary purpose of procedural rules is to protect the defendant against any abuse of authority and it is therefore the defence which is the most likely to suffer from omissions and lack of clarity in such rules”). Note that the issue was examined under Article 6 (1) ECHR. See likewise: ECtHR, Claeys c.
A quick glance at the procedural frameworks of the tribunals under review teaches us that no express principle of procedural legality can be found in international criminal procedure. In addition, the broad attribution of powers and the absence of detailed rules on the collection of evidence seem more in line with the common law approach outlined above (‘what is not prohibited is permitted’). It should be noted that the question of how detailed the procedural part of the ICC Statute should be was occasionally raised during its drafting process. At the Prepcom, several delegations warned that the ICC Statute should not be overloaded “with extensive and detailed rules.” According to these delegations, the goal of the ICC Statute should not be to replicate an exhaustive criminal code in the Statute. Some delegations suggested that the principle of procedural legality and its legal consequences should be firmly established in the Statute itself. In particular, the Dutch delegation took issue with the reference of the ICC draft Statute to national law on procedural matters, including the procedural roles of the Court and its organs. It held that it should not be possible to rely on other sources of law than the ICC Statute regarding procedural matters. The delegation unsuccessfully pleaded for the incorporation of an explicit principle of legality into the Statute which would imply that criminal procedure (including acts and competences) require a “firm and explicit basis in the Statute.”

True, there are certain advantages to a more permissive approach. The lack of detailed regulations may allow for more flexibility and leaves more room for discretion and good judgment by the participants in the investigations and proceedings. Moreover, the broad nature of the investigative powers of the Prosecutors of international criminal tribunals and courts should be understood in light of the need to rely on state cooperation.
hand, there are important advantages attached to the incorporation of such a principle, not the least of which is the protection against arbitrariness and legal certainty. Besides, there are reasons why the absence of such a rule in international criminal procedure is particularly inapposite. In particular, it was described above how international criminal procedure, itself being *sui generis*, borrows from common law and civil law criminal justice systems. Additionally, it was pointed out how transformations may occur when features of common law or civil law are transplanted to international criminal procedure. Therefore, to avoid any confusion regarding the content of a procedural rule borrowed from domestic criminal procedure and any incoherence in its application, it is important that these rules be sufficiently elaborated.

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

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

\(^\text{513}\) See supra, Chapter 2, IV.

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

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

\(^\text{516}\) S. VASILIEV, Proofing the Ban on ‘Witness Proofing’: Did the ICC get it right?, in «Criminal Law Forum», Vol. 20, 2009, p. 229 (holding that it follows that the high density regulation renders the ICC Statute suitable for the adoption of the prohibitive rule. This would imply that the participants cannot resort to procedural course of action that has not explicitly or tacitly been authorised by the ICC’s procedural framework. The author adds that on today, the prohibitive approach has consistently been followed by the ICC). Critical, consider: R. KAREMAKER; B. DON TAYLOR III; T.W. PITTMAN, Witness Proofing in International Criminal Tribunals, in «Leiden Journal of International Laws», Vol. 21, 2008, p. 921 (“The question is not whether proofing is only
IV acknowledged that the Court has to use its inherent powers sparingly, since “its proceedings are governed by an extensive legal framework of instruments in which the States Parties have spelt out the powers of the Court to a great degree of detail.”517

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

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

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

517 ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, Prosecutor v. Abdallah Banda Abukar Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan, Case No. ICC-02/05-03/09-410, T. Ch. IV, 26 October 2012, par. 78.
518 ICTR, Decision on Interlocutory Appeal Regarding Witness Proofing, Prosecutor v. Karemera et al., Case No. ICTR-98-44-AR73.8, A. Ch., 11 May 2007, par. 11.
520 Ibid., par. 16.
521 Consider e.g. C. SCHUON, International Criminal Procedure: A Clash of Legal Cultures, The Hague, T.M.C. Asser Press, 2010, p. 7 (“We therefore propose that when assessing the suitability of a procedural element for international criminal trials, this unique setting should be taken into particular consideration”); P.L. ROBINSON,
complete without addressing the specific features of investigations by international(ised) criminal tribunals. Three of these characteristics will be addressed below: to know (i) the reliance on cooperation by states and other international actors, (ii) the fragmented character of investigations and (iii) the scope and complexity of these investigations. This list is, by no means, exhaustive.522

VII.1. Reliance on state cooperation

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

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522 Additionally, as far as international criminal tribunals are concerned, one could refer to the great distance which normally exists between the headquarters of these tribunals and the place where the investigative activities are conducted; the limited access to the crimes sites; the fact that investigations normally take place long after the crimes have been committed or the fact that investigations take place in politically unstable environments.

523 Consider e.g. M. LANGER, The Rise of Managerial Judging in International Criminal Law, in «American Journal of Comparative Law», Vol. 53, 2005, p. 854. It was noted by DAMAŠKA that there is a paradox where international criminal courts lack inherent enforcement powers while they must process crimes of unusual complexity and must simultaneously realise goals additional to those of national states (which do possess enforcement powers). See M. DAMAŠKA, The International Criminal Court between Aspiration and Achievement, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, p. 20. The author adds that notwithstanding this shortcoming, the ICTY achieved important successes with outside assistance. However, such was a result of political changes in successor states and from external pressure (e.g. by the EU) (ibid., p. 20).


525 R. MAY and M. WIERDA, International Criminal Evidence, Ardsley, Transnational Publishers, 2002, pp. 51 – 52; R. BANK, Cooperation with the International Criminal Tribunal for the Former Yugoslavia in the Production of Evidence, in «Max Planck Yearbook of United Nations Laws», Vol. 4, 2000, p. 234. This is not to say that the Prosecution did not encounter great difficulties in gathering evidence. Consider e.g. G.
It is only logical to assume that international criminal procedure reflects this specific characteristic. Therefore, these obligations to cooperate will constitute a recurrent, cross-cutting theme throughout the subsequent chapters. While international criminal tribunals rely on different forms of legal cooperation, the discussion below is limited to cooperation in the gathering and production of evidence as well as the arrest (detention) and transfer of suspects and accused persons to the tribunals. It is easy to understand how this characteristic may seriously hamper the Prosecution’s or the Defence’s investigative efforts, in case the state or another actor from which cooperation is needed is unwilling to do so because it is itself implicated or has other reasons to not cooperate. This feature may also make these institutions vulnerable to political intrusions and pressure. It suffices to recall the Rwandese authorities’ reaction to cease cooperation following the ICTR Appeals Chamber’s decision to release Barayagwiza.


Meant here are purely domestic criminal proceedings, where no inter-state cooperation in criminal matters is required.

M. DAMASKA, The International Criminal Court between Aspiration and Achievement, in «UCLA Journal of International Law & Foreign Affairs», Vol. 37, 2009, p. 21; B. DE SMET, Internationale samenwerking in strafzaken tussen Angelsaksische en continentale landen, Intersentia, Antwerpen – Groningen, 1999, p. 8. In this regard, consider also A. ALAMUDDIN, Collection of Evidence, in K.A.A. KHAN, C. BUisman and C. GOSNELL (eds.), Principles of Evidence in International Criminal Justice, Oxford, Oxford University Press, 2010, p. 260 (the author observes that the problems faced by the international criminal tribunals in the collection of evidence are not so much caused by the absence of a police force. Both the ICC Prosecutor and the Prosecutor of the ad hoc tribunals can to some extent avail themselves of police powers: the problem is rather “the inability to enforce the legal obligations of states to cooperate”).
The relationship between international criminal courts and states, international organisations and individuals (including the extent to which states, international organisations and individuals are under an obligation to cooperate with the international criminal tribunals) is often described in ‘vertical’ vs. ‘horizontal’ (or ‘supra-state’ vs. ‘inter-state’) terms, as the ICTY Appeals Chamber did in the Blaškić case.\(^\text{530}\) Vertical cooperation sets the cooperation relationship between states and the tribunal apart from the voluntary cooperation relationship that exists between states (inter-state cooperation in criminal matters) and which respects the requested state’s sovereignty.\(^\text{531}\) Several variables are considered to indicate the verticality or horizontality of the cooperation relationship including the presence (or lack thereof) of grounds to refuse cooperation, the reciprocity or non-reciprocity of the cooperation relationship, the possibility for the requesting party to unilaterally interpret and determine the content of the obligations to cooperate as well as the presence (or absence) of a compulsory dispute settlement mechanism.\(^\text{532}\)


The ‘vertical’ cooperation regime, which can be seen at its strongest at the *ad hoc* tribunals, is based on “a clear hierarchy between the requesting and the requested state.” The general duty of states and international organisations to cooperate with the *ad hoc* tribunals can be found in Article 29 ICTY Statute and Article 28 ICTR Statute. Ultimately, it derives from resolutions of the Security Council acting under Chapter VII and the status of the *ad hoc* tribunals within the UN system. From this provision, it follows that obligations to cooperate for states are mandatory and all-encompassing. Among others, these obligations, which will be addressed in more detail in the chapters to come, include broad powers for the ICTY and the ICTR Prosecutor to conduct on-site investigations as well as the ancillary power of the *ad hoc* tribunals to subpoena witnesses or circumvent traditional obstacles to extraditions. Additionally, while states may invoke national security concerns for refusing to transmit evidence, the tribunal has the final say. KAUL and KRESS set forth the idea that the rationale for such a distinct cooperation scheme is that the horizontal approach would be “fundamentally inappropriate” for an international judicial body that is responsible for judging international core crimes. Far from pursuing the national interests of the state(s)

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534 Consider Security Council Resolution 827 adopted on 25 May 1993 and Security Council Resolution 955 of 8 November 1994, adopted under Chapter VII of the UN Charter and Article 25 of the UN Charter. It follows from paragraph 4 of Security Council Resolution 827 and from paragraph 2 of Security Resolution 955 that “all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 [28] of the Statute” (emphasis added). As far as the ICTY is concerned, an additional basis for the obligation to cooperate for the entities of the Former Yugoslavia is found in Article IX of the Dayton Peace Agreement (General Framework Agreement for Peace in Bosnia and Herzegovina), Dayton, Ohio, 2 November 1995. While Article 29 ICTY Statute and Article 28 ICTR Statute do not refer to other international actors, it will be explained how the jurisprudence expanded these cooperation duties to international organisations. See *infra*, Chapter 7, II.3.1.


536 See *infra*, Chapter 6, I.2.

537 See *infra*, Chapter 5, V.1.2 (the *ad hoc* tribunals) and V.2.2 (ICC).

538 See *infra*, Chapter 7, II.3.

directly concerned with a crime, the prosecution of these core crimes serves a “community goal”. 540

In turn, the cooperation regime of States Parties with the ICC is held to be a mixture of a horizontal and a vertical approach. 541 This was necessary in order to balance the opposing views that existed at the Rome conference. It is symptomatic that the ICC Statute does not speak of ‘orders’ but rather of ‘requests’. 542 The main distinction with the cooperation regime of the ICTY and the ICTR is that the obligations to cooperate of States Parties have been listed exhaustively and that obligations to cooperate, in principle, only apply to States Parties. 543 The general obligation to cooperate under Article 86 does not create obligations over and above those expressly mentioned (in Part 9 or any other part of the Statute). 544 As a caveat, reference should be had to Article 93 (1) (l) ICC Statute which creates an obligation for states to provide “any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court”. 545 Furthermore, the Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an *ad hoc* arrangement, an

543 An important exception to the principle that obligations are only incumbent on States Parties are Security Council Resolutions under Chapter VII, which, in case of a Security Council referral pursuant to Article 13 (b) ICC Statute, may compel states not party to cooperate with the Court. Besides, where states not party accept the jurisdiction of the ICC with regard to a situation, it follows from Article 12 (3) ICC Statute that the cooperation regime under Part 9 fully applies. Besides, The Court may invite states not party to cooperate (Article 87 (5) ICC Statute).
545 It will be noted how a broad interpretation of this provision is highly problematic, especially with regard to requests to carry out coercive measures. See *infra*, Chapter 6, II.4.3.
agreement with such State or any other appropriate basis”. Among others, the limited powers of the Court to conduct on-site investigations, the absence of an obligation of states to compel the appearance of witnesses or the lack of capacity to order cooperation in case of national security matters bear witness to the ICC’s more horizontal nature. Furthermore, the complementary nature of ICC prosecutions contrasts with the primacy of prosecutions by the ad hoc tribunals over national prosecutions.

The question of whether and to what extent the ‘vertical’ model of cooperation also applies to the internationalised criminal tribunals under review is more difficult. It is evident that these tribunals also require legal assistance by states and other actors in order to fulfil their mandates. Some possible exceptions are those internationalised criminal tribunals that have been set up in UN-administered territories such as East-Timor. The SPSC benefited from having the assistance of a ‘police force’ capable of using coercive measures. In general, it seems that a distinction needs to be drawn for internationalised criminal tribunals. On the one hand, there are far-reaching and all-encompassing obligations to cooperate for those states that are most concerned. To a large extent, these obligations mirror the vertical model. On the other hand, there are no straightforward obligations for third states to cooperate with these tribunals. As far as the SCSL and the ECCC are concerned, it follows from the pacta tertiis

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546 Article 87 (5) (a) ICC Statute.
547 Consider Article 99 (4) ICC Statute, as will be discussed infra, Chapter 6, I.2.
548 Consider Article 64 (6) (b) and 93 (1) (e) ICC Statute, as will be discussed infra, Chapter 5, V.2.2.
551 G. SLUITER, Legal Assistance to Internationalized Courts and Tribunals, in C.P.R. ROMANO, A. NOLLKAEMPER and J. KLEFFNER (eds.), Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia, Oxford, Oxford University Press, 2004, p. 383 (the author refers to a number of special features which may justify the vertical model and which international criminal tribunals do not necessarily share with the internationalised criminal tribunals. These include the subject matter jurisdiction of international criminal courts: internationalised criminal tribunals tend to have a broader jurisdiction and apart from serious crimes, have jurisdiction over other, albeit heinous, crimes.
552 Ibid., p. 389.
553 Consider Article 25 ECCC Agreement. The formulation of this provision (“shall comply without undue delay with any request for assistance”) including the absence of grounds for refusal of cooperation clearly reflects the vertical model. A similar wording can be found in Article 17 SCSL Agreement (and Rule 5 (A) SCSL RPE) and Article 15 STL Agreement (which expressly refers to cooperation with the defence counsel). However, it has been argued by SLUITER that these cooperation schemes are not ‘fully’ vertical in nature where no compulsory dispute settlement mechanism is provided for. Consider Article 20 SCSL Agreement and Rule 8 (B) SCSL RPE; Article 29 ECCC Agreement; Article 18 STL Agreement.
nec nocent nec prosunt maxim that the bilateral agreements between the United Nations and these courts do not entail any obligations to cooperate for third states. 554 Similarly, no obligations to cooperate for UN member states vis-à-vis the SPSC were included when the SPSC were set up by UNTAET. 555 Also Security Council Resolution 1757 (2002), which established the STL, did not impose obligations to cooperate on third states. 556 Rather, it will be for these internationalised criminal tribunals to conclude agreements or make ad hoc arrangements with third states. 557 Besides, states may otherwise have an obligation to cooperate with these tribunals on the basis of other instruments. 558 Furthermore, the UN Security Council has the ability to, on an ad hoc basis, oblige certain states or other actors to cooperate with these courts. 559

From the foregoing, it is clearly not possible to determine one cooperation scheme in international criminal adjudication. 560 Moreover, it emerges that different forms of cooperation exist. Although obligations to cooperate of states or other international actors may take different forms (they may be statutory, contractual or otherwise), it must be emphasised that cooperation does not need to be mandatory in nature and might as well be

554 While UN Security Council Resolution 1470 (2003) “urges” all States to “cooperate fully”, with the SCSL, and UN Security Council Resolution 1478 (2003) “calls” upon all states to “cooperate fully” with the Court, this seems to fall short from a clear-cut binding obligations incumbent on states to cooperate with the Court.

555 No obligations to cooperate for UN member states vis-à-vis the SPSC were provided for. No clear-cut obligation to cooperate with UNTAET was to be found in UN Security Council Resolution 1272 (1999) establishing UNTAET. Operative paragraph 7 only “[s]tresses the importance of cooperation between Indonesia, Portugal and UNTAET in the implementation of this resolution”. This is particularly problematic in relation to Indonesia. However, a Memorandum of Understanding (‘MOU’) was concluded between Indonesia and UNTAET, which does not impose far reaching obligations to cooperate on Indonesia and provides for important grounds for refusal. See the Memorandum of Understanding between the Republic of Indonesia and the United Nations Transitional Administration in East Timor regarding Cooperation in Legal, Judicial and Human Rights Related Matters, Jakarta, 5-6 April 2000. For a critical discussion thereof, see G. SLUITER, Legal Assistance to Internationalized Courts and Tribunals, in C.P.R. ROMANO, A. NOLLKAEMPER and J. KLEFFNER (eds.), Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia, Oxford, Oxford University Press, 2004, pp. 391 – 393.


557 In this regard, consider Article 11 (d) SCSL Agreement (“The Special Court shall possess the juridical capacity necessary to: Enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court”) as well as Rule 8 (C) SCSL RPE; Article 7 (d) STL Agreement (“The Special Tribunal shall possess the juridical capacity necessary (d) To enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Tribunal”) and Rule 13 STL RPE; Rule 5 ECCC RPE.

558 As acknowledged by Rule 21 STL RPE.

559 Consider e.g. UN Security Council Resolution 1638 (2005), mandating UNAMIL “to apprehend and detain former President Charles Taylor in the event of a return to Liberia and to transfer him or facilitate his transfer to Sierra Leone for prosecution before the Special Court for Sierra Leone”).

voluntary. Furthermore, it may be expected that obtaining cooperation from states is more problematic for the Defence. Defence counsels that were interviewed regularly referred to the lack of cooperation by states, particularly when asked about the major challenges they encountered in the course of their investigations. The recurrent stories of intimidation and interference of the Rwandese authorities toward defence investigations are discomforting. One well-documented case is that of defence counsel Peter Erlinder, who was arrested in Rwanda in May 2010 on allegations of negating the Rwandan genocide against the Tutsis in 1994. In addition, the Rwandese authorities seem to have used Gacaca proceedings to intimidate prospective defence witnesses. Some defence witnesses were actually prosecuted upon their return to Rwanda.

561 Consider e.g. Interview with Mr. Gumpert, Defence Counsel, ICTR-20, Arusha, 22 May 2008, p. 6; Interview with Mr. Black, Defence Counsel, ICTR-19, Arusha, 22 May 2008, p. 6; Interview with Peter Zaduk, Defence Counsel, ICTR-22, Arusha, 26 May 2008, p. 6; Interview with Dr. O’Shea, Defence Counsel, ICTR-23, Arusha, 28 May 2008, pp. 3 - 4.

562 Interview with Mr. Black, Defence Counsel, ICTR-19, Arusha, 22 May 2008, p. 7 (Q. Have members of the defence team been prosecuted in Rwanda on any charges? Yes, Leonidas. He was a Rwandan lawyer. He went with his lead counsel to Kigali to do an investigation and meet with a witness. He was arrested and charged with negationism. Then there is another Rwandan named Gakwaya who was arrested here in Tanzania by the Tanzanian police); Interview with Mr. Taku, Defence counsel, ICTR-21, Arusha, 23 May 2008, p. 4 (You know the Rwandan government keeps a list of alleged perpetrators of the genocide. And if you conduct a study of that list from 1996 to date, you will see in the variations and changes in the list people who have not [been] at specific locations from the outset, but as soon as they accept to come to testify on behalf of the defendant, they became suspects in the alleged perpetration of crimes in those areas in which they never visited. You also find that most of our defense investigators are Rwandese citizens who have been of help to us, and many of them have had to withdraw or leave because the Rwandan government. As soon as it finds out that they are investigating for the Defense, it accuses them of committing genocide. And there are many cases of people who were not in Rwanda at the time of the crimes, some of whom were still too young, but nevertheless, they still put their names on the list. This list is used as a sort of blackmail against Rwandan citizens who would like to assist the Defense); BUISMAN refers to one instance where an ICTR Defence investigator fled Rwanda to seek asylum in The Netherlands. See C. BUISMAN, Ascertaintment of the Truth in International Criminal Justice, 2012, (http://bura.brunel.ac.uk/handle/2438/6555, last visited 18 November 2013), p. 187.

563 At the time of his arrest, professor Erlinder was not investigating on behalf of the ICTR but was in Rwanda to defend a well-known Rwandese opposition leader, who had been arrested. It became clear that his arrest was largely based on statements he made in his function as defence counsel of the ICTR. This led the ICTR to change its position and hold that Erlinder was immune from prosecution in Rwanda. Although these immunity claims were rejected by Rwanda, he was eventually released “on health grounds”. Consider in particular the Note Verbale by the ICTR Registrar to the Rwandese authorities, attached to ICTR, Further Registrar’s Submissions Under Rule 33(B) of the Rules of Procedure and Evidence in Respect of the Appeals Chamber Order to the Registrar dated 9 June 2010, Prosecutor v. Bagosora et al., 98-41-A, A. Ch.,15 June 2010 (“The ICTR hereby notifies the Rwandan authorities that Professor Erlinder enjoys immunity and requests therefore, his immediate release”).

564 Interview with Mr. Taku, Defence counsel, ICTR-21, Arusha, 23 May 2008, p. 4 (“this Gacaca court procedure is used to intimidate potential witnesses, in the sense that in the Gacaca proceedings, anybody can come out and denounce you: “Yes, this person burned down my home”, or “This person intimidated me during the genocide”. Because of the nature of proceedings, the system uses it to intimidate and imprison any potential witnesses. As soon as somebody appears on your witness list, the next thing you hear is that this person is detained in the Gacaca proceedings”); Interview with Defence Counsel Peter Zaduk, ICTR-22, Arusha, 26 May 2008, p. 7 (“At the core of this, the government of Rwanda controls most of the witnesses who are still in the country, including the defense witnesses, many of whom are very fearful about testifying. We had a witness in our case, a very helpful witness to us, who came in November 2006 to testify from Rwanda, and did not testify at
More problems are likely to arise for the Defence if the requested state belongs to the civil law family. Unlike common law criminal justice systems, civil law states tend to prefer to conduct all investigative acts themselves and often require prior approval. Also, on-site investigations will always require some involvement by state officials. While they will already find it difficult to accept on-site investigation powers of an international Prosecutor, this is certainly the case for the Defence. The Defence cannot address requests to the authorities of the state concerned because they are not officials. Defence counsel Peter Robinson confirmed that it was more difficult to obtain cooperation from civil law states.


567 Interview with Mr. Peter Robinson, Defence Counsel, ICTR-18, Arusha, 22 May 2008, p. 5 (“We do not encounter too many problems except from some countries in Europe where they won’t do anything voluntarily to assist the Defence so we have to get an order from the Trial Chamber for example in Belgium to get any documents from the Belgian government. The Prosecutor can send them a letter and they will give them the documents but we have to go through the Trial Chamber. However, when we are investigating and there are some roadblocks we have the right to address the Trial Chamber and to ask for a motion to enforce what we are asking for. If somebody does not want to meet with us, we can ask that the Trial Chamber issues summons or subpoenas to meet with us or to come and testify. Q: The problems you just mentioned, do you mostly encounter them with civil law countries? A: Yes.”).
§ Outsourcing investigations

Since states may often be reluctant to cooperate, other actors, including human rights NGO’s, UN entities or intermediaries may step in and offer welcome assistance. Such assistance may take different forms, two of which will be addressed below, shortly.568

First, international(ised) criminal tribunals may rely on evidence or information that was previously gathered by third parties as part of their own investigations. In the Lubanga case, the ICC Prosecutor relied heavily on information gathered by UN entities and NGO’s. The possible dangers of this course of action were fully felt when proceedings were stayed in the Lubanga case because confidentiality agreements concluded with the UN (pursuant to Article 54 (3) (e) ICC Statute) prevented the ICC Prosecutor from disclosing evidence to the Defence or to the Court.569 Relying on evidence and information gathered by third parties is not a new phenomenon. For example, it is recalled that most international(ised) criminal tribunals were preceded by international commissions of inquiry mandated to investigate serious violations of human rights law and international humanitarian law.570 Besides, some NGO’s have been

568 Other forms of assistance may be provided. For example, it will be discussed how arrests of suspects or accused persons may be effectuated by U.N. entities. See infra, Chapter 7, II.3.1.
569 Most of this confidential evidence was obtained from the U.N. In this regard, consider Article 18 (3) of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 2283 UNTS 195, entry into force 4 October 2004 (‘The United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations’). See ICC, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06-1401, T. Ch. I, 13 June 2008. See infra, Chapter 3, III. The excessive reliance on confidentiality agreements also caused its deal of problems in the Katanga and Ngudjolo Chui case. See in particular: ICC, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. ICC-01/04-01/07, T. Ch. II, 20 August 2008. As far as confidentiality agreements concluded by the ICC OTP are concerned, it is to be noted that the Prosecution has stated that it seeks to reduce its reliance on such agreements. See ICC, Prosecutorial Strategy 2009 – 2012, par. 34 (b).
very active in providing assistance to these courts.\textsuperscript{571} One of the advantages of relying on these entities lays in their better understanding of the context of the conflict, particularly if they have a long-term presence on the ground.\textsuperscript{572}

Several dangers are connected with this kind of involvement by third parties. Apart from problems of disclosure, and the fact that a great deal of the information provided constitutes hearsay, problems of partiality may arise.\textsuperscript{573} For example, where MONUC was actively involved in the implementation of peace in the DRC and had regular contacts with members of the different parties involved in the conflict, including ICC suspects, its views may not be neutral.\textsuperscript{574} Besides, these third-party actors are not usually trained in the procedures of the international(ised) criminal tribunals.\textsuperscript{575} Fact-finding by third parties serves different purposes established in the aftermath of WWII. Even during the entire investigation phase, the reliance on external entities in the collection of evidence continued, in the form of reliance on the assistance of the allied armed forces and their intelligence agencies. See H. FUJIWARA and S. PARMENTIER, Investigations, in L. REYDAMS, J. WOUTERS and C. REYNGAERT (eds.), International Prosecutors, Oxford, Oxford University Press, 2012, pp. 597 – 598.

\textsuperscript{571} As an example, DC-CAM can be mentioned. This independent organisation has, since it was established in 1995, collected evidence on the crimes allegedly committed by the Khmer Rouge and conducted thousands of interviews with victims, witnesses and perpetrators. See Open Society Justice Initiative, Justice Initiatives, Spring 2006, p. 74.

\textsuperscript{572} E. BAYLIS, Outsourcing Investigations, in «UCLA Journal of International Law & Foreign Affairs», Vol. 14, 2009, p. 142 (the author gives the example of the MONUC investigations in the DRC which “dwarf the OTP’s.” MONUC developed a ‘Special Investigations Unit’, which had the primary purpose of investigating war crimes and crimes against humanity and to produce reports, among others for the use at future prosecutions. (ibid., pp. 139, 141)); L.S. SUNGA, How Can UN Human Rights Special Procedures Sharpen ICC Fact-Finding?, in «The International Journal of Human Rights», Vol. 15, 2011, p. 188 (arguing that the ICC Prosecutor may rely on the expertise of various U.N. human rights special procedures, which have already collected information and continue gathering it); C. BUISMAN, Delegating Investigations: Lessons to be Learned from the Lubanga Judgment, in «Northwestern University Journal of International Human Rights», Vol. 11, 2013, p. 54 (noting that due to their long-term presence in the field, they are more familiar with the territory).

\textsuperscript{573} E. BAYLIS, Outsourcing Investigations, in «UCLA Journal of International Law & Foreign Affairs», Vol. 14, 2009, pp. 144 – 145; Under certain circumstances, prosecutorial reliance on intermediaries may endanger his or her objectivity, see infra, Chapter 3, III.

\textsuperscript{574} C. BUISMAN, Delegating Investigations: Lessons to be Learned from the Lubanga Judgment, in «Northwestern University Journal of International Human Rights», Vol. 11, 2013, p. 56.

\textsuperscript{575} One member of the ICTR OTP, when asked about obstacles encountered in investigations by the Prosecutor, referred to the fact that initially, the OTP investigators were in fact human rights officers as well as staff of UNAMIR, who were redeployed to the ICTR, and which were “extremely incompetent individuals”. Interview with Dr. Alex Obote Odora of the OTP, ICTR-11, Arusha, 21 May 2008, p. 7. Another member of the ICTR OTP also referred to the problem of “poor investigations” and refers in that regard to the involvement of staff of UNAMIR and other UN organisations as investigators, but added that “I think it is really difficult to recruit investigators into doing what they are doing. I would not blame the investigators. I think that any investigator from any part of the world would have trouble. It is a difficult job to do.” See Interview with Ms. Christine Graham of the OTP, ICTR-14, Arusha, 28 May 2008, p. 6. Consider also Interview with a Legal Officer of the ICTR, ICTR-10, Arusha, 21 May 2008, pp. 5 - 6 (“I think it is very important that the ICC should learn that you must train investigators so they know what they should be looking for during an investigation. In many cases I think that our investigators went with fishing nets, they got an octopus, a goldfish, a shark, and so on. I think that people looking for evidence should know what they are looking for. I do not blame them, because we were just
and information has not necessarily been gathered for the purpose of criminal prosecutions. Fact-finding by third parties may focus on state responsibility rather than individual criminal responsibility.\(^{576}\) Additionally, it has been noted that it may be more difficult for the Defence than the Prosecution to obtain information and materials from the UN and from NGO’s.\(^{577}\)

Nevertheless, on the condition that it is understood that fact-finding cannot substitute for the parties’ obligation to investigate diligently, information and fact-finding by third parties may enhance the Prosecution’s (and Defence’s) investigative capacities.\(^{578}\) However, the difficulty lies in finding the right balance when relying on third-party information.\(^{579}\) Commentators have discerned a certain tendency in the use of third-party information by international(ised) criminal courts and tribunals. They argue that while the ad hoc tribunals very much relied upon such reports and materials by third parties during the initial years of investigations, nowadays, such sources play a much more limited role in the investigations, limited to the commencement of an examination.\(^{580}\) However, some signs suggest that this may not be the case at the ICC. At least with regard to investigations relating to a number of situations and cases, the Prosecution seems to have relied (too) heavily on information gathered by third parties rather than on conducting its own investigations. Reference can be made to starting and had no lessons learnt to guide us, but I think our experiences have highlighted lesson that we can learn”).


\(^{579}\) On this interaction between human rights fact-finding missions and international criminal investigations, promising work is currently undertaken by the research project: “From Fact-finding to Evidence: Harmonising Multiple Investigations of International Crimes”, by the Hague Institute for Global Justice. Consider also M. MARKOVIC, The Prosecutor’s Missing Code of Conduct, in «Texas International Law Journal», Vol. 47, 2011 – 2012, p. 216 (“it is likely that the OTP will have to continue to rely on information providers, many of whom may expect confidentiality, in future investigations because the OTP does not have the capacity or resources to conduct full, intensive investigations with respect to every conflict before the Court”).

CASSESE’s and ARBOUR’s criticism of the Prosecutor’s decision to not conduct investigations in Darfur (at a time when investigations within Sudan were still possible), but rather to rely on third-party evidence and documents of the UN Commission of Inquiry.  

It has been argued that this kind of conduct is not limited to this situation. Also in other situations and cases, the OTP barely conducted its own investigations on the ground.

Apart from this reliance on evidence and information gathered by third parties, the Prosecution or the Defence may also wish to involve third parties as ‘intermediaries’ in facilitating their investigative efforts. None of the procedural frameworks of the tribunals under review provide a definition of ‘intermediaries’. The ICC ‘Draft Guidelines Governing the Relations between the Court and Intermediaries’ define an intermediary as ‘someone who comes between one person and another; who facilitates contact or provides a link between one of the organs or units of the Court or counsel on the one hand, and victims, witnesses…or affected communities more broadly on the other’. In practice, intermediaries

C. BUISMAN, Delegating Investigations: Lessons to be Learned from the Lubanga Judgment, in «Northwestern University Journal of International Human Rights», Vol. 11, 2013, pp. 45 – 54 (the author (in addition to the Darfur situation) refers in particular to the investigations in the Mbarushimana case, (the author claims that the security situation in North-Kivu was stable at the time the Prosecutor could and should have conducted its investigations); the Situation in the Republic of Kenya (where the author claims the Prosecutor relied too much on the results of the investigations carried out by the Commission of Inquiry into the Post-Election Violence and did not conduct investigations inside Kenya prior to the confirmation of charges); the Abu Garda case (referring to argumentations of incomplete investigations made by the Defence) and the Situation in Libya (where the author claims that the Prosecutor, at first, primarily relied on information gathered by third parties, including the U.N. Commission of Inquiry).

One reference can be found in Regulation 97 of the ICC Registry Regulations, which refers to the obligation of confidentiality “between the Court and persons or organisations serving as intermediaries between the Court and victims.” Additional references may be found in Regulations 67 and 71 of the ICC Regulations of the Trust Fund for Victims.

C. BUISMAN, Delegating Investigations: Lessons to be Learned from the Lubanga Judgment, in «Northwestern University Journal of International Human Rights», Vol. 11, 2013, p. 31 (defining intermediaries as “liaison officers facilitating contact with potential witnesses”).

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581 ICC, Decision Inviting Observations in Application of Rule 103, Situation in Darfur, Sudan, Situation No. 02/05-10, PTC I, 24 July 2006; ICC, Observations of the United Nations High Commissioner for Human Rights Invited in Application of Rule 103 of the Rules of Procedure and Evidence, Situation in Darfur, Sudan, Situation No. 02/05-19, PTC I, 10 October 2006; and ICC, Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending Before the ICC, Situation in Darfur, Sudan, Situation No. ICC-01/05-14, 25 August 2006.

582 C. BUISMAN, Delegating Investigations: Lessons to be Learned from the Lubanga Judgment, in «Northwestern University Journal of International Human Rights», Vol. 11, 2013, pp. 45 – 54 (the author (in addition to the Darfur situation) refers in particular to the investigations in the Mbarushimana case, (the author claims that the security situation in North-Kivu was stable at the time the Prosecutor could and should have conducted its investigations); the Situation in the Republic of Kenya (where the author claims the Prosecutor relied too much on the results of the investigations carried out by the Commission of Inquiry into the Post-Election Violence and did not conduct investigations inside Kenya prior to the confirmation of charges); the Abu Garda case (referring to argumentations of incomplete investigations made by the Defence) and the Situation in Libya (where the author claims that the Prosecutor, at first, primarily relied on information gathered by third parties, including the U.N. Commission of Inquiry).

583 One reference can be found in Regulation 97 of the ICC Registry Regulations, which refers to the obligation of confidentiality “between the Court and persons or organisations serving as intermediaries between the Court and victims.” Additional references may be found in Regulations 67 and 71 of the ICC Regulations of the Trust Fund for Victims.

often act as “informal agents” of the Court.\textsuperscript{585} It is evident that intermediaries and other local informants can offer important assistance to the Court.\textsuperscript{586} The use of ‘intermediaries’, to a large extent, dominated the trial proceedings in the \textit{Lubanga} case thus providing some insight as to their role in the collection of evidence and information. The reliance on intermediaries was discussed on several occasions throughout the course of the trial proceedings.\textsuperscript{587} Notably, the use of intermediaries in this case led the Defence to allege that witnesses had been induced. The Defence subsequently applied for a permanent stay of proceedings on the basis of abuse of process. The request, however, was turned down.\textsuperscript{588} The ICC Prosecutor sought to explain the reliance on intermediaries by the lack of a police force, ongoing hostilities and security risks for witnesses associated with the investigation.\textsuperscript{589} Human rights activists could move more freely and talk to potential witnesses due to their long-term presence on the ground. Hence, the OTP decided that they should act as intermediaries.\textsuperscript{590} One OTP

\begin{itemize}
  \item \textsuperscript{585} C.M. \textsc{De Vos}, Case Note, Prosecutor \textit{v. Lubanga}, ‘Someone who Comes Between one Person and Another’: \textit{Lubanga, Local Cooperation and the Right to a Fair Trial}, in \textit{Melbourne Journal of International Law}, Vol. 12, 2011, p. 218.
  \item \textsuperscript{587} See, among others, ICC, Redacted Decision on Intermediaries, \textit{Prosecutor \textit{v. Lubanga Dyilo, Situation in the DRC}}, Case No. ICC-01/04-01/06-2434, T Ch. I, 31 May 2010 (in which the Trial Chamber ordered the disclosure of information on intermediary 143; that intermediaries 316 and 321 be called “to deal with the suggestions that they attempted to persuade one or more individuals to give false evidence”; and that someone of the Prosecution staff be called “to testify as to the approach and the procedures applied to intermediaries”); ICC, Redacted Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending further Consultations with the VWU, \textit{Prosecutor \textit{v. Lubanga, Situation in the DRC}}, Case No. ICC-01/04-01/06-2517, T. Ch. I, 8 July 2010, par. 31 (the Trial Chamber decided to stay the proceedings after the Prosecutor defied the repeated orders of the Trial Chamber to disclose the identity of intermediary 143). On appeal, the decision to impose an unconditional stay was reversed. See ICC, Judgment on the Appeal of Prosecutor Against the Oral Decision of Trial Chamber I of 15 July 2010 to Release Thomas Lubanga Dyilo, \textit{Prosecutor \textit{v. Lubanga Dyilo, Situation in the DRC}}, Case No. ICC-01/04-01/06-2583 OA17, A. Ch., 8 October 2010.
  \item \textsuperscript{588} ICC, Redacted Decision on the “Defence Application Seeking a Permanent Stay of Proceedings”, \textit{Prosecutor \textit{v. Lubanga Dyilo, Situation in the DRC}}, ICC01/04-01/06-2690-Red2, T. Ch. I, 7 March 2011, par. 199, 205, 213, 218 and 224 (the request for a permanent stay of proceedings because of abuse of process was turned down by the Trial Chamber because “[e]ven accepting, for the sake of argument, the defence submissions at their highest that the Prosecutor knew that there were doubts as to the integrity of the four intermediaries, staying the proceedings, as an exercise of judgment, would be disproportionate”).
  \item \textsuperscript{589} Ibid., par. 123. The Prosecution additionally argued that “this approach is widely considered to be ‘best practice’ during investigation” (ibid., par. 124); ICC, Prosecution’s Response to the Defence’s “Requête de la défense aux fins d’arrêt définitive des procedures, \textit{Prosecutor \textit{v. Lubanga Dyilo, Situation in the DRC}}, Case No. ICC-01/04-01/06-2678-Red, T. Ch. I, 31 January 2011, par. 14. See also ICC, Judgement pursuant to Article 74 of the Statute, \textit{Prosecutor \textit{v. Lubanga Dyilo, Situation in the DRC}}, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 153 (on the security situation in Bunia) and 154 (on the security risks for witnesses). Critical on the security concerns invoked by the Prosecutor, consider C. \textsc{Buisman}, Delegating Investigations: Lessons to be Learned from the Lubanga Judgment, in \textit{Northwestern University Journal of International Human Rights}, Vol. 11, 2013, pp. 63 – 72.
  \item \textsuperscript{590} ICC, Redacted Decision on the “Defence Application Seeking a Permanent Stay of Proceedings”, \textit{Prosecutor \textit{v. Lubanga Dyilo, Situation in the DRC}}, ICC01/04-01/06-2690-Red2, T. Ch. I, 7 March 2011, par. 167. Consider
\end{itemize}
investigator testified that the OTP, in fact, used two (overlapping) categories of intermediaries. The first category consisted of intermediaries that assisted in the identification of witnesses and established the contacts between the investigators and the witnesses. 591 They would also inform the investigators of possible health or security problems or of the lack of understanding on the relevant issues. These intermediaries were often human rights activists. 592 The second category of intermediaries consisted of persons who contributed to the evaluation of the security situation and consisted of members of MONUC, the Congolese armed forces and others with useful information on the situation. 593 The Prosecution submitted that the role of intermediaries was limited in the sense that they were not involved in any decision making, did not participate in taking witness statements and were only exceptionally present when witnesses were screened or interviewed. 594 Besides, the intermediaries were not informed about the investigation team’s objectives. 595 Furthermore, some background checks were usually conducted by the OTP investigation team. 596 However, the OTP investigations team leader testified that during investigations in the DRC, it was sometimes difficult to conduct such tests due to security considerations. In other instances, it was held that their background was sufficiently established on the basis of reports on their

also Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, pp. 48, 63 - 64 (stating that most intermediaries were activists “most of whom were fully aware of the activities of international criminal justice, […] they were fully aware of what we were trying to do and they consulted internet sites to keep abreast of the progress in the investigations and in the progress of international criminal justice”). 591 Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, p. 49; ICC, Judgement pursuant to Article 74 of the Statute, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 190. Consider also ICC, Transcript, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. 01/04-01/07-T-81, T. Ch. II, 31 January 2011, par. 17.

592 Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, pp. 51 – 52; ICC, Judgement pursuant to Article 74 of the Statute, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 193.

593 Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, pp. 51 – 52; ICC, Judgement pursuant to Article 74 of the Statute, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 193.


595 Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, p. 63.

596 ICC, Transcript, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009, p. 37.
human rights activities in the field. 597 The majority of intermediaries worked on a voluntary basis but received reimbursements for their travel and communication costs. 598 A few of the intermediaries received compensation on the basis of a special contract because they were indispensable for the investigators. 599 In its final judgement, Trial Chamber I was very harsh on the Prosecution’s use of intermediaries. It concluded that:

“The Chamber is of the view that the prosecution should not have delegated its investigative responsibilities to the intermediaries in the way set out above, notwithstanding the extensive security difficulties it faced. A series of witnesses have been called during this trial whose evidence, as a result of the essentially unsupervised actions of three of the principal intermediaries, cannot safely be relied on. The Chamber spent a considerable period of time investigating the circumstances of a substantial number of individuals whose evidence was, at least in part, inaccurate or dishonest. The prosecution’s negligence in failing to verify and scrutinise this material sufficiently before it was introduced led to significant expenditure on the part of the Court. An additional consequence of the lack of proper oversight of the intermediaries is that they were potentially able to take advantage of the witnesses they contacted. Irrespective of the Chamber’s conclusions regarding the credibility and reliability of these alleged former child soldiers, given their youth and likely exposure to conflict, they were vulnerable to manipulation.” 600

“As set out above, there is a risk that P-0143 persuaded, encouraged, or assisted witnesses to give false evidence; there are strong reasons to believe that P-0316 persuaded witnesses to lie as to their involvement as child soldiers within the UPC; and a real possibility exists that P-0321 encouraged and assisted witnesses to give false evidence. These individuals may have committed crimes under Article 70 of the Statute.” 601

From these excerpts, it appears that it was not so much the use of intermediaries that was problematic, but the lack of supervision or oversight of intermediaries. 602 Considering the

597 ICC, Judgement pursuant to Article 74 of the Statute, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 197; Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, p. 55.
598 Ibid., pp. 58 – 59. ICC, Judgement pursuant to Article 74 of the Statute, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 198 – 199.
599 Ibid., par. 203.
600 Ibid., par. 482.
601 Ibid., par. 483.
602 Confirming, consider C. BUISMAN, Delegating Investigations: Lessons to be Learned from the Lubanga Judgment, in «Northwestern University Journal of International Human Rights», Vol. 11, 2013, p. 57 (noting that “they made all of the relevant decisions on the ground. It was the intermediaries who travelled to locations,
extent to which intermediaries were involved in the Prosecutor’s investigations, it is fair to say that the Prosecutor did, in fact, delegate a part of its investigative responsibilities to them. In the Prosecution’s investigations in the (now severed) Katanga and Ngudjolo Chui case—which, like the Lubanga case, concerned the Ituri region---, intermediaries were used as well. For investigations in other situations and cases, it is not entirely clear but it is expected that intermediaries were used. While ‘intermediaries’ are not referred to in relation to investigations by other international(sed) criminal tribunals, it can be assumed that local contact persons are also used by the Prosecution and the Defence. In some instances, their use may well be unavoidable because of the dangers of witness intimidation. Some commentators have been very critical of the reliance on ‘intermediaries’.

The ICC has understood that further regulation of the relationship between the Court and intermediaries is necessary. To that extent, in October 2010, the ‘Draft Guidelines Governing the Relationship between the Court and Intermediaries’ were finalised by the Court. The future adoption thereof by the ASP may accommodate problems related to investigative methods.
VII.2. Fragmentation of the investigation

A second feature of criminal investigations (and prosecutions) by international criminal tribunals is closely connected to the necessary reliance on state cooperation. This is the fragmentation of the investigation over several jurisdictions. Because of the important limitations in the tribunals’ ability to gather evidence and information autonomously and independently on the territory of states or to effectuate the arrest of suspects or accused persons, cooperation by states (and other international actors) will be required. Therefore, evidence is gathered or arrests are made by states or other international actors, pursuant to a request by the tribunal. Where the request is consequently executed according to the laws of the requested state, this leads to fragmentation of the investigation over several jurisdictions. As a consequence, complicated situations may arise, causing tensions and conflicts between different procedural regimes. An example from the practice of the ICTY (which will be discussed in more detail further on) may illustrate this. In the Delalić case, Mucić had been interviewed according to Austrian law, which did not provide for a right to counsel during questioning. In turn, the ICTY’s procedural framework provides for the right to the assistance of counsel during an interrogation. In a case such as this, the question arises as to whether the Austrian police officers who conducted the interrogation were right to apply national procedure or whether they should have given priority to the more stringent ICTY procedural norms? Even if the latter question is answered in the affirmative, the question arises as to whether this was only the case when Mucić was interrogated at the tribunal’s request? To give another example, if an accused person has been arrested at the behest of an international criminal tribunal, can that state, prior to the transfer of the accused to the seat of the tribunal, provisionally release the accused (if this is allowed for under its own laws)? If so, what law applies: the procedural rules of the tribunal or domestic law?

The most problematic aspect of the fragmentation of international criminal investigations and proceedings lays in the potentially reductive impact that it can have on the protection of the individual rights of the person(s) concerned. Such reductive impact will be present if and to the extent that international(ised) criminal tribunals decline responsibility for acts carried out

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610 As will be discussed, infra, Chapter 4, IV.1.1.
611 See infra, Chapter 4, II.2.2.
by states at the request of the tribunal, or for other external events from which it benefited. 612

One commentator concluded that the fragmentation of international criminal proceedings over
different jurisdictions does not have a diminishing impact on the level of human rights
protection in proceedings before the ICC. 613 He arrived at this conclusion after finding that the
ICC accepts responsibility for all human rights violations, even in cases when violations are
the result of external events. Below, it will be illustrated how this conclusion should be
faulted. For example, the ICC has so far declined to accept responsibility for all violations of
the suspect’s or the accused’s rights prior to his or her transfer to the Court. 614 As far as other
international(ised) criminal tribunals are concerned, the picture is mixed at best.

International criminal procedure shares the problem of the potentially reductive effects of
fragmentation in international criminal investigations with the law on inter-state cooperation
in criminal matters. Several authors have warned of the dangers of such fragmentation and
emphasised the importance of internal consistency. 615 In the words of ORIE:

“The impression of equal protection of the position of the suspect in case of the
execution of a request for judicial assistance in criminal matters could well prove to be
mistaken. It is founded on the denial of the procedural complications which arise in case
more than one investigating, prosecuting and adjudicating authority, more than one

International Law, Vol. 27, 2002, p. 121 (noting that “commentators are well aware of the difficulties the
cooperation regime creates for effective prosecutions; less appreciated is how the same problems affect the rights
of the accused”).
613 C. DEPREZ, Extent of Applicability of Human Rights Standards to Proceedings before the International
– 739 (the author agrees that the fragmentation of proceedings is one of the distinctive characteristics of
international criminal proceedings).
614 See infra, Chapter 7, VIII.
615 A.M.M. ORIE, De verdachte tussen wal en schip of de systeem-breuk in de kleine rechtshulp, in E.A. DE LA
PORTE et al. (eds.), Bij deze stand van zaken – bundel opstellen aangeboden aan A. L. Melai, Gouda, Quint,
1983, pp. 351 – 361; C. SAFFERLING, The Rights and Interests of the Defence in the Pre-Trial Phase, in
«Journal of International Criminal Justice», Vol. 9, 2011, p. 651 (noting, with regard to the ICC, that “under the
cooperation-model the defence situation becomes complex and runs the danger of losing itself between national
and international law”); E. VAN SLIEDREGT, J.M. SJÖCRONA, A.M.M. ORIE, Handboek Internationaal
Strafrecht, Schets van het Europese en Internationale Strafrecht, Deventer, Kluwer, 2008, p. 271; B. DE SMET,
Internationale samenwerking in strafzaken tussen Angelsaksische en continentale landen, Intersentia, Antwerpen –
Groningen, 1999, p. 193 (arguing that procedural safeguards of the suspect in the lex fori are at risk of being
lost in case the assistance of another state is required in the proceedings).
The risk of lacunae in the legal protection of individual rights when more than one legal system is involved may be best illustrated with an example. If an international criminal tribunal requests the assistance of a state in the collection of evidence, the relevant laws of the requested state will normally be applied in the execution of the request (locus regit actum), subject to procedural wishes indicated in the request. However, if the evidence is subsequently gathered in disrespect of the formal or material requirements of the national law (which may very well have been adopted to ensure the respect of human rights norms), there is often very little chance that the affected individual(s) will obtain a remedy. Where the evidence was gathered at the request of an international tribunal or the national authorities were compelled to do so by an international tribunal, the requested state may be reluctant to accept responsibility for irregularities. Besides, by the time a remedy is sought at the national level, the evidence that was obtained as a result of the violation may have already been transmitted to the international tribunal. When the evidence has been transferred, the state may request that the tribunal not make use of the evidence. However, the requested state may be reluctant to honour such a request. It follows that the prospects for an effective remedy in the requested state are limited.

Hence, remedies may be sought before the tribunal. After all, the tribunal may exclude the evidence; in many cases, this may be the most suitable remedy. However, the tribunal is not under any obligation to provide remedies when the laws of the requested state are violated.

617 Consider e.g. Article 99 (1) ICC Statute. In much more detail, see G. SLUITER, International Criminal Adjudication and the Collection of Evidence, Antwerp, Intersentia, 2002, pp. 203 – 229. The ‘national law’ applied is not necessarily identical to the law applied in domestic criminal cases. This depends on the manner in which the state concerned has implemented its obligations vis-à-vis the international criminal tribunals. The law will differ in case the state has regulated in detail the execution of requests for assistance by the tribunals, without or with minimal reference to the ordinary laws of criminal procedure and international cooperation in criminal matters (ibid., p. 211).
The tribunals will only offer remedies if the evidence was obtained in such a way that violated the international criminal tribunal’s own legal framework. The flexible rules of evidence may effectively prevent the exclusion of the evidence.

International criminal courts should be aware of the fact that part of the investigative actions may not have been submitted to effective control. In order to address these potentially reductive effects of fragmentation, several scholars have advocated the need of increased human rights protection by means of accepting the shared responsibility of the tribunals and the states whose cooperation is sought to protect the human rights of the individual(s) concerned. In this regard, it has been noted that, much like inter-state cooperation in criminal matters, vertical cooperation must be seen as a “triangular” relation between the court, the requested state and the individual(s) concerned. From this, it follows that both the court and the requested state have the responsibility to protect the rights of the individual(s) concerned when cooperation is sought from states or other international actors. This serves to avoid loopholes in the protection of the rights of these individuals. Since international criminal tribunals are bound to respect international human rights norms, as previously discussed, the international courts or tribunals are not allowed to request assistance which would violate the individual rights of the person(s) concerned. This is why, as will be discussed in more detail further on, a judicial authorisation is required when the assistance required from states involves coercive measures. It also implies that the international criminal tribunals are not allowed to request cooperation when the commission of gross human rights violations by the requested state is clearly foreseeable. In turn, the requested

621 Ibid., p. 223.
625 Ibid., p. 1510.
626 See infra, Chapter 6, I.3.1.
state should respect human rights when executing the request. This implies that when the tribunal would, in violation of its obligations, still request assistance which would infringe upon the rights of the individual(s) concerned, the requested state can (or should) refuse cooperation.\textsuperscript{628} Cooperation must also be refused when the requested state has substantial grounds to believe that grave human rights violations will take place during the proceedings in the trial forum (for example a flagrant denial of justice).\textsuperscript{629}

The risk of reductive effects on the individual rights of the person(s) involved and for potential loopholes to be exploited explains why it is important that the tribunal’s law be indirectly applied. This is true even when evidence was gathered by a state according to its own relevant laws following a tribunal’s request. Otherwise, applying the \textit{lex loci} may put the rights of the suspects, accused persons or other individuals under the \textit{lex fori} at risk. As SLUITER points out, this ‘hypothetical’ application of the \textit{lex fori} upholds the general responsibility of these tribunals as being the “ultimate guardian of the fairness of the trial”.\textsuperscript{630} Besides, when a person is investigated and prosecuted by the trial forum, he or she should also enjoy the (procedural) protection of its laws (notion of mutuality).\textsuperscript{631}

The question then arises as to whether the \textit{lex fori} should also apply in cases where evidence was not gathered at the tribunals’ request and to events preceding the tribunals’ request. It is argued that this question should be answered positively, in order to ensure that the individual concerned at least enjoys the full protection of one of the jurisdictions involved.\textsuperscript{632} This implies that the international criminal tribunals should consider all relevant violations, whether or not they were committed directly by the tribunal.

\textsuperscript{628} Consider the \textit{Soering} and \textit{Abu-Qatada} judgments of the ECtHR, \textit{supra}, fn. 250 - 255 and accompanying text.
\textsuperscript{630} G. SLUITER, International Criminal Adjudication and the Collection of Evidence, Antwerp, Intersentia, 2002, p. 217. See in particular Article 20 (1) ICTY Statute, Article 19 (1) ICTR Statute and Article 64 (2) ICC Statute.
\textsuperscript{631} \textit{Ibid.}, pp. 218 – 219.
\textsuperscript{632} \textit{Ibid.}, p. 221.
VII.3. Scope and complexity of the investigations

Lastly, the scope and complexity of cases is a distinctive feature of cases traditionally dealt with by these international(ised) criminal tribunals. It cannot seriously be doubted that international criminal investigations are usually complex and extensive. One may, for example, think of the evidentiary difficulties posed by issues of linkage and responsibility with regard to indirect (high-level) perpetrators. The case law occasionally refers to this complexity of investigations in order to emphasise the inherently distinct nature of international criminal proceedings from domestic criminal proceedings. Investigations presuppose the collection of vast amounts of documentary evidence or the identification of hundreds of potential witnesses. Investigative acts may be required in many different parts of the world. For example, victims and witnesses will often have fled to different parts of the world. This may make the tracking down of witnesses a challenge. It may be objected that these crimes may not be too different from serious (organized) crime investigations in the


634 Consider e.g. ICTR, Judgment, Prosecutor v. Nahimana, Barayagwiza, and Ngeze, Case No. ICTR-99-52-A, A. Ch., 28 November 2007, par. 1076 – 1077 (on the length of the proceedings, the Appeals Chamber noted: "the Appeals Chamber notes in particular that the case cited to support the Appellant’s argument relates to criminal proceedings before a domestic court and not before an international tribunal. However, because of the Tribunal’s mandate and of the inherent complexity of the cases before the Tribunal, it is not unreasonable to expect that the judicial process will not always be as expeditious as before domestic courts").


636 Interview with Mr. Taku, Defence counsel, ICTR-21, Arusha, 23 May 2008, p. 7 ("As I said, we have witnesses of all over the world, many of them cannot stay in Rwanda – they are afraid for their lives"). M.B. HARMON and F. GAYNOR, Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 407 (noting, with regard to the ICTY that victims often have scattered to different parts of the Former Yugoslavia and of the world).

637 When asked about the major obstacles encountered during investigations, several interviewees would include this challenge. Consider e.g. Interview with a member of the OTP, ICTR-12, Arusha, 21 May 2008, p. 4 ("there are geographical challenges, witnesses who know about certain facts have to be identified and traced"); Interview with Mr. Gershom Otachi BW’Omanwa, Defence Counsel, ICTR-27, Arusha, 30 May 2008, p. 11; Interview with a Defence Counsel at the ICTR, ICTR-25, Arusha, 29 May 2008, p. 4 ("One of the main problems is just the practical aspect of getting the witnesses").
For example, because of the vast number of perpetrators and crimes as well as the great number of victims, the focus of the investigations differs.\footnote{638} Scale is often an issue and the Prosecutor has the difficult task of selecting charges that have the highest chance of returning a conviction while, at the same time, satisfying the interests of the society and of the victims.\footnote{639} Unlike national criminal investigations, the context in which a crime occurred is of primary importance insofar that it determines the jurisdiction of the Court.\footnote{640} Typically, fewer variables are known to the investigators. Where national criminal investigations deal with crimes committed by one or more perpetrators and in which the victim(s) and one or more of the suspects’ identities are usually known, it is impossible to establish all perpetrators and victims of the crimes committed in international criminal investigations.\footnote{641} These crimes often result in mass victimisation.\footnote{642} Furthermore, the lack of access to the crime scene and to witnesses makes these investigations even more complicated.\footnote{643} It is not usual for investigators to gain access to the crime scene only years after the event, at which time evidence may have deteriorated or been tampered with.\footnote{644}

\footnote{638} The number of perpetrators also creates additional problems in that a number of witnesses “are not clean”. See Interview with a member of the OTP, ICTR-09, Arusha, 20 May 2008, p. 3.


\footnote{640} Ibid., p. 4.


\footnote{643} Consider e.g. ICC, Judgment pursuant to Article 74 of the Statute, Prosecutor v. Ngudjolo Chui, Situation in the DRC, Case No. ICC-01/04-02/12-3, T. Ch. II, 18 December 2012, par. 115 (“The Chamber is mindful that these investigations were conducted in a region still plagued by high levels of insecurity. It therefore acknowledges that the Office of the Prosecutor would have encountered difficulties in locating witnesses with sufficiently accurate recollections of the facts and able to testify without fear, as well as in the collection of reliable documentary evidence necessary for determining the truth in the absence of infrastructure, archives and publicly available information”); A. WHITING, In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered, in «Harvard International Law Journal», Vol. 50, 2009, pp. 335 – 336; M.B. HARMON and F. GAYNOR, Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings, in «Journal of International Criminal Justice», Vol. 2, 2004, pp. 406 - 407.

VIII. THE IDENTIFICATION OF NORMATIVE PARAMETERS

From the overview above, it can be concluded that there are many reasons why finding agreement on procedural rules in international criminal procedure is fraught with difficulties. The sources from which such rules are to be derived remain uncertain. Also, different perceptions persist as to whether and to what degree human rights norms should be adjusted to the context of international criminal procedure or what goals international criminal procedure is intended to serve. Overall, international criminal procedure seems to lack a strong theoretical foundation and a convincing theory, which takes into consideration its specifics characteristics and the goals it is intended to serve.645

It remains to be determined what criteria will be used to normatively assess international criminal procedure. From the discussion above, one suitable candidate for such a normative evaluation clearly emerges. It was concluded that all courts and tribunals under review are bound by international human rights norms. This renders these norms a suitable tool for the normative evaluation of international criminal procedure. In the following chapters, the law of international criminal procedure relevant to the investigation phase of proceedings will be assessed in light of these norms. It is clear that fair trial norms will be of paramount importance. However, other human rights norms, including the right to privacy, are also relevant to investigations under international criminal procedure.

Other potential normative tools for the evaluation of international criminal procedure are the goals of international criminal justice and international criminal procedure. It was concluded how ideally, the design of the procedural framework of international criminal investigations, every aspect of it, should be informed by the goals of international criminal justice and international criminal procedure. However, this presupposes agreement on these goals and the hierarchy that exists between them. The absence of any such agreement takes a great deal away from the evaluative potential of these goals. They do not allow us to say much on the form that proceedings should take to serve these goals or to make firm choices regarding the procedural design of international criminal proceedings. Although it may be possible on the

basis of individual (added) goals of international criminal justice, to say something meaningful on the manner proceedings should best be structured and how ends and means should be matched, attention should be paid to the fact that different goals require different procedures and often pull in different directions. It follows that these goals will only be relied upon to a very limited extent in this study.

A third possibility is to evaluate international criminal procedure in light of the common law and civil law dichotomy. However, it was concluded that while this dichotomy has some descriptive, explanatory force, it is not a normative tool per se. That said, where international criminal procedure borrows a lot from the common law and civil law style of proceedings, this dichotomy will be used as a tool to better understand international criminal procedure and thus to assist the normative evaluation. Besides, it may allow us to discover ‘systemic tensions’ in international criminal procedure and help to better understand evolutions. Finally, caution is necessary in that criminal justice systems were developed in response to a certain socio-political climate. Hence, one should consider the different context and goals of international criminal procedure in applying this common law – civil law terminology.

Finally, it was concluded that any assessment on what procedure is most fit for international criminal tribunals should consider its ‘uniqueness’ or unique characteristics. Therefore, when relevant, reference will be made to these unique characteristics in assessing international criminal procedure.