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

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Chapter 6: Non-custodial Coercive Measures*

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INTRODUCTION

International criminal investigations necessarily encompass the use of coercive measures, like in national criminal investigations. At the international level, however, and in contrast with national criminal justice systems, these powers seem broadly formulated and their use seems unrestricted. A frequently heard argument justifying these extensive powers is that they are a necessary corollary of the fact that these international criminal courts and tribunals lack their own policing and enforcement powers. These broadly formulated powers are indispensable where the international criminal courts and tribunals necessarily depend on the cooperation by national states, for example in the arrest of suspects or the execution of search and seizures. ¹

This chapter seeks to examine and to critically assess the nature and scope of these coercive measures in international criminal procedural law. Special attention will be given to the interplay between the domestic and the international level in the execution of these coercive (compulsory) measures. It is important to note at the outset that coercive measures that restrict liberty of individuals are excluded from this chapter and will be examined in the following chapter.

Part I of this chapter begins with the adoption of a working definition of ‘coercive measures’ in international criminal procedural law. Next, how coercive measures are executed under international criminal procedure (either by the Prosecutor through direct enforcement or by the domestic states following a request to that extent) will be assessed. The section then continues with a more general part inquiring into the existing thresholds, procedural requirements, and restrictions for the use of coercive measures. Firstly, it will be assessed whether the Prosecutor is obliged to obtain a judicial warrant under the law of international

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¹ A view upheld by most OTP staff interviewed at the ICTR, see Interview with Dr. Alex Obote Odora of the OTP, ICTR-11, Arusha, 21 May 2008, p. 8 (discerning two distinct reasons why such broad formulation of powers is necessary: one reason is to give the Prosecutor greater prospects of getting reasonable access to member states, another reason is the type of criminality the international criminal tribunals are dealing with: complex investigations and participation at the highest level of state); Interview with Ms. Christine Graham of the OTP, ICTR-14, Arusha, 21 May 2008, p. 7 (arguing that while the investigative powers of the Prosecutor are broad, they ultimately are not sweeping as the OTP has to rely on states to execute. It would be difficult to draft a procedural framework which fits to all different situations, as the OTP has to cooperate with so many different states); Interview with a member of the OTP, ICTR-13, Arusha, 21 May 2008, p. 7; Interview with a member of the OTP, ICTR-12, Arusha, 21 May 2008, pp. 5-6; Interview with a member of the OTP, ICTR-10, Arusha, 21 May 2008, p. 6.
criminal procedure. Secondly, whether a general threshold exists for the use of coercive measures will be asked. Thirdly, an attempt will be made to construe other material conditions for the use of coercive measures, including the principle of proportionality, the principle of necessity, and the principle of subsidiarity. This general section concludes with a short, but necessary, detour into the law of evidence by discussing the possible consequences of irregularities to the use of the resulting evidence at trial.

In Part II of this chapter, specific coercive measures, including search and seizures or the interception of communications, will be examined. Again, measures encompassing the restriction or deprivation of liberty are excluded from this chapter.

I. GENERAL

1.1. Definition

It is striking that none of the international criminal courts or tribunals explicitly distinguish between coercive and non-coercive investigative measures. None of the statutory documents of these jurisdictions contain a useful definition of what should be understood as constituting ‘coercive measures’. Nowhere does the jurisprudence of the international criminal courts and tribunals explicitly refer to the existence of this distinction. However, it may rightly be asked whether the specific nature of coercive measures does not warrant a specific procedural treatment.

Only two of the internationalised criminal tribunals, notably the ECCC and the SPSC, distinguish between non-coercive and coercive investigative measures. While none of these ‘hybrids’ expressly provide us with a ready-to-use definition, their statutory documents indicate some of these coercive measures’ distinctive features. According to the Extraordinary Chamber’s Internal Rules, firstly, these measures can only be conducted under the judicial

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2 Note that other distinctions have been made in the literature, e.g. between ‘simple investigative measures’ and ‘qualified investigative measures’. According to Safferling, the former category refers to investigative acts which have no relevance to individuals’ rights and do not need specific authority. The latter category refers to those investigative acts which intrude into the rights of individuals and require special legitimacy. See C. Safferling, International Criminal Procedure, Oxford, Oxford University Press, 2012, pp. 257 – 258. However, this distinction is grossly similar to the distinction between coercive and non-coercive investigative acts.
authorities’ control. Secondly, it concerns powers which cannot be delegated to investigators, neither by the Co-Prosecutors during the preliminary investigation or by the Co-Investigating Judges in the context of a judicial investigation. Thirdly, they should be ‘strictly limited to the needs of the proceedings’. This language is reminiscent of the ‘necessity requirement’, a requirement which, arguably, also exists in the procedural framework of the international criminal tribunals, as will be explained. Fourthly, all coercive measures taken should be ‘proportionate to the gravity of the offence’. Lastly, whenever the Co-Prosecutors or Co-Investigating Judges resort to coercive measures, this should be done in full respect of human dignity.

In turn, before the SPSC, a warrant or an order by the Investigating Judge was normally required for the adoption of coercive measures during the investigation. Furthermore, the Investigating Judge could only issue orders or warrants lawfully requested by the public Prosecutor when there were ‘reasonable grounds to do so’.

In order to provide a working definition of ‘coercive measures’ (intrusive investigative measures) what their nature is and what function they fulfil within criminal proceedings should be asked. It is clear that most coercive measures undertaken serve the broader goal of ‘truth-finding’ and support the administration of justice or are supportive of other measures which serve this goal. Furthermore, coercive measures may also be taken to safeguard the execution of sentences. These measures may equally fulfil other functions, including specific prevention (by detaining the accused in order to prevent additional crimes from being committed or in the interest of protection against dangerous persons or goods).

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3 Rule 21 (2) ECCC IR.
4 Respectively Rules 13 (4) (a) and 14 (5) ECCC IR and Rule 62 (1) of the ECCC IR.
5 Rule 21 (2) ECCC IR.
6 See infra, Chapter 6, I.6.
7 Rule 21 (2) ECCC IR.
8 Rule 21 (2) ECCC IR.
9 Section 9 (3) TRCP.
10 Section 9 (2) TRCP.
11 In that respect, it may be interesting to see how far the Prosecutor can seize goods of a suspect or accused person to provide compensation to the victims, if such person were to be convicted. See in that respect Rule 105 of the ICTY and ICTR RPE and Rule 104 SCSL RPE on the restitution of property. See infra Chapter 6, II.3.
12 See e.g. Article 58 (1) (b) (iii) ICC Statute, mentioning ‘preventing a person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances’ as one of the grounds on which the Pre-Trial Chamber may issue an arrest warrant.
Coercive measures are, by nature, investigative acts which infringe upon the rights and liberties of the suspect (accused) or third persons. These measures are applied in criminal investigations in defiance of the will of the person. In the domestic context, these measures infringe upon rights and liberties of individuals that are laid down in a Constitution. In the international arena, these rights and liberties primarily derive from international human rights law.

In every criminal justice system, the use of coercive measures is restricted, either by setting certain thresholds or by imposing certain substantive requirements for their use. It will be examined in this chapter in how far such thresholds or substantive requirements can be identified in international criminal procedural law.

I.2. Direct enforcement v. request for judicial assistance

It follows from the holding of the ICTY Trial Chamber in the Kordić and Čerkez case that the execution of coercive measures by the Prosecutor, encompassing the taking of enforcement action, directly on the territory of Bosnia Herzegovina, is “perfectly within the powers of the Prosecution provided for in the Statute.” Consequently, the direct enforcement of coercive acts, without directing a request for legal assistance to the national authorities concerned, is possible. Nevertheless, the ICTY Appeals Chamber clarified, in Blaškić, that normally the Prosecutor should rely on the cooperation of the competent judicial or prosecutorial authorities of the country concerned except when the Prosecutor is authorised by national law or special agreement to execute the coercive measures directly on the territory of the state.

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14 Ibid., p. 107.
15 ICTY, Decision Stating Reasons for Trial Chamber’s Ruling of 1 June 1999 Rejecting Defence Motion to Suppress Evidence, Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2, T. Ch. III, 25 June 1999, p. 6. In casu, no search warrant had been obtained from the authorities of Bosnia Herzegovina, but a search warrant had been issued by an ICTY Judge prior to the search operation. The Prosecutor relied on the assistance of the SFOR international forces. Consider also ICTY, Transcript, Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2, T. Ch. III, 31 May 1999, pp. 2975 – 3045 and ICTY, Judgement, Prosecutor v. Naletilić and Martinović, Case No. IT-98-34-A, A. Ch., 3 May 2006, par. 238.
16 ICTY, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Prosecutor v. Blaškić, Case No. IT-95-14, A. Ch., 29 October 1997, par. 53 and 55. It should be noted that only few laws on the domestic implementation of the Statutes include the possibility for the Prosecutor to work independently on their territory. The German implementing law, for example, includes this possibility but explicitly prohibits the taking of coercive measures and states that “the initiation and execution of coercive measures shall remain the preserve of the competent German authorities and shall conform to German law.” See Section 4 (4) of the Law on Cooperation with the International Tribunal in respect of the Former
Furthermore, the Chamber has acknowledged the existence of a second exception regarding states or entities of the Former Yugoslavia against whom coercive measures can be executed directly by the tribunal as part of its inherent powers. While the holding of the Appeals Chamber in Blaškić may be interpreted as implying that normally, for the direct execution of coercive measures on the territory of a state, the Prosecutor “must” turn to the national authorities this reading would contradict Article 18 (2) of the ICTY Statute (Article 17 (2) ICTR Statute), which does not restrict the on-site investigation powers of the Prosecutor in this way (“the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned”).

The ICC Prosecutor lacks similar powers to directly undertake coercive actions on the territory of a state. The Prosecutor has to ensure the cooperation of the state concerned and will send a request for assistance before resorting to coercive measures. Only in the exceptional scenario of a ‘failed state’ can the ICC Prosecutor directly execute coercive

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Yugoslavia (Law on the International Yugoslavia Tribunal) of 10 April 1995. The Norwegian implementing law allows the Prosecutor to work independently on its territory, but only upon permission to do so. See Section 3 in fine of ‘Act No. 38 of 24 June 1994 relating to the incorporation into Norwegian law of the United Nations Security Council Resolution on the establishment of international tribunals for crimes committed in the former Yugoslavia and Rwanda’. Also the Finnish implementing law provides for the possibility to operate independently on its territory. See Section 7 of the Act on the Jurisdiction of the International Tribunal for the Prosecution of Persons Responsible for Crimes Committed in the Territory of the Former Yugoslavia and on Legal Assistance to the International Tribunal, 15 January 1994.

ICTY, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Prosecutor v. Blaškić, Case No. IT-95-14, A. Ch., 29 October 1997, par. 53, 55. According to the Appeals Chamber, this category includes states on the territory of which crimes may have been perpetrated and some authorities of which might be implicated in the commission of these crimes. Consider also ICTY, Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, Prosecutor v. Gotovina et al., Case No. IT-06-90-T, T. Ch. I, 12 March 2010, par. 30. No further explanation for such distinction between the states or the entities of the former Yugoslavia and other UN member states is provided for. Consider A. ALAMUDDIN, Collection of Evidence, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), Principles of Evidence in International Criminal Justice, Oxford, Oxford University Press, 2010, p. 256 (the author argues that “[t]his distinction is perplexing.” “The reason for the distinction seems to be more pragmatic than judicial”) and p. 259 (arguing that such distinction limits the powers of the Prosecutor “on a clearly pragmatic but questionable legal basis”). Interesting in that regard is A. ZAHAR, International Court and Private Citizen, in «New Criminal Law Reviews», Vol. 12, 2009, pp. 576-577 (“I once had to prepare a judicial order authorizing a raid by UNMIK police and ICTY investigators on a ministerial building in Kosovo for the purpose of seizing evidence. The order was pursuant to rule 54. I remember thinking that we would never be issuing such an order to raid governmental offices located in, say, Switzerland, or, for that matter, Croatia or Serbia. However, in Kosovo, we could get away with it; and rule 54 provided plausible cover in the event of any protest—if, that is, one were prepared to overlook the circularity of the provision and the fact that it was judge-made”).

Consider Article 99 (4) of the ICC Statute: “Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place…” (emphasis added). Nothing seems to prevent States Parties or other states (on the basis of a written agreement or an ad hoc arrangement) to provide the ICC Prosecutor with broader powers to conduct on site investigations on its territory.
measures on the territory of a state and only then with the authorisation of the Pre-Trial Chamber.\textsuperscript{19} In this case, the discharge of the Court’s mandate and effective prosecution might justify the power of the Prosecutor to exercise on-site investigations including forcible measures.\textsuperscript{20} In cases where a state has been requested to execute coercive measures, the request must be executed in accordance with national law and in accordance with procedures which have been prescribed in the request.\textsuperscript{21} This offers leeway to the Prosecution to request the participation of OTP staff in the execution of the request.

Where coercive action is undertaken by the national authorities, a further distinction should be drawn between (i) situations in which the evidence has been gathered pursuant to a request and (ii) situations in which the evidence is gathered prior to, or independent from, the issuance of a request. Evidence may already have been gathered by national authorities without a request being issued to that effect by the international criminal tribunals. Often, this evidence has been gathered for non-judicial purposes. Here, for example, the important role evidence obtained through the interception of communications has played in the proceedings before the ICTY can be mentioned.\textsuperscript{22} Most likely, these communications have been gathered during the war outside the existing national procedural framework concerning the interception of communications. The extent to which these intercepts can be used in international

\textsuperscript{19} Article 57 (3) (d) of the ICC Statute. While the formulation of the provision seems to limit this possibility to States Parties, this possibility arguably extends to non states parties in case of a referral of the situation by the Security Council (in which case such power derives directly from Chapter VII of the United Nations Charter) and in case of the acceptance by a state of the jurisdiction of the Court in relation to a particular crime under Article 12 (3) ICC Statute \textit{juncto} Rule 44 ICC RPE.


\textsuperscript{21} Article 99 (1) ICC Statute. With regard to the Situation in the DRC, it may be noted that the Memorandum of Understanding between the ICC and MONUC allows MONUC to provide assistance in the execution of requests for cooperation involving coercive powers, at the request of the authorities of the DRC. See Memorandum of Understanding between the United Nations and the International Criminal Court Concerning Cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court, 8 November 2005. Consider R. RASTAN, The Responsibility to Enforce – Connecting Justice with Unity, in C. STAHN and G. SLUITER (eds.), The Emerging Practice of the International Criminal Court, Leiden, Koninklijke Brill, 2009, pp. 173-174.

proceedings is important as these intercepts can be of invaluable importance to the Prosecution.23

1.3. Necessity of a judicial warrant

The execution of coercive powers by the Prosecutor, under international criminal procedural law, does not expressly require any form of judicial authorisation. Nevertheless, it has been argued that the statutory documents of the ad hoc tribunals and the SCSL can be interpreted as including an obligation to obtain a judicial warrant. Indeed, from the combined reading of Rule 39 (iv) and Rule 54 of the RPE of the ad hoc tribunals and the SCSL, one may conclude that a warrant by a Judge or Trial Chamber ‘is necessary for the conduct of the investigation’.24 In a similar vein, Article 57 (3) (a) of the ICC Statute could be interpreted as providing the legal basis for the obligation, for the Prosecutor, to request a warrant from the Pre-Trial Chamber before executing coercive measures. Nevertheless, it has rightly been argued that this latter provision of the ICC Statute leaves the issue at the discretion of the Court.25

Nevertheless, this interpretation is not upheld in practice. The following holding by the ICTY Trial Chamber in Stakić is illustrative in this regard:

“[…] there appears to be no identifiable rule of public international law according to which it is mandatory to request a judge’s warrant before conducting a search and seizure”26

23 Consider, for example, the following interception of a radio conversation between Obrenović and Krstić over an open channel after the fall of Srebrenica: O: “we’ve managed to catch a few more, either with guns or mines.” K: “Kill them all. God damn it.” O: “Everything, everything is going according to plan. Yes.” K: “[Not a] single one must be left alive.” O: “Everything is going according to plan. Everything.” ICTY, Transcript, Prosecutor v. Krstić, Case No. IT-98-33, T. Ch., 1 November 2000, pp. 6506-6507.


The scarcely accessible jurisprudence of the \textit{ad hoc} tribunals reveals that a distinction should be drawn; usually, no request for a judicial warrant or order is addressed to a Chamber or Judge of the \textit{ad hoc} tribunals. A request to take or execute lawful coercive measures is directed to the national authorities concerned.\footnote{For an example, see SCSL, Transcript, \textit{Prosecutor v. Taylor}, Case No. SCSL-03-1-T, T. Ch. II, 19 January 2009, pp. 22998 \textit{et seq} (referring to a request by the SCSL Prosecutor to the Liberian authorities to conduct lawful searches at a former residency of Charles Taylor (White Flower)).} Whether a judicial authorisation needs to be obtained by the national authorities before this coercive action is initiated depends upon national law, including special agreements which may have been concluded with the international criminal tribunal concerned.\footnote{See \textit{supra} Chapter 6, I.2, fn. 16.} Exceptionally, in cases where cooperation by the national authorities could not be ascertained, the ICTY Prosecutor first obtained a judicial warrant before resorting to its coercive powers. For example, in the \textit{Karadžić} case, the Prosecutor sought and obtained a judicial warrant from the tribunal for a search operation at the premises of the Public Security Center (CJB) on the territory of Bosnia and Herzegovina.\footnote{ICTY, Search Warrant for the Public Security Center (CJB) Srpsko Sarajevo, \textit{Prosecutor v. Karadžić}, Case No. IT-95-05/18, Duty Judge, 11 September 2003.} The ICTY Manual on Developed Practices also confirms the practice of requesting judicial authorisation to execute a search and seizure operation only “in areas protected by uncooperative local authorities.”\footnote{ICTY Manual on Developed Practices, Turin, UNICRI Publisher, 2009, p. 18. Apparently, ‘lengthy internal guidelines’ cover the legal procedures for search warrant applications.} According to McIntyre, at the ICTY, search and seizure operations are mostly conducted on the basis of informal arrangements with the authorities. In case this is not possible, an authorisation for a search and seizure is obtained from the tribunal.\footnote{G. McIntyre, \textit{Equality of Arms – Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia}, in «Leiden Journal of International Law», Vol. 16, 2003, p. 279 (“more often than not the prosecution accesses much of its material through informal arrangements with the authorities. Teams of investigators will travel where the documents are held and spend as much time as necessary perusing the documents and identifying and taking into their custody those documents which will benefit the prosecution. […] Alternatively, the prosecution will be assisted in the gathering of material by search and seizure warrants granted by the Tribunal pursuant to Rule 54. These warrants authorize investigators to go into various government and military offices of the former Yugoslavia and seize evidence of interest”).} It was explained above how the Appeals Chamber in \textit{Blaškić} recognised that in relation to states or entities of the Former Yugoslavia coercive measures can be executed directly by the tribunal.\footnote{See \textit{supra}, Chapter 6, I.2.} In this case, it seems to be the Prosecutor’s general practice first to obtain the authorisation from a Judge of the ICTY before executing the measure.

\footnotesize
\begin{itemize}
\item \footnote{27 For an example, see SCSL, Transcript, \textit{Prosecutor v. Taylor}, Case No. SCSL-03-1-T, T. Ch. II, 19 January 2009, pp. 22998 \textit{et seq} (referring to a request by the SCSL Prosecutor to the Liberian authorities to conduct lawful searches at a former residency of Charles Taylor (White Flower)).}
\item \footnote{28 See \textit{supra} Chapter 6, I.2, fn. 16.}
\item \footnote{29 ICTY, Search Warrant for the Public Security Center (CJB) Srpsko Sarajevo, \textit{Prosecutor v. Karadžić}, Case No. IT-95-05/18, Duty Judge, 11 September 2003.}
\item \footnote{30 ICTY Manual on Developed Practices, Turin, UNICRI Publisher, 2009, p. 18. Apparently, ‘lengthy internal guidelines’ cover the legal procedures for search warrant applications.}
\item \footnote{31 G. McIntyre, \textit{Equality of Arms – Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia}, in «Leiden Journal of International Law», Vol. 16, 2003, p. 279 (“more often than not the prosecution accesses much of its material through informal arrangements with the authorities. Teams of investigators will travel where the documents are held and spend as much time as necessary perusing the documents and identifying and taking into their custody those documents which will benefit the prosecution. […] Alternatively, the prosecution will be assisted in the gathering of material by search and seizure warrants granted by the Tribunal pursuant to Rule 54. These warrants authorize investigators to go into various government and military offices of the former Yugoslavia and seize evidence of interest”).}
\item \footnote{32 See \textit{supra}, Chapter 6, I.2.}
\end{itemize}
Interviews conducted at the ICTR with OTP staff confirm these views. When asked whether an obligation exists, at present, to obtain judicial authorisation from a Judge or Trial Chamber of the ICTR before coercive measures can be initiated (with the exception of an arrest warrant), the majority of interviewees responded negatively. It was noted by the interviewees that Rule 54 is sometimes resorted to (and a judicial warrant or order is requested) in order to seize certain pieces of evidence or to freeze accounts.

Interviews with Judges and senior legal officers further corroborate these views. Normally the Prosecutor does not require judicial authorisation to initiate non-custodial coercive measures. Some interviewees noted that the possibility of the parties to request the Trial Chamber or Judge pursuant to Rule 54 to obtain an order or warrant is generally understood as a subsidiary means for obtaining judicial cooperation, in case one of the parties has tried every means of obtaining cooperation and it did not work. The Judges, thus, only intervene in cases where voluntary cooperation is not possible. However, also in other instances judicial authorisation is sometimes obtained. For example, indictments that are presented to the Judge by the Prosecutor are normally accompanied by a request for an arrest warrant and can also include a request for the adoption of coercive measures in the form of a seizure of documents and a search in the premises where the person was arrested.

Consequently, it can be concluded that the Prosecutor only resorts to the procedural vehicle of Rule 54 (in the form of the issuance of an order or warrant) in case the execution of a request by the national authorities is unlikely. In the instances in which a request for an order or

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33 Interview with a member of the OTP, ICTR-16, Arusha, 4 June 2008, p. 10; Interview with a member of the OTP, ICTR-10, Arusha, 21 May 2008, p. 6; Interview with a member of the OTP, ICTR-13, Arusha, 21 May 2008, p. 7; Interview with a member of the OTP, ICTR-09, Arusha, 20 May 2008, p. 5; Interview with Dr. Alex Obote Odora of the OTP, ICTR-11, Arusha, 21 May 2008, p. 9.
34 Interview with a member of the OTP, ICTR-16, Arusha, 4 June 2008, p. 9.
35 Interview with a Judge of the ICTR, ICTR-07, Arusha, 16 May 2008, p. 5 (“the Prosecutor does not need judicial authorization to request a state to carry out a search and seizure operation. Now, if he requests a state to do it, and the state refuses, then he has to apply to the Chamber, and the Court may formally request the state to cooperate. If the Chamber issues a formal request, and the state still refuses to cooperate, then it becomes a further justiciable issue, and the Chamber would have to decide whether, under the circumstances, it would request the President to report the matter to the Security Council. So the ultimate method of enforcement is a Security Council action against the state”); Interview with Judge Short of the ICTR, ICTR-04, Arusha, 23 May 2008, p. 5; Interview with a Legal Officer of the ICTR, ICTR-08, Arusha, 19 May 2008, p. 5; Interview with Judge Mshe, ICTR-03, Arusha, 20 May 2008, p. 6; Interview with a Legal Officer of the ICTR, ICTR-28, Arusha, 30 May 2008, p. 6; Interview with a Judge of the ICTR, ICTR-05, Arusha, 2 June 2008, p. 6.
36 Interview with a Legal Officer of the ICTR, ICTR-28, Arusha, 30 May 2008, p. 6; Interview with a Legal Officer of the ICTR, ICTR-08, Arusha, 19 May 2008, p. 5.
37 Interview with Judge Egorov of the ICTR, ICTR-39, Arusha, 20 May 2008, p. 5, see the discussion of this exception, infra, Chapter 6, II.2.1.
warrant has been directed to the Trial Chamber or a Judge, such is not based on an understanding that a form of judicial authorisation is required for the adoption of non-custodial coercive measures. The interpretation of Rule 39 (iv) and Rule 54 as encompassing an obligation of prior judicial authorisation is not upheld in practice. Rule 54 is seen as a subsidiary means to execute coercive measures. The interpretation provided for Rule 54 
_{juncto_} Article 29 (ICTY Statute) and Article 28 (ICTR Statute), in the case law of the tribunals, includes a requirement that efforts have been made to obtain cooperation by the state requested and that these efforts were unsuccessful (‘reasonable efforts’ requirement) which may explain this interpretation.38

In the following paragraphs, the argument will be made that a formal condition to obtain judicial authorisation _should_ be read into the law of international criminal procedure. How this requirement (1) derives from international human rights law, (2) while not amounting to a general principle, is in line with domestic procedural practices, (3) on one reading, derives from the statutory documents of the international criminal tribunals, and (4) follows from a functional analysis of the judicial role at the pre-trial stage in international criminal proceedings will be established. Subsequently, it will be asked whether this requirement for judicial authorisation should exist at the national level, the international level or at both levels.

I.3.1. The requirement of a judicial authorisation derives from international human rights law

By definition, non-custodial coercive measures do infringe upon the rights and liberties of suspects (accused persons) or third persons.39 They infringe upon such rights as the right to privacy or the right to property. These rights are, to varying degrees, provided for under international human rights law.40 Human rights law allows only for interferences with the

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39 See the definition given, _supra_, Chapter 6, I.1.
40 The right the privacy can be found in Article 17 ICCPR, Article 8 ECHR and Article 11 of the ACHR as well as Article 12 of the UDHR and Article 67 of the EU Charter of Fundamental Rights. The right is not included in
aforementioned rights as long as these are ‘in accordance with the law’. This legal basis for non-custodial coercive measures seems conspicuously absent in international criminal procedure. The extremely broadly formulated powers ‘to collect evidence’ and ‘to conduct on-site investigations’ constitute the only legal basis in the Statutes of most jurisdictions under review for the prosecutorial power to conduct non-custodial coercive measures (the ECCC and SPSC being exceptions). 41

Under human rights law the lawfulness requirement implies that there should be legislation fulfilling certain conditions and an interference in accordance with this legislation. More precisely, it includes a qualitative element requiring a regulation which is sufficiently detailed and precise (foreseeable) as well as adequately accessible. 42 The Court’s case law requires the existence of sufficient procedural safeguards, either through the requirement of legality (internal quality of the law) or through the requirement of proportionality. 43 The HRC has also stressed the importance of procedural safeguards in order to avoid arbitrary interference. 44

41 Article 18 (2) ICTY Statute; Article 17 (2) ICTR Statute. See also Rule 39 (i) of the ICTY, ICTR and SCSL RPE; Article 54 (3) (a) ICC Statute.
42 ECtHR, [Malone v. United Kingdom](https://www.echr.coe.int/), Application No. 8691/79, Judgment of 2 August 1984, par. 67 (holding that foreseeability implies that citizens should have “an adequate indication as to the circumstances in which and the conditions on which” the authorities may resort to coercive investigative measures); ECtHR, [James and Others v. The United Kingdom](https://www.echr.coe.int/), Application No. 8793/79, Series A, No. 98, Judgment of 12 July 1984, par. 67 (“The Court has consistently held that the terms "law" or "lawful" in the Convention "do not merely refer back to domestic law but also [relate] to the quality of the law, requiring it to be compatible with the rule of law").
43 E.g. ECtHR, [Huvig v. France](https://www.echr.coe.int/), Application No. 11105/84, Judgment of 24 April 1990, par. 34 (“Above all, the system does not for the time being afford adequate safeguards against various possible abuses. For example, the categories of people liable to have their telephones tapped by judicial order and the nature of the offences which may give rise to such an order are nowhere defined. … Similarly unspecified are the procedure for drawing up the summary reports containing intercepted conversations; the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge (who can hardly verify the number and length of the original tapes on the spot) and by the defence; and the circumstances in which recordings may or must be erased or the tapes be destroyed, in particular where an accused has been discharged by an investigating judge or acquitted by a court”).
44 CCPR General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Article 17), U.N. Doc. HRI/GEN/1/Rev.6, 8 April 1988, par. 4, 8; HRC, [Pinkney v. Canada](https://www.ohchr.org/en/case-law/), Communication No. 27/1978, U.N. Doc. CCPR/C/OP/1, 29 October 1981, par. 34 (establishing that the lawful interference with privacy must be sufficiently circumscribed to be in accordance with Article 17 of the ICCPR. “A legislative provision in the very general terms of this section did not … in itself provide satisfactory legal safeguards against arbitrary application”).

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The absence of detailed, statutory norms may be more striking to someone coming from the ‘civil law’ tradition, where all law should be statutory in principle, than it would be to someone coming from a ‘common law’ background. It follows from the case law of the ECtHR that the requirement of lawfulness should be interpreted in a substantive, rather than in a formal, sense.45 However, international criminal tribunals may lack a sufficient number of judicial precedents, rendering the prospects of a ‘settled case law’ unlikely.46 It will be illustrated in the following sections of this chapter that the scarce jurisprudence of the different international criminal tribunals is not helpful in clarifying the boundaries and content of the coercive powers which are at the Prosecutor’s disposal during a criminal investigation. Indeed, in those cases where a judicial warrant was sought by the Prosecutor from the tribunal, this was done on an ex parte basis and without rendering these judicial warrants public in most cases.47 As a result, the prospect of the existence of a ‘settled case law’ which would render the infringement lawful in a substantive sense is highly dubious.

The importance of a judicial warrant for the execution of coercive measures has been underscored in the jurisprudence of both the ECtHR and the HRC. The ECtHR has emphasised its importance in the assessment of the proportionality of domestic laws providing coercive measures and has stated that the absence of the requirement of a judicial warrant may be problematic in cases for which the conditions and restrictions provided by law are “too lax and full of loopholes.”48 The ECtHR has underlined that vigilance should be

45 ECtHR, Chappell v. United Kingdom, Application No. 10461/83, Judgment of 30 March 1989, par. 52; ECtHR, Malone v. United Kingdom, Application No. 8691/79, Judgment of 2 August 1984, par. 66; ECtHR, Sunday Times v. United Kingdom, Application No. 13166/87, Judgment of 26 April 1979, par. 47. Whereas the aforementioned examples concern a ‘common law’ country, the Court repeated its holding also in relation to French settled case law, see ECtHR, Kruslin v. France, Application No. 11801/85, Series A, No. 176-A, Judgment of 24 April 1990, par. 29. Consider also the discussion on the procedural principle of legality, supra, Chapter 2, VI.

46 The notion of ‘settled case-law’ was referred to by the ECtHR, see ECtHR, Kruslin v. France, Application No. 11801/85, Series A, No. 176-A, Judgment of 24 April 1990, par. 29.

47 For an exception, see ICTY, Search Warrant for the Public Security Center (CJB) Sepsko Sarajevo, Prosecutor v. Karadžić, Case No. IT-95-05/18, Duty Judge, 11 September 2003.

48 ECtHR, Funke v. France, Application No. 10828/84, Judgment of 25 February 1993, par. 57; ECtHR, Crémieux v. France, Application No. 11471/85, Series A, No. 256-B, Judgment of 25 February 1993, par. 40 and ECtHR, Mialhe v. France (no. 1), Application No. 12661/87, Series A, No. 256-C, Judgment of 25 February 1993, par. 38. Also in other cases, the Court underlined the importance of judicial oversight over the use coercive measures. See e.g. ECtHR, Teixeira de Castro v. Portugal, Application No. 25829/94, Judgment of 9 June 1998, par. 37 - 38 (“The Court notes, firstly, that the present dispute is distinguishable from the case of Lüdi v. Switzerland, in which the police officer concerned had been sworn in, the investigating judge had not been unaware of his mission and the Swiss authorities, informed by the German police, had opened a preliminary investigation. The police officers’ role had been confined to acting as an undercover agent. […] The Court notes that the Government have not contended that the officers’ intervention took place as part of an anti-drug-trafficking operation ordered and supervised by a judge” (emphasis added)).
exercised in cases where the executive authorities can resort to coercive action without a judicial warrant. Likewise, the HRC has underscored the importance of a judicial warrant. Human rights law should thus be interpreted as providing an obligation for the Prosecutor to obtain a judicial authorisation before resorting to coercive action when the statutory documents are overly broad and vague concerning the use of coercive powers by the Prosecutor of the international criminal tribunals.

Two conclusions can now be drawn; Firstly, (i) no clear-cut obligation to obtain judicial authorisation, prior to authorities resorting to coercive action, can be discerned. Secondly, (ii) when the law (the statutory documents of the international criminal tribunals) is overly broad and vague concerning the use of coercive powers by the Prosecutor, human rights law should be interpreted as providing for an obligation incumbent on the Prosecutor to obtain judicial authorisation before resorting to coercive action.

I.3.2. The requirement of a judicial warrant as a general principle of law

The existence of a general principle of law requiring judicial authorisation before adopting coercive measures, is important insofar that the statutory documents of the international criminal tribunals keep silent on this matter and a lacuna exists. As explained above, the ad hoc tribunals have eschewed the interpretation of Rule 54 and Rule 39 (iv) ICTY, ICTR and SCSL RPE as entailing an explicit requirement to obtain judicial authorisation for the use of coercive measures. Likewise, Article 57 (3) (a) ICC Statute is not clear on the existence of an obligation of judicial authorisation. The existence of a general principle of law could make this requirement binding on the tribunals, given the lack of an explicit requirement to that effect in the statutory documents. Importantly, it follows from Article 21 (1) (c) ICC Statute that, in order to identify general principles, no systematic comparison of all legal systems in

50 HRC, Concluding Observations on Poland, U.N. Doc. CCPR/C/79/Add.110, 29 July 1999, par. 22 (“as regards phone tapping, the Committee is concerned (a) that the Prosecutor (without judicial consent) may permit telephone tapping; and (b) that there is no independent monitoring of the use of the entire system of tapping telephones”); NOWAK notes that while there is no express judicial requirement, Article 17 (2) requires that searches only ensue on the basis of a decision by a state authority expressly authorised to do so (usually a court). See M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR commentary (2nd edition), Kehl am Rein, Engel, 2005, p. 400.
51 See supra, Chapter 6, I.3.
52 See supra, Chapter 2, II.
the world is necessary. It suffices that these principles can be found in the ‘principal legal systems of the world’.

Proof of the existence of the Prosecutor’s obligation to obtain judicial authorisation before resorting to coercive action can certainly be found in domestic criminal justice systems. Both common law and inquisitorial criminal justice systems will, normally, require the issuance of a judicial warrant before the Prosecutor can resort to the use of coercive measures. An analysis of 33 national reports by AMBOS confirmed that “[i]n general, the Prosecutor may not initiate compulsory measures without judicial authorisation,” and that this requirement was shared by most of the national systems surveyed.

In common law criminal justice systems, the judicial role during the investigation stage of proceedings is traditionally limited as it will be for the parties to conduct their own investigations. Judicial intervention is limited to situations in which the interests of the person cannot be guaranteed in another way. Consequently, it should come as no surprise that AMBOS’ analysis reveals that in all common law countries surveyed, the authorisation of coercive measures is “the most exclusive judicial competence during the pre-trial phase.” However, that said, the police have wide-ranging coercive powers and they can initiate coercive investigative acts without judicial or prosecutorial authorisation. For example, while in principle English law requires a judicial authorisation for searches of premises to be carried out there are many exceptions to that rule authorising the police to conduct searches without a warrant. Personal searches can also be conducted without a judicial warrant. Furthermore,

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57 The requirement of a judicial authorisation for the execution of searches of premises is laid down in Section 8 PACE 1984. However, there are many exceptions to that rule, allowing the police to conduct searches without a warrant, for example Section 17 PACE 1984 (arrestable offences), Section 18 PACE 1984 or Section 32 (2) (b) PACE 1984 (search of property a person under arrest was in at the time of arrest or immediately before, or property that they occupy or control, may be searched for evidence in respect of the offence for which they are under arrest and, in some cases, other offences as well). See e.g. J.R. SPENCER, The English System, in M. DELMAS-MARTY and J.R. SPENCER (eds.), European Criminal Procedure, Cambridge, Cambridge University Press, 2002, pp. 190-191; E. CAPE and J. HODGSON, The Investigative Stage of the Criminal
DNA samples can be taken by the police without judicial authorisation. On the other hand, under English law, the interception of communication now requires a prior judicial authorisation by a Judge acting as a commissioner. In the US or Canada, the Prosecutor normally lacks compulsory powers and should obtain a judicial authorisation. However, while the U.S. Fourth amendment requires a judicial warrant for the execution of searches, several exceptions exist, including for cases in which the search is executed in the hot pursuit of a suspect or for further searches of the premises, in the form of a protective sweep, based on the reasonable suspicion that confederates are hiding there.

In inquisitorial criminal justice systems, judicial intervention is usually required for the purpose of protecting against undue infringements of the rights of the persons concerned. While criminal justice systems which have a judge-led investigation, like France or Belgium, traditionally require judicial authorisation, the Prosecutor still has limited compulsory...
powers.66 The picture is more diverse in those civil law criminal justice systems characterised by a Prosecutor-led investigation. In Germany, for example, an authorisation by a judge is normally required, except when this would delay the proceedings.67 In the Netherlands, the police and the Prosecutor can initiate certain coercive measures, which do not require a prior warrant; only the more intrusive or far-reaching coercive powers require prior judicial authorisation.68

The limited comparative exercise above shows rather a diverse picture. The line between which investigative acts presuppose judicial authorisation, and which acts do not, is not identical in every state.69 Therefore, it cannot be safely concluded whether the requirement for prior judicial authorisation constitutes a general principle of law.

I.3.3. The requirement can be derived from the statutory texts

It has been noted that the ECCC Internal Rules make the execution of coercive measures conditional upon judicial authorisation.70 Similarly, the procedural framework of the SPSC

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66 In case of inquiries en flagrant délit, the Prosecutor has certain compulsory powers. For example, he or she can conduct searches without judicial warrant: see Article 36 of the Belgian Code of Criminal Procedure and Article 56 of the French Code of Criminal Procedure; C. VAN DEN WYNGAERT, Criminal Procedures in the European Community, Brussels, Butterworths, 1993, p. 125.

67 In Germany, the public Prosecutor who conducts the pre-trial investigation normally needs judicial authorisation for the initiation of coercive measures (few exceptions exist). In particular, Article 13 (2) of the Constitution (Grundgesetz für die Bundesrepublik Deutschland) requires a judicial warrant. See K. AMBOS, The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports, in «European Journal of Crime, Criminal Law and Criminal Justices», Vol. 8/2, 2000, p. 108. The German Prosecutor or police may search premises without previously obtaining a judicial warrant in urgent cases where there is ‘danger in delay’ (Gefahr in Verzuge). See T. WEIGEND and F. SALDITT, The Investigative Process of the Criminal Process in Germany, in E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN (eds.), Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union, Intersentia, Oxford, 2007, p. 85. The authors add that the vast majority of searches and seizures are conducted where this ‘danger in delay’ clause is invoked, without prior judicial authorisation.

68 For example, searches can normally be authorised by the prosecutor, but the search of a private dwelling requires a judicial warrant, see T. PRAKKEN and T. SPRONKEN, Criminal Defence during the pre-trial Stage in the Netherlands in E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN (eds.), Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union, Intersentia, Oxford, 2007, p. 162. Also the interception of telecommunication requires a judicial authorization. In contrast, the taking of DNA for analysis does not require judicial intervention. See C.J.M. CORSTENS, Het Nederlands Strafprocesrecht, Deventer, Kluwer, 2008, p. 357. In the latter case, the DNA sample is taken by the public Prosecutor (Officier van Justitie), who is bound by a principle of objectivity.


70 Rule 21 (2) ECCC IR. See supra Chapter 6, I.1.
normally requires judicial authorisation when coercive measures are adopted in the course of
the investigation.71 The procedural frameworks of the other tribunals are less clear. It has been
noted that Rule 39 (iv) and Rule 54 of the ICTY, ICTR and SCSL RPE could, nonetheless, be
interpreted as encompassing an obligation on the Prosecutor to obtain judicial authorisation
prior to initiating coercive measures. Likewise, the ICC Statute could be interpreted as
presupposing an authorisation from the Pre-Trial Chamber for the adoption of coercive measures.72
The Statute and the RPE of the STL also do not expressly require the
Prosecutor to request a warrant or an order for the execution of coercive measures in the
investigation.73 Rule 77(B) of the STL RPE prescribes that whenever a party wants to conduct
investigative measures independently on the territory of Lebanon, it ‘may’ seek the Pre-Trial
Chamber’s authorisation, when this party deems this authorisation to be ‘appropriate and
necessary’.74 However, this provision falls short of a general obligation to obtain a warrant for
the execution of coercive measures on the territory of Lebanon.

One other provision may also point in the direction of the existence of a requirement for the
Prosecutor of the ad hoc tribunals and the SCSL to obtain a form of judicial authorisation
before resorting to coercive measures (through state cooperation or by means of on-site
investigations), at least as far as the seizure of evidence is concerned. It follows from Rule 40
(ii) ICTY RPE and Rule 40 (A) (ii) of the ICTR and SCSL RPE that in cases of urgency, the
Prosecutor can request a state to seize evidence.75 It could be argued that this provision would
be redundant and meaningless were there no obligation to obtain judicial authorisation in the absence of the existence of an urgency to seize evidence. Clearly, it follows from the general
cooperation obligations of States (or of Sierra Leone as far as the SCSL is concerned) vis-à-
vis the ad hoc tribunals (and the SCSL) that the Prosecutor can address requests for the

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71 Section 9 (3) of UNTAET Regulation 2000/30. More precisely, a judicial authorisation from an Investigating
Judge is required for the following measures: (a) arrest of a suspect; (b) detention or continued detention of a
suspect; (c) exhumation; (d) forensic examination; (e) search of locations and buildings; (f) seizure of goods or
items, including seizure or opening of mail; (g) intrusive body search; (h) physical examination, including the
taking and examination of blood, DNA, samples, and other bodily specimens; (i) interception of
telecommunication and electronic data transfer; (j) other warrants involving measures of a coercive character in
accordance with the applicable law.
72 Article 57 (3) (a) ICC Statute.
73 Article 18 (2) STL Statute; Rule 77 (A), (B) and 88 (A) STL RPE.
74 Article 77 (B) STL RPE. STL, Annual Report, 2009-2010, par. 51.
75 A detailed overview of the prosecutorial power to resort to search and seizures will be given, see infra,
Chapter 6, II.2.
collection of evidence to states. Furthermore, the broad formulation of prosecutorial powers clearly allows the Prosecutor to seize evidence outside a context of urgency.

A comparison in that sense can be made with Rule 40 (i) of the ICTY RPE and Rule 40 (A) (i) of the ICTR and SCSL RPE on provisional arrest. Whereas, under normal circumstances, the arrest would be preceded by the issuance of an arrest warrant by the tribunal, exceptionally, and in cases of urgency, the RPE provide that a suspect can provisionally be detained without prior judicial intervention by the tribunal. These urgency exceptions are reminiscent of domestic practices which do away with the requirement of obtaining a prior judicial authorisation in situations of urgency. Hence, if the purpose of Rule 40 ICTY, ICTR and SCSL is to allow for some flexibility in the procedural requirements to respond to the urgencies of a situation, it could be held that the requirements should be lower in this situation. However, it is evident that a purposive interpretation of Rule 40 does not allow us to conclude to the general existence of a requirement to obtain a judicial authorisation for the conduct of a seizure operation in the absence of a situation of urgency.

It is clear that neither a literal nor a contextual interpretation of the relevant provisions of the Statutes and RPE of the jurisdictions under review are able to remove all ambiguities. It is also unclear what the intentions of the drafters were. It follows, then, that uncertainty remains whether or not the existence of a formal requirement to obtain a judicial authorisation can be held to derive from the statutory frameworks of all jurisdictions under review.

I.3.4. The requirement follows from a theoretical perspective on the judicial role

At the national level, judicial involvement in criminal investigations by means of authorising the use of coercive measures is inextricably linked with the protection of the individual rights and liberties of the suspect or other persons implicated in the investigation. Consequently, these judicial interventions highlight the function of the Judge as the ‘guarantor of the

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76 Article 29 (ICTY Statute) and Article 28 (ICTR Statute); Rule 39 (iii) ICTY, ICTR and SCSL RPE (‘In the conduct of an investigation, the Prosecutor may: (iii) seek, to that end, the assistance of any State authority concerned, as well as of any relevant international body including the International Criminal Police Organization (INTERPOL)’).
77 See infra, Chapter 7, III.1.
78 As explained above, supra, Chapter 6, I.3.1 and I.3.2.
individual rights and liberties’ during the investigation. Notably, the ICC Pre-Trial Chamber has confirmed its function as the “ultimate guarantor” of the rights of suspects at the pre-trial stage of proceedings. This function necessitates the ability for the Judge to exercise control over the Prosecutor’s use of these investigative powers.

At the international level, the fragmented character of the investigation may hamper the international Judge’s fulfilment of this function. Indeed, it may be difficult for the Judges to properly exercise the function of guaranteeing the rights and liberties of suspects and other persons in cases when the investigation is spread over different jurisdictions and when coercive measures are executed by national law enforcement officials. Only by requiring the Prosecutor to obtain judicial authorisation, before initiating coercive measures or requesting national states to execute these measures, can this judicial function be safeguarded. Judicial intervention is explicitly provided for in cases where the right to liberty is at stake. It is argued here that, from the functional perspective, in case other rights of the accused or of a third person are at stake, that this judicial intervention should equally be required.

Through the requirement of a warrant, Judges can effectively safeguard the rights of suspects and third persons by checking whether the different thresholds and requirements for the issuance of coercive measure have been met. In case this function were to be delegated to or left with the national Judge, the control would be rendered less effective as the national Judge lacks the overview over the investigation required. Furthermore, the scope of the supervisory role of the national Judge may differ amongst jurisdictions. Relying solely, or to a large extent on national law, may not be sufficient to guarantee the rights of suspects or third persons.

81 On the fragmented character of investigations conducted by international criminal courts and tribunals, see supra, Chapter 2, VII.2.
82 Inter alia Article 58 ICC Statute (see also Article 60 (5) ICC Statute; Rule 40bis and Rule 55 of the ICTY, ICTR and SCSL RPE).
If no requirement of judicial authorisation were to be read in the statutory documents of the different international criminal tribunals, the powers of the international Judges would be limited to the decision on the admissibility of the resulting pieces of evidence, once the matter has been brought before them. Only at that moment in time would the international Judges be able to play their role in guaranteeing human rights by maintaining certain legal standards. This judicial control is ex post by nature. Besides, the low (flexible) threshold for the admission of evidence at the international level, even where evidence would be inadmissible at the national level, makes the effective realisation of this judicial function even more problematic.

I.3.5. Judicial authorisation by an international Judge

While it was found that an obligation exists for the Prosecutor to obtain judicial authorisation before coercive measures can be initiated, the question as to whom should deliver such authorisation remains. The interaction between the international level and domestic jurisdictions may lead to confusion as to the level at which this judicial authorisation should be sought. This question is not without its relevance. One could argue that because of the reliance on state cooperation necessary in international criminal proceedings, the requirements of lawfulness and proportionality deriving from human rights law (from which the requirement of judicial authorisation was also derived) should be assessed at the national level. Besides, a sufficiently detailed procedural framework may exist at the national level (in which case a judicial authorisation may not be required under international human rights law). It may be argued that requiring a search warrant from the Trial Chamber or a Judge of the international criminal tribunal may even lead to a ‘duplication of efforts’.

Moreover, it has been argued that reading a requirement of authorisation by the international criminal tribunal in the statutory documents may prove to be problematic as “pre-authorisation may not be possible or time-consuming and post-authorisation could be sensitive if it involves international judicial supervision of domestic measures, including the

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85 Pursuant to Rule 89 (A) ICTY, ICTR and SCSL RPE, the ad hoc tribunals and the SCSL are not bound by national rules of evidence. According to Rule 63 (5) of the ICC RPE, “[t]he Chambers shall not apply national laws governing evidence, other than in accordance with article 21”. See also, infra, Chapter 6, I.7.
application of national law and perhaps even its compliance with international human rights standards.86

The ICTR Prosecution staff interviewed acknowledge the existence of a requirement for judicial authorisation within most domestic systems but they expressed scepticism about the translation of such requirement into the international arena.87 One member of the OTP stated that this authorisation is not necessary because the Prosecution has discretion in terms of what to look for, as long as he or she gets the national authorities to proceed in accordance with the law.88 The international Prosecutor has to rely on states to execute the coercive measures and states have to comply in accordance with their own procedural laws.89 Consequently, even if this requirement were to be inserted, the Prosecutor would still have to go through the national agencies.90 One member of the OTP called such additional requirement, encompassing authorisation by a Trial chamber or a Judge of the ICTR, a “waste of time”.91 Only one interviewee agreed that a judicial authorisation should, ideally, be required to protect the integrity of the process and to protect the rights of the suspects.92

It is beyond a shadow of a doubt that it is difficult for the Prosecutor to assess in how far the domestic procedures have been upheld in the execution of the requests by national law enforcement officials. Several interviewees referred, in that regard, to the expectation that whenever a state is requested to execute coercive measures that they are undertaken within its laws.93 This trust is also reflected in the jurisprudence. For example, in the Ntabakuze case, 86 R. CRYER, H. FRIMAN, D. ROBINSON and E. WILMSHURST, An Introduction to International Criminal Law and Procedure, Cambridge, Cambridge University Press, 2010, p. 526, fn. 138.
87 Interview with a member of the OTP, ICTR-09, Arusha, 20 May 2008, p. 5.
88 Interview with a member of the OTP, ICTR-13, Arusha, 21 May 2008, p. 6; Interview with a member of the OTP, ICTR-16, Arusha, 4 June 2008, p. 9.
89 Interview with a member of the OTP, ICTR-13, Arusha, 21 May 2008, p. 7.
90 Interview with Dr. Alex Obote Odora of the OTP, ICTR-11, Arusha, 21 May 2008, p. 9 (“In principle, I agree we should have judicial authorization. My problem is the practicality of it”).
91 Interview with a member of the OTP, ICTR-13, Arusha, 21 May 2008, p. 6 (“Our expectation is that whatever we ask a country to do, it does it within its laws. That is a standard expectation. I do not think your fears are..."
the ICTR Trial Chamber noted, in relation to a search and seizure, that “the Trial Chamber takes cognizance of the fact that most countries maintain a police code of ethics for the members of their police forces for search and seizure.”94 In a similar vein, the ICC Pre-Trial Chamber held that “it may be presumed that the investigative activities carried out by national judicial and executive authorities in pursuance of domestic investigations or further to a request for co-operation by the Court have been carried out in accordance with the legal provisions applicable in that State.”95

The OTP staff interviewed also raised other objections to the inclusion of this requirement in the tribunal’s procedural framework. Notably, several interviewees referred to the problems of situations where some urgency exists, for example when evidence runs the risk of being destroyed.96 In that regard, it will be illustrated that these concerns are not justified, regarding search and seizures in particular, because the possibility to provisionally seize evidence on the territory of a state without judicial authorisation is explicitly provided for in the RPE of the ad hoc tribunals and the SCSL.97 Another concern raised relates to the public character of an application for authorisation. While normally the adoption of coercive measures would entail an application in open court, there should be a possibility for the Prosecutor to file a motion confidentially, and under seal to a Judge.98 In some cases, an application in open court may put sources, including victims, at risk and may allow individuals or other entities to interfere.

justified. Even if we got an order from the Chamber here first, the country would still have to do it within its law. Last week we had the assets frozen of a key suspect in neighboring Kenya. We asked the Kenyans to do it, under their law. They went to court and did it. Similarly, if we had first gone to our Chamber here, the Chamber would have issued an order directing the Kenyan government to sequester or freeze ‘asset x’ belonging to the accused. That order, we found out, because we discussed this with the Kenyan authorities, would have to be filed before their national courts, because this is not a direction to the judiciary in Kenya, it is a direction to the executive of the Republic of Kenya. So the Kenyans would have attached the ICTR order and an affidavit to the application. So it is a waste of time. If the Kenyans can go directly to their courts to get a freezing order, why first go to our courts?”); Interview with a member of the OTP, ICTR-09, Arusha, 20 May 2008, p. 6.


95 ICC, Decision on the Confirmation of Charges, Prosecutor v. Mbarushimana, Situation in the DRC, Case No. ICC-01/04-01/10-465-Red, PTC II, 16 December 2011, par. 58.

96 Interview with a member of the OTP, ICTR-12, Arusha, 21 May 2008, p. 6 (“If someone is going to burn some documents, do you have to run to the Tribunal to make an application to the Judges, to say “can you please allow me to stop the burning of the evidence and seize the documents?””).

97 Rule 40 (ii) of the RPE of the ICTY and Rule 40 (A) (ii) of the RPE of the ICTR and SCSL, see supra Chapter 6, I.3.3 and infra, Chapter 6, II.2.

98 Interview with Dr. Alex Obote Odora of the OTP, ICTR-11, Arusha, 21 May 2008, p. 9.
Judicial authorisation by a tribunal Judge or Chamber was generally not felt to be necessary by Judges and senior legal officers. The lack of this requirement was not considered problematic by most Judges and staff interviewed. It was noted, by one ICTR Judge, that this requirement would amount to an intervention in the proceedings in another jurisdiction which falls outside the jurisdiction of the tribunal. Consequently, the tribunal cannot intervene to protect the rights of citizens in proceedings which are held in another state. It would be tricky to have a Trial Chamber sit in review of a state practice. It would not be practicable and may be problematic insofar that the tribunal is not familiar with the procedural laws of the state in which this measure is going to be executed.

A minority of SCSL and ICTR Judges and staff interviewed would prefer greater judicial supervision over coercive measures. One ICTR Judge remarked that some control over the procedure is necessary when coercive measures are adopted but adds that in these cases, the tribunal would have to rely on the cooperation of a domestic judge. It was further noted by one ICTR Judge that the different standards that exist in African states may be a sufficient

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99 Interview with a Legal Officer of the ICTR, ICTR-28, Arusha, 30 May 2008, p. 6: (“Il faut être aussi pragmatique que possible. Si le Procureur demande aux Rwandais si les Rwandais sont prêts à coopérer, pourquoi requérir une décision judiciaire ?”); Interview with a Judge of the SCSL, SCSL-09, The Hague, 16 December 2009, p. 5. One Judge opined that the Prosecutor should request judicial authorisation when resorting to coercive measures for the taking of evidence, Interview with a Judge of the ICTR, ICTR-02, Arusha, 16 May 2008, pp. 3-4.

100 Interview with Judge Short of the ICTR, ICTR-04, Arusha, 23 May 2008, p. 4 (“Q: The problem may arise that the provisions under national law might be not in accordance with international human rights law or the prosecutor might not respect national procedures. Therefore it could be argued that it is important that the Trial Chamber be able to control the whole procedure and intervene as an essential guarantee for certain human rights” A: “The Tribunal’s jurisdiction does not extend to intervention in proceedings in another country. I do not see how the Trial Chamber can intervene to protect the rights of citizens in proceedings in another country”).

101 Interview with Judge Short of the ICTR, ICTR-04, Arusha, 23 May 2008, p. 5.

102 Interview with a Legal Officer of the ICTR, ICTR-34, Arusha, 3 June 2008, p. 6.

103 Interview with a Judge of the SCSL, SCSL-10, The Hague, 16 December 2009, p. 7 (“I have had experience in the past both as a lawyer and as judge in the issuance of search warrants. I would have preferred to see greater control over the powers to search. I have noted for example that during one trial, not mine, documents were seized in what appeared to be a raid on a house, apparently, without any authority. But the court does have powers not to admit evidence that would bring the administration of justice into serious disrepute, Rule 95”); Interview with a Legal Officer of the SCSL, SCSL-12, The Hague, 4 February 2010, p. 8 (“I would be in favour of that as a way providing checks and balances on the investigation and the powers of the Prosecution, because especially in the Special Court there were problems with the investigation, which came to light later. […] [It] seems that during these investigations, there were some problems, there was very little judicial oversight. For example, in the Sesay voir dire about the admission of his previous statements, it became obvious that there were many infringements on his rights, and that the investigators had not always acted properly. So at that point, there was a remedy in respect to the admission of the evidence, but this all came to light only many years after the investigation and only in one particular case”); Interview with a Legal Officer of the SCSL, SCSL-13, The Hague, 16 December 2009, p. 7.

104 Interview with Judge Weinberg de Roca of the ICTR, ICTR-01, Arusha, 19 May 2008, p. 2.
reason to strengthen the role of the Judges in the initiation and execution of coercive measures. 105

§ Duplication of efforts

There is, doubtless, some truth in the argument that the requirement of a warrant by a Judge or Trial Chamber of the international tribunal may be cumbersome and can sometimes be duplicative. 106 Indeed, under domestic law, national states normally require judicial authorisation for the execution of coercive measures. 107 However, there is no guarantee that this judicial authorisation is required for the specific measure sought or that this authorisation will in practice be sought. 108 Furthermore, there is no guarantee that domestic law will not depart from the requirements under international human rights law, or that the domestic law will not be circumvented. 109

Generally, the international criminal tribunals scrutinised contain no binding obligations for states to adopt certain procedural requirements or thresholds for the adoption of non-custodial coercive measures. 110 No express minimum standards for domestic procedures on non-custodial coercive measures can be discerned in the statutory documents of the international criminal tribunals. If one of the objectives of international criminal procedural law is to

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105 Interview with a Judge of the ICTR, ICTR-05, Arusha, 2 June 2008, p. 6 (“In Europe which is much more unified than some other places, we have some conventions trying to introduce some standards. Even there we have big problems using evidence gathered by other countries because of procedural differences. I am afraid that would be even worse here because, for example, in Africa there are really different national standards on the gathering of evidence, and that is why maybe there should be a strengthening of the Role of the Tribunal Judges”).

106 In practice, authorisation is sometimes obtained at both the national and international level. For an example, consider ICC, Decision on the Confirmation of Charges, Prosecutor v. Mbarushimana, Situation in the DRC, Case No. ICC-01/04-01/10-465-Red, PTC II, 16 December 2011, par. 56 (the Prosecution asserts that the seizure of items at the house of the suspect had not only been authorised by a French Judge, but also followed upon a request for cooperation upon an order by the Pre-Trial Chamber).

107 See supra, Chapter 6, I.3.2.

108 It should be reiterated that, while human rights law jurisprudence considers the necessity of obtaining judicial authorisation as ‘highly relevant’, there is no clear-cut obligation to obtain judicial authorisation for coercive measures under human rights law.


110 While Article 88 of the ICC Statute only obliges states to ensure that there are procedures available under their domestic laws for all forms of cooperation under Part 9, some provisions do contain binding obligations. One notable exception is Article 59 on arrest proceedings in the custodial state, which prescribes that the person arrested should be brought promptly before a Judge and should have the right to apply for interim release. This provision will be discussed in the Chapter on arrest and deprivation of liberty, infra, Chapter 7; other exceptions include Article 55 (2) of the ICC Statute (on the rights of persons questioned by national authorities following a request made under Part 9).
protect the due process rights of the defendant, it could be argued that a judicial warrant by an international Judge is indispensable to the use of non-custodial coercive measures by the Prosecutor, as the national judge is not the best placed to assess the merit of a request for coercive measures and lacks both the overview and information necessary. However, admittedly, it can be doubted whether these problems would be fully resolved if the international Judge or Trial Chamber were to authorise the request. In cases where a judicial warrant is requested, this will be done on an ex parte basis. The international Judge can only rely on the information which is handed over by the Prosecutor and cannot rely on a dossier to assess the proportionality, necessity and other restrictions of the Prosecutor’s power to rely on coercive measures in the conduct of the investigation. Therefore, the Judge or Trial chamber may naturally be inclined to attach credence to the information presented to them by the Prosecutor. Consequently, it is unlikely that this request would be denied. However, similar objections can be made regarding the efficiency of judicial overview at the national level. It may equally be doubted whether the international Judge would be better placed to assess situations in which the individual rights of ‘third persons’, rather than the suspect or the accused, are at stake.

However, it is clear that in the absence of any international supervision, a lacuna may exist in the protection of the defendant. The national authorities may demonstrate restraint in exercising control over the coercive measures that are executed following a request by an international tribunal. The compulsory action was undertaken at the request of an international tribunal or the national authorities were compelled to do so by an international tribunal. As a

111 G. SLUITER, International Criminal Adjudication and the Collection of Evidence, Antwerp, Intersentia, 2002, pp. 125 - 126. Consequently, the national Judge would most likely assume the request to be lawful. However, it can be doubted whether the situation would be appreciably different if the international Judge or Trial Chamber were to authorise the request. In case a judicial warrant is requested, this will be done on an ex parte basis. The international Judge can only rely on the information which is handed over by the Prosecutor and cannot rely on a dossier to assess the proportionality, necessity and other restrictions of the Prosecutor’s power to rely on coercive measures in the conduct of the investigation. Therefore, the Judge or Trial chamber may naturally be inclined to attach credence to the information presented by the Prosecutor. Consequently, it is unlikely that such request would be denied. However, similar arguments can be made regarding the efficiency of judicial overview at the national level.


113 See the discussion above, supra, Chapter 2, VII.2; A.M.M. ORIE, De verdachte tussen wal en schip óf de systeem-breuk in de kleine rechtshulp, in E.A. DE LA PORTE et al., Bij deze stand van zaken - bundel opstellen aangeboden aan A. L. Melai, Gouda, Quint, 1983.
result, the state whose assistance has been requested may be reluctant to accept responsibility for irregularities that occur.\textsuperscript{114} At the moment that a remedy is sought at the national level, the evidence obtained as a result of the violation of the rights of a suspect, accused person or third person may already have been transmitted to the international tribunal. The state may also request the tribunal not to make use of the evidence when the evidence has been transferred. However, the requested state may be reluctant to formulate such a request.\textsuperscript{115}

\textit{§ Ex post judicial intervention}

The preference human rights law expresses for a judicial review, especially in cases where the restrictions and conditions for the adoption of coercive measures are vague, has previously been shown.\textsuperscript{116} However, the extent to which \textit{ex post} judicial control may compensate for the absence of any \textit{ex ante} control by a tribunal Judge or Chamber remains to be examined.

The ECtHR held in the \textit{Smirnov} case that the lack of the requirement of a judicial warrant can be remedied by providing an \textit{ex post} judicial review.\textsuperscript{117} Consequently, if the (Pre-) Trial Chamber can \textit{ex post} review both the lawfulness and the justification for the adoption of the coercive measure taken, no prior judicial authorisation by the international criminal tribunal would be required.\textsuperscript{118} One occasion in the proceedings when an assessment of the coercive measures which were initiated could occur is when the Trial Chamber has to decide on the admission of the fruits of these measures into evidence.


\textsuperscript{116} See supra, Chapter 6, I.3.1.

\textsuperscript{117} Importantly, the judicial review included both the lawfulness and the justification of the coercive measure (search warrant), see ECtHR, \textit{Smirnov v. Russia}, Application No. 71362/01, Judgment of 12 November 2007, par. 45 (“In the cases of \textit{Funke, Crémieux and Mialhe v. France} the Court found that owing, above all, to the lack of a judicial warrant, “the restrictions and conditions provided for in law... appear[ed] too lax and full of loopholes for the interferences with the applicant's rights to have been strictly proportionate to the legitimate aim pursued” and held that there had been a violation of Article 8 of the Convention. [...] In the present case, however, the absence of a prior judicial warrant was, to a certain extent, counterbalanced by the availability of an \textit{ex post facto}m judicial review. The applicant could, and did, make a complaint to a court which was called upon to review both the lawfulness of, and justification for, the search warrant. The efficiency of the actual review carried out by the domestic courts will be taken into account in the following analysis of the necessity of the interference”); ECtHR, \textit{Heino v. Finland}, Application No. Application No. 56720/09, Judgment of 15 February 2011, par. 45.

\textsuperscript{118} Ibid., par. 45.
Where a prior judicial authorisation has been obtained from a Trial Chamber or Judge, the _ad hoc_ tribunals allow for the review of such authorisation. Notably, in the _Prosecutor v. Naletilić and Martinović_ case, one of the accused argued on appeal that the Trial Chamber had erred and abused its discretion in denying him the opportunity to review and challenge the evidence (in the form of affidavits, transcripts or any sworn testimony) on which the Judge relied to support the issuance of a search warrant. While the Appeals Chamber seemed to agree that access to these materials may be of ‘material assistance’ to the accused, it subsequently found that the Trial Chamber had not erred in denying access to the materials sought where this access “could jeopardise […] other investigations or trials.”

More problematic is the review when no prior authorisation has been obtained. International criminal tribunals have expressed a reluctance to determine whether a coercive measure has been lawfully executed under the laws of the requested state. Most notably, an ICTR Trial Chamber previously held that it lacked the competence to review the legality of coercive measures that had been executed by the national state. In _Nyiramasuhuko_, the Chamber held that:

“it is a sovereign state that executes the request and against whom the person arrested may seek a remedy against the arrest, custody, search, and seizure under the laws of the requested state.”

The tribunal thus declined to supervise the legality of coercive measures which were executed by a state and argued that the sovereignty of the state concerned prevented it from supervising the lawfulness of coercive measures executed by national law enforcement.

120 Ibid., par 233.
121 ICTR, Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized, _Prosecutor v. Nyiramasuhuko_, Case No. ICTR-97-21-T, T. Ch. II, 12 October 2000, par. 26; ICTR, Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items, _Prosecutor v. Ngirumpatse_, Case No. ICTR-97-44-I, T. Ch. II, 10 December 1999, par. 56; ICTR, Decision on the Defence Motion for the Restitution of Documents and other Personal or Family Belongings Seized (Rule 40 (C) of the Rules of Procedure and Evidence), and the Exclusion of such Evidence which may be Used by the Prosecutor in Preparing an Indictment against the Applicant, _Prosecutor v. Karemera_, Case No. ICTR-98-44-I, T. Ch. II, 10 December 1999, par. 4.2; ICTR, Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized, _Prosecutor v. Nsirorera_, T. Ch. II, 7 September 2000, par. 27; ICTR, Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing, _Prosecutor v. Kajelijeli_, Case No. ICTR-98-44-I, T. Ch. II, 8 May 2000, par. 34-35.
personnel under national law. The international criminal tribunal cannot review the execution of the coercive measures under national law or even assess its compliance with international human rights norms. The accused or third person should seek a remedy from the requested state that executed the coercive measure.

Nevertheless, it will be shown in Part II of the present chapter how other case law from the international criminal tribunals reveals a willingness to assess the lawfulness of coercive measures which were adopted and their compliance with international human rights law, even in the absence of express provisions in the statutory documents.\textsuperscript{122} Even where the irregularities are attributable to the requested state, this does not prevent the tribunal from addressing these violations and providing remedies.

Overall, as will be illustrated, it will be difficult for the international tribunal to enforce the national laws that govern the execution of the coercive measures undertaken and to provide an effective remedy. Only where irregularities amount to gross human rights violations, the practice of the international criminal tribunals reveals a willingness to provide a remedy in the form of the exclusion of the resulting pieces of evidence from the proceedings.\textsuperscript{123}

Hence, while a formal requirement for prior authorisation by a Judge or Trial Chamber of the international criminal tribunal may be time-consuming or may sometimes even be considered a duplication of efforts (where national criminal justice systems often require judicial authorisation before coercive measures can be executed)\textsuperscript{124}, pre-authorisation offers the best protection for the suspect or accused person. The additional benefits of \textit{ex ante} control over \textit{ex post} judicial control have also been acknowledged by the ECtHR. The Court occasionally underlined, in relation to intrusive investigative measures, that unlike \textit{ex post} control, \textit{ex ante}

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\footnote{\textsuperscript{122} See infra, Chapter 6, II. Compare with the Delalić \textit{et al.} case, on the interrogation of the accused in the absence of counsel. In that case, an express provision granting the right to be assisted by counsel could be found in the statutory framework (Rule 42 ICTY RPE). See ICTY, Decision on Zdravko Mucić Motion for the Exclusion of Evidence, \textit{Prosecutor v. Delalić et al.}, Case No. IT-96-21, T. Ch., 2 September 1997, par. 43-44.}

\footnote{\textsuperscript{123} See infra Chapter 6, I.7.}

\footnote{\textsuperscript{124} However, there is no guarantee that such judicial authorisation is required for the specific measure sought or that such authorisation will in practice be sought. It should be reiterated that, while human rights law jurisprudence considers the necessity of obtaining judicial authorisation as `highly relevant', there is no clear-cut obligation to obtain judicial authorisation for coercive measures under human rights law. Besides, there is no guarantee that domestic law will not depart from the requirements under international human rights law, or that the domestic law will not be circumvented. See: R. CRYER, H. FRIMAN, D. ROBINSON and E. WILMSHURST, An Introduction to International Criminal Law and Procedure, Cambridge, Cambridge University Press, 2007, p. 419.}

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supervision may prevent violations of human rights, including the right to privacy.\footnote{See ECtHR, Sanoma Uitgevers BV v. The Netherlands, Application No. 38224/03, Judgment (Grand Chamber) of 14 September 2010, par. 99. See M.F.H. HIRSCH BALLIN, Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States, The Hague, T.M.C. Asser Press, 2012, pp. 245 – 246.} In a similar vein, the U.S. Supreme court views an *ex ante* judicial authorisation as being an important safeguard for searches falling within the scope of the Fourth Amendment.\footnote{See Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), p. 357 (“Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes,” [...] and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions” (emphasis added)). Consider also M.F.H. HIRSCH BALLIN, Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States, The Hague, T.M.C. Asser Press, 2012, pp. 469 - 470 (arguing that since 9/11, the protective function of this requirement has declined).} There is a “clear preference” for an *ex ante* review, because of its potential to prevent unreasonable searches, not because an *ex ante* review is considered to be an “inherently better” form of review compared to an *ex post* review.\footnote{G. SLUITER, International Criminal Adjudication and the Collection of Evidence, Antwerp, Intersentia, 2002, p. 128 (giving the example where the Prosecutor requests the seizure of evidence without knowing the exact location of such evidence. Where the evidence were to be found in a private premise, the seizure would infringe on the right to the inviolability of the house of the person concerned).}

§ Uncertainty regarding the necessity of a judicial review

The requirement seems equally problematic when the Prosecutor seeks to obtain certain evidence from a particular state and it is uncertain at the outset whether a resort to coercive measures will be necessary. Should the Prosecutor be required to obtain judicial authorisation before requesting the state to seek that evidence in this case? It has been argued that the Trial Chamber should consider whether the use of coercive measures was ‘reasonably expected’, in which case a prior warrant would be necessary.\footnote{G. SLUITER, International Criminal Adjudication and the Collection of Evidence, Antwerp, Intersentia, 2002, p. 128 (giving the example where the Prosecutor requests the seizure of evidence without knowing the exact location of such evidence. Where the evidence were to be found in a private premise, the seizure would infringe on the right to the inviolability of the house of the person concerned).}

I.4. General threshold for the use of non-custodial coercive measures

In addition to the *formal* condition of a judicial authorisation, national criminal justice systems often provide for certain *material* conditions for the use of non-custodial coercive measures. Most importantly, the coercive measures taken should be proportionate. Moreover,
national criminal justice systems often require that the coercive measures are necessary or fulfil the requirement of subsidiarity, this requirement often being linked to the degree of invasiveness of the measure. Lastly, national criminal justice systems often set a minimum threshold and provide for a triggering mechanism for the use of coercive measures in the course of criminal investigations. The following paragraphs will inquire as to whether these material conditions can be found in international criminal procedural law.

A comparative study by VERVAELE on the basis of reports received by 17 states concluded that most countries seem to adhere to the principle of reasonable suspicion for the use of coercive measures. An often cited example is the Fourth Amendment to the US Constitution which requires the showing of a ‘probable cause’ before a search warrant will be issued. Normally, English law requires the existence of ‘reasonable grounds for believing that an indictable offence has been committed’, before an entry and search of premises can be authorised. Under Canadian law, the search of premises presupposes that a judicial official has been satisfied by information on oath that there are reasonable grounds to believe that the prescribed items would be found at the place to be searched, and would provide evidence of an offence, or the whereabouts of the person believed to have committed an offence, or anything reasonably believed to have been used to commit any serious offence against a person. Belgian law requires the existence of serious indications that a crime has been committed. These thresholds ultimately protect the presumption of innocence, by preventing innocent people from being unnecessarily subjected to intrusive investigative

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129 Meanwhile, some authors have noticed a trend of lowering such thresholds and triggering mechanisms, especially in relation to the pro-active investigation of serious crimes, see e.g. J.A.E. VERVAELE, Mesures de procédure spéciales et respect des droits de l’homme – Rapport général, in «Utrecht Law Review», Vol. 5, 2009, pp. 129-130.


131 The Fourth Amendment provides that “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

132 Section 8 PACE; Where such material condition is not always explicitly provided by law, such requirement may follow from jurisprudence.


134 While the law does not expressly stipulate it, the existence of such material condition has been recognised in practice, see e.g. R. VERSTRAETEN, Handboek Strafvoering, Antwerpen – Apeldoorn, Maklu, 2003, p. 347; C. VAN DEN WYNGAERT, Strafrecht en Strafprocesrecht, Maklu, Antwerpen-Apeldoorn, 2009, p. 1023.
acts. In addition, they protect against arbitrary interferences with human rights, including the right to privacy and the right to property.

These triggering mechanisms or minimum thresholds are remarkably absent in international criminal procedure. Nowhere do the statutory documents of the ad hoc tribunals require a threshold, or an underlying justification or basis for the adoption of coercive measures, such as ‘probable cause’, the existence of ‘concrete indications’ or ‘reasonable grounds’. The only applicable threshold is the general ‘sufficient basis to proceed’ assessment made by the Prosecutor to start an investigation, which barely constitutes a useful criterion. Whether or not the Trial Chamber Judges apply a minimum threshold in practice, when authorising requests made to execute coercive measures, remains unclear. In the case of a request to the national state concerned, the applicable threshold will depend on the respective national legislation. Under the current regime, it does not seem necessary that any indication of guilt (concrete or not) has been demonstrated before the Prosecutor can resort to the use of coercive measures.

A more robust threshold is provided for under the ICC Statute, which includes the requirement that the information in the Prosecutor’s possession reveals a ‘reasonable basis to believe that a crime within the jurisdiction of the Court has been committed’, before the investigation is triggered. While the Prosecutor can already use some of his investigative powers during the preliminary inquiry, no coercive measures may be used before the determination of a reasonable basis.

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136 Consider Article 17 (2) of the ICTR Statute, Article 18 (2) ICTY Statute, Rule 39 (i) and (iv) of the ICTY, ICTR and SCSL RPE.
137 Article 17 (1) ICTR Statute, Article 18 (1) ICTY Statute. No comparable threshold can be found in the SCSL Statute. On this threshold, see supra, Chapter 3, I.1.
138 Consider in this regard ICTY, Mladen Naletelić’s Revised Appeals Brief – Redacted, Prosecutor v. Naletalić and Martinović, Case No. IT-98-34-A, A. Ch., 6 October 2005, par. 23 (the Defence “seeks the establishment of some standard of review for search warrants in order to protect against prosecutorial capriciousness and zeal. Probable cause should be a minimum. If a search warrant affidavit does not state probable cause, the warrant should fail. If a warrant fails, the evidence derived thereby should not be a basis of guilt”).
139 Article 53 (1) (a) ICC Statute; Article 15 (3) ICC Statute, requiring the authorisation by the Pre-Trial Chamber that there is a reasonable basis to proceed.
140 See Rule 104 (2) ICC RPE, supra, Chapter 3, I.2.
I.5. Principle of proportionality

It follows from international human rights law that coercive measures should respect the principle of proportionality. As acknowledged by the ICTY Appeals Chamber in Milosević, some principle of proportionality for restrictions of fundamental rights is honoured by most national criminal justice systems, which entails that coercive measures which restrict fundamental rights should be in service of “a sufficiently important objective” and should impair that right no further than necessary to accomplish the objective. Nevertheless, only occasionally do the international criminal tribunals refer to the existence of a material condition of proportionality for the adoption of coercive measures. Notwithstanding some examples to the contrary, this requirement restricting the Prosecutor’s power to initiate coercive measures seems to lead a rather obscure life in international criminal proceedings.

For example, the principle of proportionality was referred to by the Trial Chamber in Stakić in relation to a request by the Prosecution to inter alia order UNDU to identify, seal, and transfer materials in the possession of Stakić upon his arrival at the tribunal’s detention unit. In its decision, the Trial Chamber held that the legality of a search of these materials largely depended on its proportionality. In that context, it referred to what it identified as ‘the general principle of proportionality’, which entails that a measure in public international law is proportional only when it is (1) suitable, (2) necessary, and (3) its degree and scope are in a

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141 ICTY, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, Prosecutor v. Milosević, Case No. IT-02-54-AR.73.7, A. Ch., 1 November 2004, par. 17. For example, according to the French code de procédure pénale, coercive measures to which a person suspected or prosecuted is subjected should be strictly limited to “what is necessary for the process, proportionate to the gravity of the offence and should not infringe human dignity” (Article préliminaire (III) du Code de Procédure Pénale). In Dutch criminal procedure, the principles of proportionality (and subsidiarity) constitute principles of due administration of law (“beginselen van behoorlijke procesorde”), which are “unwritten principles that aim to guarantee, supplementary to the statutory conditions, the legitimacy of the criminal process where the law affords discretion, including the criminal investigation.” See M.F.H. HIRSCH BALLIN, Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States, The Hague, T.M.C. Asser Press, 2012, p. 59; The principle of proportionality of coercive measures equally governs the German Vorverfahren or Ermittlungsverfahren, see R. JUY-BIRMANN, The German System, in M. DELMAS-MARTY and J.R. SPENCER (eds.), European Criminal Procedure, Cambridge, Cambridge University Press, 2002, p. 313.

142 Only the Internal Rules of the ECCC explicitly provides for this principle. See Rule 21 (2) IR ECCC and supra, Chapter 6, I.2.

143 ICTY, Order to the Registry of the Tribunal to Provide Documents, Prosecutor v. Stakić, Case No. IT-97-24-T, T.Ch. II, 5 July 2002.

144 Ibid., p. 4; S. SWOBODA, Admitting Relevant and Reliable Evidence: The ICTY’s Flexible Approach Towards the Admission of Evidence under Rule 89 (C) ICTY RPE, in T. KRU/ESMANN (ed.), ICTY: Towards a Fair Trial?, Antwerp, Intersentia, 2009, p. 391.
reasonable relationship to the envisaged target (proportionality in the narrowest sense).\textsuperscript{145} Moreover, procedural measures should not be capricious or excessive. Lastly, it includes a notion of subsidiarity, by requiring that if a more lenient measure would be sufficient, it should be applied. In the \textit{Stakić} case the Trial chamber considered that the requirements, of necessity and proportionality \textit{sensu stricto} especially, entail that in some cases the accused’s right to privacy may be predominant, for example as far as medical records or diaries are concerned.\textsuperscript{146} In relation to restrictions to another fundamental right (at stake was Milošević’ right to self-representation) the ICTY Appeals Chamber held that the Trial Chamber made an error of law by failing to recognise that any restrictions to the fundamental rights of the accused should be proportionate and underscored that the ICTY has been guided by “a
general principle of proportionality.”\textsuperscript{147}

The proportionality criteria, identified above, were first established by the Trial Chamber in the \textit{Hadžihasanović et al.} case in relation to a request for provisional release and were later confirmed by the ICTY Appeals Chamber in \textit{Limaj}.\textsuperscript{148} The origin of these criteria remains dubious. The tribunal never provided any source for these criteria. This test is reminiscent of the interpretation given by the German Constitutional Court to the ‘Rechtsstaatsprinzip’ as containing three elements, to know suitability, necessity, and proportionality \textit{sensu stricto}.\textsuperscript{149} It follows from this three-pronged test that state measures should (i) be suitable for the purpose of facilitating or achieving the objective pursued, (ii) must also be necessary in that

\textsuperscript{145} ICTY, Order to the Registry of the Tribunal to Provide Documents, \textit{Prosecutor v. Stakić}, Case No. IT-97-24-T, T. Ch. II, 5 July 2002.
\textsuperscript{146} Same, p. 4.
\textsuperscript{149} It may be noted that the same German Judge was presiding the Trial Chamber bench that rendered the Hadžihasanović decision and the Appeals Chamber bench that confirmed the holding of Hadžihasanović in the \textit{Limaj} case.
no other instrument be at the authority’s disposal, which is less restrictive of freedom, and (iii) the state measures may not be disproportionate to the restrictions which they involve (Is the disadvantage created in a proportional relationship with the benefits created by the measure?). The two latter prongs could also be referred to as ‘means-proportionality’ or ‘alternative-means’ and ‘ends-proportionality’ or ‘end-benefits proportionality’.

The ICC Pre-Trial Chamber has also referred to the ‘principle of proportionality’ in the Lubanga case, in connection to the assessment of the legality of a search that had been conducted on the private premises of the accused in the DRC. Rather than referring to the aforementioned Rechtstaatsprinzip, the Pre-Trial Chamber derived this principle from the case law of the ECtHR in relation to infringements of the right to privacy. The Pre-Trial Chamber concluded that the search operation was of an indiscriminate nature and was not proportionate to the objective sought by the national authorities. Consequently, the operation was conducted in disrespect of the principle of proportionality and thus violated internationally protected human rights. This finding was later confirmed by Trial Chamber I. However, the ICC Trial Chamber added that the violation of the principle of proportionality will not lead to the automatic exclusion of the resulting evidence.

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151 E.T. SULLIVAN and R.S. FRASE, Proportionality Principles in American Law: Controlling Excessive Government Actions, Oxford, Oxford University Press, 2009, p. 7 (according to the author, ‘Means-proportionality’ is about the availability of less intrusive ways of achieving the government’s asserted purposes: it involves a comparison of the costs and burdens imposed by equally effective alternative measures designed to achieve the same benefits. ‘Ends-proportionality’ refers to the balancing of the asserted law enforcement or other government interests against the nature and degree of the resulting intrusion into privacy, liberty or property. It is about the comparison of a single measure to its expected benefits.
153 Ibid., par. 80-81 (“it is clear from the list of documents and items seized by the Congolese authorities and handed over to the Prosecution’s investigators that hundreds of documents were confiscated... There is no means of determining the relevance, if any, of the documents and items seized from [redacted]’s home to the Congolese authorities. However, the information before the Chamber suggests that the Prosecution seemed just as interested, perhaps even more interested, in the items in question and it appear that the Prosecution’s presence influenced the conduct of the search and seizure”). The Pre-Trial Chamber additionally noted that only 70 out of hundreds items seized were listed in the Prosecutor’s Amended List of Evidence.
154 Ibid., par. 82.
155 ICC, Decision on the Admission of Material from the “Bar Table”, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01-06-1981, T. Ch. I, 24 June 2009, par. 38 (“There is no reason for this Chamber to reach a different conclusion on these issues, and in particular that an unjustified violation of the individual’s right to privacy occurred”).
156 ICC, Decision on “Prosecution’s Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)”, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01-06-2589, TC I, 21 October 2010, par. 29-30; ICC, Decision on the Admission of Material from the “Bar Table”, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01-06-1981, T. Ch. I, 24 June 2009, par. 39; ICC, Decision
Indeed, while human rights texts do not explicitly mention it, it follows from human rights law that coercive measures, as they interfere with human rights, should be proportionate to the legitimate aim that they pursue. This principle of proportionality has been viewed in the jurisprudence of the ECtHR as a corollary to the ‘necessary in a democratic society’ requirement and the requirement of a ‘pressing social need’ read into this requirement by the Court.157 The requirement of proportionality follows from the need to balance different competing interests of the right at stake (right to privacy, right to property) and the limiting interest in a particular case.158 The Court has emphasised that insofar that the proportionality requirement is derived from the ‘necessary in a democratic society’ provision, the word ‘necessity’ is not synonymous with ‘indispensable’, ‘strictly necessary’ or ‘absolutely necessary’ but means more than ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’. While there is a certain margin of appreciation for the states, the ultimate control lies with the Court.159 The broadness of the powers restricting certain rights or freedoms is one aspect which will be considered when the Court looks into the proportionality of a coercive power restricting human rights. In that regard, the ECtHR has always been highly critical of giving powers too wide and too discretionary to the executive.160 A notion of reasonableness or proportionality is equally inherent in Article 17 of the ICCPR concerning the right to privacy.161

159 See ECtHR, Handyside v. The United Kingdom, Application No. 5493/72, Series A, No. 24, Judgment of 7 December 1976, par. 48-49; ECtHR, Silver and Others v. The United Kingdom, Application Nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Series A, No. 83, Judgment of 25 March 1983, par. 97. On coercive measures infringing on the right to privacy, consider e.g. ECtHR, Niemietz v. Germany, Application No. 13710/88, Judgment of 16 December 1992 or ECtHR, Miailhe v. France (no. 1), Application No. 12661/87, Series A, No. 256-C, Judgment of 25 February 1993, par. 37 – 39. The requirement of proportionality has also been read in Article 1 of Protocol 1 ECHR; on coercive measures infringing upon the right to property, consider e.g. ECtHR, Raimondo v. Italy, Application No. 12954/87, Judgment of 22 February 1994, par. 36.
161 M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR commentary (2nd edition), Kehl am Rein, Engel, 2005, p. 383 (noting that “whether interference with privacy is permissible requires a precise balancing of the circumstances in a given case, paying regard to the principle of proportionality”); CCPR General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Article 17), U.N. Doc. HRI/GEN/1/Rev.6, 8 April 1988, par. 4 (“The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances”).
From the above, it can be concluded that references to the proportionality principle in relation to the use of non-custodial coercive measures can be found in the jurisprudence of the *ad hoc* tribunals and the ICC. It is beyond the scope of this study to entertain on the similarities and differences between these concepts where different concepts are relied upon by these jurisdictions.

### I.6. (Subsidiarity) - necessity - specificity

It has been illustrated, above, how the principle of proportionality, as interpreted by the international criminal tribunals and as deriving from international human rights law is broad enough to include a notion of necessity in the sense of subsidiarity. This principle of subsidiarity means that coercive measures can only be relied upon when less intrusive measures would not suffice. While it is difficult to construe this principle as a general principle of law, the principle has been recognised in human rights law and has been recognised in the jurisprudence of the different international criminal tribunals under the principle of proportionality (*sensu lato*).

Another obligation of necessity applies indirectly in cases where coercive measures are relied upon. It was argued above that the adoption of coercive measures by the Prosecutor presupposes judicial authorisation. A request to that extent should be made by the Prosecutor pursuant to Rule 54 of the ICTY, ICTR, and SCSL RPE. It follows from Rule 54 that a request for a warrant should be necessary for the Prosecutor for the purposes of the investigation and, thus, to obtain evidence (*requirement of necessity*). In addition, the

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164 Some countries recognise a general principle of subsidiarity. Consider e.g. The Netherlands, where the principle of subsidiarity forms part of ‘het beginsel van redelijke en behoorlijke belangenafweging’. See G.J.M. Corstens, *Het Nederlands Strafprocesrecht*, Deventer, Kluwer, 2008, p. 70; M.F.H. *HIRSCH BALLIN, Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States*, The Hague, T.M.C. Asser Press, 2012, p. 59. Other countries seem to reserve a more limited role to the principle of subsidiarity. The Belgian code of criminal procedure, for example, only provides for a requirement of subsidiarity for the more intrusive coercive measures, including the interception of the content of private telecommunications (Art. 90ter Sv.), systematic observation (47sexies, §2 Sv.) or infiltration (47octies, §2 Sv.). These coercive measures can only be employed where other investigative measures have proven insufficient to discover the truth.

165 Rule 54 of the ICTY, ICTR and SCSL RPE; See also ICTY, Decision of the President on the Prosecutor’s Motion for the Production of Notes Exchanged between Zajnul Delalić and Zdravko Mucić, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, President, 11 November 1996, par. 38-39.
material being sought must be relevant to an investigation or prosecution or for the conduct of trial (requirement of relevancy) and not entail a ‘fishing expedition’ (requirement of specificity).

In a similar vein, the ICC Prosecutor should file a request with the Pre-Trial Chamber pursuant to Article 57 (3) (a) ICC Statute. Article 57 (3) (a) and (b) “allude to the existence of a necessity requirement” which will govern requests for coercive measures.166 Indeed, the reference to orders and warrants ‘as may be required for the purposes of an investigation’ or ‘as may be necessary to assist the person in the preparation of his or her defence’ are reminiscent of a requirement of necessity. These provisions seem equally to allude to the existence of a requirement of specificity. Article 57 (3) (b) is complemented by Rule 116 ICC RPE on the collection of evidence at the request of the Defence, encompassing a requirement of relevancy as well as a requirement of specificity for requests to seek cooperation from States.167 Trial Chamber IV, in responding to a defence request to issue cooperation orders under Article 57 (3) (b), has held that requests for assistance must be based on the requirements of (i) specificity, (ii) relevance, and (iii) necessity.168 Hence, Chambers of the ICC have started to adopt a similar position as the ad hoc tribunals and the SCSL and read these requirements into Article 57 (3) (a) in order to avoid ‘fishing expeditions’.169

Hence, the requirements of necessity and specificity for requests for judicial authorisation concerning the adoption of coercive measures constitute material conditions restricting the power of the international Prosecutor (or the Defence) to use coercive measures.

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167 Rule 116 (1) (a) and (b) ICC Statute respectively.
I.7. Admissibility of evidence obtained through illegal coercive measures

I.7.1. The question of a proper remedy

Irregularities in the initiation and execution of coercive measures may result in breaches of the right to privacy (or to the peaceful enjoyment of property) of the suspect, accused person or a third person. It has been addressed, above, how the ICTR has sometimes declined to supervise the legality of coercive measures if these coercive measures are executed by national states. In the Ngirumpatse case, the ICTR Trial Chamber held that it lacked the competence to overview the legality of a search that had been executed by the national authorities of Mali. This holding was reiterated in a number of decisions by the ICTR about search and seizures executed by a national state following a request. It was shown how this approach deviated from other case law, indicating that the fact that the violations were committed by a state executing a request does not prevent the tribunal from addressing these violations or providing remedies.

It was also illustrated how it would be difficult for a suspect, accused person, or third person whose rights have been violated as a consequence of irregularities in the execution of coercive measures by national law enforcement officials to obtain a suitable remedy. The requested state may be reluctant to accept responsibility for irregularities that occur insofar that the compulsory action was undertaken at the request of an international court or tribunal or

170 ICTR, Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items, Prosecutor v. Ngirumpatse, Case No. ICTR-97-44-I, T. Ch. II, 10 December 1999, par. 56 (“it is a sovereign state that executes the request and against whom the person arrested may seek a remedy against the arrest, custody, search, and seizure under the laws of the requested state”).

171 ICTR, Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized, Prosecutor v. Nyiramucuguruzo, Case No. ICTR-97-21-T, T. Ch. II, 12 October 2000, par. 26; ICTR, Decision on the Defence Motion for the Restitution of Documents and other Personal or Family Belongings Seized (Rule 40 (C) of the Rules of Procedure and Evidence), and the Exclusion of such Evidence which may be Used by the Prosecutor in Preparing an Indictment against the Applicant, Prosecutor v. Karemera, Case No. ICTR-98-44-I, T. Ch. II, 10 December 1999, par. 4.2; ICTR, Decision on the Defence Motion in Preparing an Indictment against the Applicant, Prosecutor v. Karemera, T. Ch. II, 7 September 2000, par. 27; ICTR, Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing, Prosecutor v. Kajelijeli, Case No. ICTR-98-44-I, T. Ch. II, 8 May 2000, par. 34-35.

172 ICTY, Decision on Zdravko Mucić Motion for the Exclusion of Evidence, Prosecutor v. Delalić et al., Case No. IT-96-21-T, T. Ch., 2 September 1997, par. 43-44.
because the state was compelled to do so by an international court or tribunal.\textsuperscript{173} At the moment that a remedy is sought at the national level, the evidence obtained as a result of the violation of the rights of a suspect, accused or third person may already have been transmitted to the international tribunal. In this case, the state may request that the tribunal not make use of the evidence. However, the tribunal may be reluctant to honour such a request.\textsuperscript{174} A last resort may be the existing international human rights supervisory mechanisms. Overall, the chances for the individual to get redress from the requested state following irregularities in the execution of a request are limited. Moreover, it can be difficult for the state that executed the coercive measure to offer the remedy sought by the suspect or accused – be that the exclusion of the evidence, mitigation of the sentence or dismissal of the case – insofar as the proceedings take place in another forum.

Consequently, it may be more realistic that breaches of fundamental rights as a consequence of coercive measures be addressed by the international criminal tribunal directly. The normal remedy would then be the exclusion of the fruits of the irregular intrusive action, the evidentiary items that have been obtained unlawfully. Nevertheless, it will be illustrated below that evidence gathered through coercive measures in violation of the right to privacy (or the right to the peaceful enjoyment of property) is generally admissible before the different international criminal tribunals.

I.7.2. The \textit{ad hoc} tribunals and the SCSL

\textsection{Illegal interception of communications}

Constant jurisprudence has held that the illegality of interceptions under national law will not automatically and necessarily lead to its \textit{mandatory} exclusion under Rule 95 ICTY, ICTR and SCSL RPE.\textsuperscript{175} Such illegality does not necessarily rise to the level where it would ‘seriously

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\item \textsuperscript{174} G. SLUITER, International Criminal Adjudication and the Collection of Evidence, Antwerp, Intersentia, 2002, p. 223.
\item \textsuperscript{175} Rule 89 (A) ICTY, ICTR and SCSL RPE. ICTY, Transcript, \textit{Prosecutor v. Kordić and Čerkez}, Case No. IT-95-14/2, T. Ch., 2 February 2000, pp. 13684-13685 (Judge Robinson states that there are forms of illegality which call for the exclusion under Rule 95 but not every illegality), p. 13695 (Judge May subsequently rendered an oral decision stating that “We have come to the conclusion that the evidence obtained, as put before us in this
\end{itemize}
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It was rightly noted by the Trial Chamber in 

_Brdanin_ that:

“the drafters of the Rules chose not to set out a rule providing for the automatic exclusion of evidence illegally or unlawfully obtained and instead to leave the matter of admissibility of evidence irrespective of its provenance to be dealt with under and in accordance with Rules 89 and 95.”

_In casu_, the Defence objected to the tendering into evidence of transcripts resulting from the interception of communications, and argued that they were illegally obtained and that the interception was not properly authorised under the laws of the Republic of Bosnia and Herzegovina. Consequently, the illegally obtained evidence should be excluded pursuant to Rules 89 and 95 of the ICTY RPE.  

way evidence obtained by eavesdropping on an enemy’s telephone calls during the course of a war is certainly not within the conduct which is referred to in Rule 95. It’s not antithetical to and certainly would not seriously damage the integrity of the proceedings”); ICTY, Preliminary Decision on the Admissibility of Intercepted Communications,  _Prosecutor v. Milosević_, Case No. IT-02-54-T, T. Ch., 16 December 2003, p. 3 (“whether the process of recording the intercepts is in accordance with domestic law of BiH does not necessarily determine whether the intercepts are admissible; but rather it is the law relating to the admissibility of evidence under the Statute and Rules of this Tribunal and international law which must be applied”); ICTY, Decision on the Defence “Objection to Intercept Evidence”,  _Prosecutor v. Brdanin_, Case No. IT-99-36-T, T. Ch. II, 3 October 2003, par. 51, 61 (“admitting illegally obtained intercepts into evidence does not, in and of itself, necessarily amount to seriously damaging the integrity of the proceedings”); ICTR, Decision on Exclusion of Testimony and Admission of Exhibit,  _Prosecutor v. Renzaho_, Case No. ICTR-97-37-T, T. Ch. I, 20 March 2007, par. 15 (on the question of the admission into evidence of recordings, resulting from the RPF’s eavesdropping on Rwandese authorities’ telephone calls in April 1994 and on the question whether such admission would be in contravention of Rule 95, Trial Chamber I followed the Brdanin decision); ICTY, Judgement,  _Prosecutor v. Krajišnik_, Case No IT-00-39-T, T. Ch. I, 27 September 2006, par. 1189 (the Chamber adopted the position that even if, _arguedo_, the intercepts were not obtained strictly in accordance with state legislation applicable at the time, the intercepted evidence would not be inadmissible _per se_ under Rule 95); ICTY, Decision Denying the Stanišić Motion for Exclusion of Recorded Intercepts,  _Prosecutor v. Stanišić and Župljanin_, Case No. IT-08-91-T, T. Ch. II, 16 December 2009, par. 21; ICTY, Decision on the Accused’s Motion to Exclude Intercepted Conversations, _Prosecutor v. Karadžić_, Case No. IT-95-5/18-T, T. Ch., 30 September 2010, par. 10 (the Trial Chamber noted that Rule 95 does not serve to exclude evidence based on violations of procedural safeguards set forth in domestic law. The accused failed to demonstrate how the admission of evidence allegedly obtained in contravention of Bosnian domestic law by Bosnian authorities would be so grave as to result in damaging the integrity of the proceedings before the Chamber).  

_E.g._ ICTY, Decision Denying the Stanišić Motion for Exclusion of Recorded Intercepts,  _Prosecutor v. Stanišić and Župljanin_, Case No. IT-08-91-T, T. Ch. II, 16 December 2009, par. 21.  


_Ibid_, par. 11.
The Trial Chamber confirmed that communications that were intercepted during an armed conflict are not a priori inadmissible under Rule 95.\textsuperscript{179} Rather, “the manner and surrounding circumstances in which evidence is obtained, as well as its reliability and effect on the integrity of proceedings, will determine its admissibility.”\textsuperscript{180} According to the Trial Chamber, there may be exceptional circumstances when it is neither realistic nor practical to request permission to conduct covert interceptions.\textsuperscript{181} This decision has been criticised as it applies the wrong test: the Court should have asked whether there is a consistent rule permitting the admission of this evidence.\textsuperscript{182} However, it has been explained in Chapter 2 how, in the absence of a clear principle of procedural legality in the law of international criminal procedure, the practice of the ad hoc tribunals is rather to look for a prohibitive rule.\textsuperscript{183}

Rather than automatically excluding the evidence pursuant to Rule 95, the Court applied the balancing test provided for under Rule 89 (D) of the ICTY RPE, providing for the exclusion of evidence “if its probative value is substantially outweighed by the need to ensure a fair trial.” According to the Trial Chamber, a correct balance must be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.\textsuperscript{184} In the Chamber’s opinion, the truth-finding function of the Court may necessitate the admission of intelligence which is the result of illegal activity, this is all the more so when the evidence is not available from other sources.\textsuperscript{185} In exercising this balancing power, the Court considered several circumstances which favoured the admission of the evidence, including the

\textsuperscript{179} Ibid., par. 55; ICTY, Transcript, Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2, T. Ch., 2 February 2000, pp. 13684-13685; ICTY, Decision on the Accused’s Motion to Exclude Intercepted Conversations, Prosecutor v. Karadžić, Case No. IT-95-5/18-T, T. Ch., 30 September 2010, par. 8.


\textsuperscript{181} Ibid., par. 56.

\textsuperscript{182} G.-J.A. KNOOPS, Theory and Practice of International and Internationalized Criminal Proceedings, The Hague, Kluwer Law International, 2005, p. 237 (“Despite the impressive array of jurisprudence cited in the decision, it is hard not to suspect that it was a selective, self-justifying approach. In this regard, one could argue that rather than reviewing domestic jurisprudence to ascertain whether there is a consistent injunction against the admission of such evidence, the inquiry of the Trial Chamber should have been whether there is a consistent rule permitting the admission of such evidence. Indeed, the outdated approach of the Permanent Court of Justice in the Lotus Case (Judgement of 7 September 1927) that whatever is not strictly prohibited by international law is permissible as far as sovereign states are concerned, is hardly an appropriate evidential standard to incorporate into a criminal trial. Thus rather than embodying the highest standards of human rights, the court appears to have gone for the lowest common denominator”.

\textsuperscript{183} See supra, Chapter 2, VI.


\textsuperscript{185} Ibid., par. 61.
fact that a formal request for the interception was made and approved, the high level target and the need for secrecy, the fact that the state was at the brink of a civil war, the fact that the evidence could not have been available through another source and the gravity of the crimes. Consequently, the Trial Chamber was satisfied that the intercepted communications were relevant and that they had probative value.

When balancing interests under Rule 89 (D), the Trial Chamber in Brđanin considered the deterrent function of exclusionary rules. The Chamber noted that it is not in a position to discourage further abuses. It is not capable of discouraging the use or interception of communications in times of crisis or times of armed conflict.

“Domestic exclusionary rules are based, in part, on the principle of discouraging and punishing overreaching law enforcement. The Trial Chamber does not think for a moment that by taking a different approach to the one it is taking, it would in any event discourage the use of interception of communications in times of crisis or in times of armed conflict. … The function of this Tribunal is not to deter and punish illegal conduct by domestic law enforcement authorities by excluding illegally obtained evidence.”

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186 Ibid., par. 63.
187 Ibid., par. 64-68. At the admissibility stage, there should be sufficient indicia of reliability to admit on the intercept on a prima facie basis (‘prima facie indication of reliability’): see e.g. ICTY, Preliminary Decision on the Admissibility of Intercepted Communications, Prosecutor v. Milošević, Case No. IT-92-54-T, T. Ch., 16 December 2003, p. 3; ICTY, Decision Denying the Stanišić Motion for Exclusion of Recorded Intercepts, Prosecutor v. Stanišić and Zapčanin, Case No. IT-08-91-T, T. Ch. II, 16 December 2009, par. 14; ICTY, Decision on Admissibility of Intercepted Communications, Prosecutor v. Popović et al., Case No. IT-05-88-T, T. Ch. II, 7 December 2007, par. 32; ICTY, Decision on the Admission into Evidence of Intercept-Related Materials, Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-T, T. Ch. I, Section A, 18 December 2003, par. 26.
188 Exclusionary rules have two different functions, an adjudicative function and a deterrent function. Zuckerman explained the difference between these two functions: the first function is to vindicate the accused for the occurred violation of his right (take the example of a search operation or an interception of communication that violated the privacy rights of the accused). The second – deterrent – function deters the Prosecutor and the police officers from future abuses. Zuckerman analyses both theories and concludes that the justification for excluding illegally obtained evidence in criminal proceedings shifts to the ‘deterrence’ theory. He also doubts the effectiveness of this deterrent effect. He concludes that a principle of judicial integrity or legitimacy is to be preferred, a principle avoiding automatic exclusion and automatic inclusion and putting the emphasis on the balancing exercise. To the criticism that this is a very vague principle, he responds that ‘it is a mistake to assume that because individual decisions cannot be easily derived from a principle, the principle has no guiding force’. See A.A.S. Zuckerman, The Principles of Criminal Evidence. Oxford, Oxford University Press, 1989, pp. 343-345.
190 Ibid., par. 63.
The Trial Chamber stated that the admission of the intercepts should not be interpreted as implying the tribunal tacitly approving of this behaviour.\(^{191}\) Indeed, it might be asked what the deterrent effect of the exclusion of a certain piece of evidence, following an irregularity in the execution of a request, will be for local police officers. Consequently, the ICTY refuses to be guided by prospects of deterring similar behaviour by national authorities.\(^{192}\) Nevertheless, as argued elsewhere, the consequence of this attitude may well be a change in attitude of the international Prosecutor. Where evidence, illegally obtained by national authorities is admitted at trial, there is no incentive for the Prosecutor to monitor, to the extent possible, the actions by national authorities to prevent violations of individual rights as a consequence of coercive measures taken.\(^{193}\) It may even encourage further abuses.\(^{194}\) Moreover, the focus by the Trial Chamber on deterrence ignores that exclusionary rules may also serve additional purposes. Exclusionary rules also serve an adjudicative function, which aims at vindicating the accused for the violation of his or her rights.\(^{195}\) Furthermore, they ensure the integrity of the proceedings.

Also in the *Krajišnik* case, the Defence objected to the admission of allegedly illegally intercepted communications.\(^{196}\) The Defence argued, in line with the reasoning above, that by admitting the fruits of “lawless invasions”, the tribunals would be made party to these invasions of the human rights of individuals. “A ruling admitting evidence in a criminal trial has the necessary effect of legitimizing the conduct which produced that evidence, while an application of an exclusionary ruling withholds the judicial imprimatur.”\(^{197}\) The Chamber reiterated its previous holding and stated that if “arguendo, the intercepts were not obtained

\(^{191}\) *Ibid.*, par. 64.


\(^{194}\) See A.A.S. ZUCKERMAN, The Principles of Criminal Evidence, Oxford, Oxford University Press, 1989, p. 344 (“The willingness of the public to accept the authority of the criminal court as a dispenser of punishment depends on the extent to which the public believes in the moral legitimacy of the system. The morality of fairness of a system of adjudication hinges on many factors… Amongst these must also be numbered a publicly acceptable judicial attitude towards breaches of the law. A judicial community that is seen to condone, or even encourage, violations of the law can hardly demand compliance with its own edicts”).


\(^{196}\) ICTY, The Krajišnik Defence Motion for an Order Suppressing Illegally Intercepted Communications, *Prosecutor v. Krajišnik*, Case No. IT-00-39 & 40-PT, T. Ch. III, 13 September 2002. A decision was issued by the Trial Chamber as late as 29 January 2004 (Decision on Defence Motion to Exclude Certain Intercepted Communications). Nevertheless, this decision is not publicly available.

\(^{197}\) *Ibid.*, par. 22.
strictly in accordance with state legislation applicable at the time, the intercepted evidence would not be inadmissible per se under Rule 95.” The Chamber added that “there is no indication that the methods by which the intercepts were obtained amounted to a violation of human rights, such that the proceedings would be tainted through association with those methods.”

§ Illegal searches

The case law on the admission of the fruits of unlawful searches further confirms this picture. Rather than excluding illegally obtained evidence, the ad hoc tribunals engage in a balancing exercise as envisaged under Rule 89 (D) ICTY, ICTR, and SCSL RPE. In the Delalić et al. case, the ICTY was first confronted with the question of the admissibility of evidence that had been gathered through a search operation that had violated national (Austrian) procedures. 199

The search had been conducted by the Austrian police and the Prosecution tried to tender into evidence some pieces of evidence (two passports and an identity card) which had been obtained in violation of Austrian law.200 In its decision, the Trial Chamber first reiterated that it is not bound by national laws of evidence (Rule 89 (A) of the ICTY RPE), and that the general rule regarding the admission of evidence is the ‘flexibility rule’, as laid down in Article 89 (C) of the ICTY RPE, according to which all evidence which is relevant and has probative value should be allowed into evidence.201

The Chamber then referred to the exception to this general rule as laid down in Rule 95, which states that evidence casting serious doubt on its reliability or ‘evidence antithetical to, and that would seriously damage the integrity of the proceedings’ is not admissible and allows for the exclusion of evidence because of the way that it was obtained.202 Nevertheless, the Trial Chamber determined that the search operations only implied “a minor breach of a procedural rule which the Trial Chamber is not bound to apply.”203 Consequently, the items

199 ICTY, Decision on the Tendering of Prosecution Exhibits 104–108, Prosecutor v. Delalić et al., Case No. IT-96-21, T. Ch., 9 February 1998. It should be noted that the search was conducted pursuant to a search warrant that had been ordered by an investigating magistrate.
200 Ibid., par. 18.
201 Ibid., par. 13.
202 Ibid., par. 19.
203 Ibid., par. 20.
should be admitted “in the interests of justice.” Therefore, the Defence argumentation that a number of irregularities occurred in the conduct of the search of Mucić’s apartment and that the actions taken were unlawful according to Austrian law is not sufficient to necessitate the exclusion of the resulting evidence.

Importantly, the Chamber added that “if at any stage there is evidence to satisfy the Trial Chamber that rules of international recognised human rights have been violated, we reserve the right to exercise our discretion to exclude them.” Therefore, if irregularities relating to the issuance or execution of a search and seizure amount to a violation of internationally recognised human rights (including the right to privacy or the right to the peaceful enjoyment of property), the exclusion of the evidence may well be the consequence.

In the aforementioned Stakić case, ICTY Appeals Chamber had to decide on the admissibility of evidence obtained during the search and seizure of the accused’s bag during his transfer to the tribunal’s detention facility. According to the Defence, documents had been seized “illegally, improperly, and unethically” from the accused following his arrest. The Chamber held that it first has to decide whether the search operation was lawful or unlawful. If the Chamber considers the search operation was unlawful, the Chamber has to consider whether the admission of the documents would violate Rule 95 ICTY RPE or the accused’s privilege against self-incrimination (Article 21 (4) (g) ICTY Statute). In casu, the Appeals Chamber found that the Defence failed to establish that the search and seizure “was illegal in terms of the rules or international law.”

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204 Ibid., par. 21. The Chamber added “that it would constitute a dangerous obstacle to the administration of justice if evidence which is relevant and of probative value could not be admitted merely because of a minor breach of procedural rules which the Trial Chamber is not bound to apply.”

205 ICTY, Transcript, Prosecutor v. Delalić et al., Case No. IT-96-21, T. Ch., 11 June 1997, p. 3927 (emphasis added). The reference to the ‘discretion’ of the Trial Chamber seems to indicate that the Trial Chamber would rather rely on Rule 89 (D) (which offers a certain discretion to the Trial Chamber to exclude evidence) than on Rule 95 of the RPE (mandatory exclusion). ICTY, Decision on the Tendering of Prosecution Exhibits 104–108, Prosecutor v. Delalić et al., Case No. IT-96-21, T. Ch., 9 February 1998, par. 23.

206 ICTY, Decision, Prosecutor v. Stakić, Case No. IT-97-24-AR73.5, A. Ch., 10 October 2002, p. 3.

207 Ibid., p. 3. The Trial Chamber hinted at the possibility that the search of Stakić bag may be in violation of his privilege from self-incrimination. However, the Trial Chamber did not elaborate this argument further.

208 Ibid., p. 4. Similarly, the Trial Chamber had previously held that the documents had been legally seized and that it did not have to consider the question whether illegally obtained evidence is inadmissible per se, see ICTY, Decision on Defence Request to Exclude Evidence as Inadmissible, Prosecutor v. Stakić, Case No. IT-97-24-T, T. Ch. II, 31 July 2002, p. 3.
I.7.3. The International Criminal Court

A similar approach to the matter of evidence, illegally obtained through coercive measures, is taken by the ICC. It was discussed previously how in the Lubanga case, the Defence, both at the confirmation stage and at the trial stage of proceedings, raised the issue of the illegality of a search and seizure operation that had been conducted at a private residence.\(^{209}\) The Defence requested the exclusion of the items resulting from the unlawful search and seizure pursuant to Article 69 (7) ICC Statute.\(^{210}\) While the search and seizure was executed by the DRC authorities, an OTP investigator was also present. A domestic court (the Kisangani Court of Appeals) had previously affirmed that the search and seizure operation was in violation of Congolese criminal procedure.\(^{211}\) The latter procedure seemed to be conceived in order to safeguard privacy rights.

Similar to the ad hoc tribunals, Pre-Trial Chamber I confirmed that it was not bound by decisions of national courts on evidentiary matters.\(^{212}\) The Chamber then examined whether the evidence was obtained in violation of ‘internationally recognised human rights’ and could, thus, be excluded pursuant to Article 69 (7) of the ICC Statute.\(^{213}\) In a first step, the Chamber held that the right to privacy and the protection against unlawful interference and

\(^{209}\) See supra, Chapter 6, I.3.5.


\(^{211}\) See the Kisangani Court of Appeals Decision as cited in ICC, Public Redacted Version of Request to Exclude Evidence Obtained in Violation of Article 69 (7) of the Statute, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-683, PTC I, 7 November 2006, par. 6 (« La Cour estime que ce moyen de défense est pertinent et fondé. En effet, l’article 333 du Code de Procédure Pénale dispose que “les visites et perquisitions se font en présence de l’auteur présumé de l’infraction et de la personne au domicile ou à la résidence de laquelle elles ont lieu, à moins qu’ils ne soient pas présents ou qu’ils refusent d’y assister” et la jurisprudence a clarifié cette disposition en décidant dans une situation analogue que “devant les protestations légitimes du prévenu, le juge ne peut prendre en considération une pièce à conviction prétendument trouvée au bureau (ici résidence) lorsque la saisie de la pièce litigieuse a été opérée en l’absence de l’intéressé alors que, mis en état d’arrestation, celui-ci se trouvait entièrement à la disposition du Parquet et pouvait donc être conduit à tout moment sur les lieux de la saisie... »»).

\(^{212}\) Article 69 (8) ICC Statute; ICC, Decision on the Confirmation of Charges, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04 01/06-803-tEN, PTC I, 29 January 2007, par. 69; confirming, ICC, Decision on the Admission of Material from the “Bar Table”, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06-1981, T. Ch. I, 24 June 2009, par. 18.

\(^{213}\) MIRAGLIA notes that this procedural issue is particularly noteworthy as it represents the first interpretation of Article 69 and the choices made by the drafters of the ICC on the rules of evidence, see M. MIRAGLIA, Admissibility of Evidence, Standard of Proof, and Nature of the Decision in the ICC Confirmation of Charges in Lubanga, in «Journal of International Criminal Justice», Vol. 6, 2008, p. 492.
infringement of privacy is a fundamental internationally recognised right under the terms of Article 69 (7) of the ICC Statute.\textsuperscript{214} The Chamber held that the violation of national criminal procedure does not, in itself, amount to a human rights violation but, as discussed above, concluded that in the case at hand the search and seizure operation entailing the search and seizure of hundreds of documents and items was indiscriminate in nature and not proportionate to the objectives sought by the authorities. Hence, it violated the principle of proportionality under human rights law.\textsuperscript{215}

Article 69 (7) of the ICC Statute falls short of an exclusionary rule for all human rights violations.\textsuperscript{216} Rather, it provides for the mandatory exclusion of evidence if this evidence is obtained by means of a violation of the Statute or of internationally recognised human rights if (a) the violation casts serious doubt on the reliability of the evidence or (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.\textsuperscript{217} Evidence obtained through irregular coercive measures (for example a search and seizure operation without a judicial authorisation) may only be excluded when the requirements of one of the two limbs of the second prong of the test are fulfilled (‘the dual test’).\textsuperscript{218} Whereas the Pre-Trial Chamber in \textit{Lubanga} logically concluded that the human rights violation did not ‘cast serious doubt on the reliability of the evidence’, the second limb of the second prong proved to be more problematic. When examining whether the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings, the Chamber underscored the delicate \textit{balancing exercise} that should be undertaken by the Court between the rights of the accused and the need to respond to the

\textsuperscript{214} Article 69 (8) ICC Statute; ICC, Decision on the Confirmation of Charges, \textit{Prosecutor v. Lubanga Dyilo, Situation in the DRC}, Case No. ICC-01/04 01/06-803-tEN, PTC I, 29 January 2007, par. 75.

\textsuperscript{215} As discussed above, supra, Chapter 6, I.3.5; ICC, Decision on the Confirmation of Charges, \textit{Prosecutor v. Lubanga Dyilo, Situation in the DRC}, Case No. ICC-01/04 01/06-803-tEN, PTC I, 29 January 2007, par. 80 – 81. Regarding the breach of the national procedural law, the Court noted that “the unlawfulness of the search and seizure conducted in [redacted]’s absence was a breach of a procedural rule, but cannot be considered so serious as to amount to a violation of internationally recognised human rights” (\textit{ibid.}, par. 78).

\textsuperscript{216} \textit{Ibid.}, par. 84. Notably, ICC Trial Chamber I stressed that Article 69 (7) ICC Statute, dealing with illegally obtained evidence is \textit{lex specialis} to the general admissibility provisions of the Statute. See ICC, Decision on the Admission of Material from the “Bar Table”, \textit{Prosecutor v. Lubanga, Situation in the DRC}, Case No. ICC-01/04/01-1981, T. Ch. I, 24 June 2009, par. 34, 43. Consider also ICC, Decision on the Confirmation of Charges, \textit{Prosecutor v. Mparushimana, Situation in the DRC}, Case No. ICC-01/04/01-10-465-Red, PTC II, 16 December 2011, par. 61.

\textsuperscript{217} Compared to the exclusionary rule of both \textit{ad hoc} tribunals, Article 69 (7) of the ICC Statute contains no reference to the severity of the human rights violations. Consequently, this provision seems more broadly formulated, but the scope may be limited indirectly through the definition of the ‘internationally recognised human rights’.

\textsuperscript{218} ICC, Decision on the Admission of Material from the “Bar Table”, \textit{Prosecutor v. Lubanga, Situation in the DRC}, Case No. ICC-01/04/01-1981, T. Ch. I, 24 June 2009, par. 39 – 41.
expectations of the victim community and the international community.\textsuperscript{219} The Pre-Trial Chamber concluded on the basis of a comparative study of various European countries that “the issue of the admissibility of illegally obtained evidence raises contradictory and complex matters of principle”.\textsuperscript{220} The Pre-Trial Chamber further argued that “[a]lthough no consensus has emerged on this issue in international human rights jurisprudence, the majority view is that only a serious human rights violation can lead to the exclusion of evidence”.\textsuperscript{221} The Chamber then looked at the practice of the other international criminal tribunals, in particular to the Brdanin Objection to Intercept Evidence Decision, and concluded that human rights and the ICTY jurisprudence focus on the balance between the seriousness of the violation and the overall fairness of the trial.\textsuperscript{222} The evidence obtained through the illegal search and seizure was subsequently allowed for the purposes of the confirmation hearing.\textsuperscript{223}

The Prosecutor sought the admission of documents obtained during the aforementioned search and seizure operation at several instances during the trial proceedings. Therefore, Trial Chamber I also had the opportunity to consider the admissibility of the illegally obtained evidence. The Trial Chamber clarified that the second prong of Article 67 (7) (b) ICC Statute should be interpreted in light of the core values of the ICC Statute, including “respect for the sovereignty of States, respect for the rights of the person, the protection of victims and witnesses and the effective punishment of those guilty of grave crimes.”\textsuperscript{224} The Chamber, in line with the Pre-Trial Chamber, referred to the Brdanin Objection to Intercept Evidence Decision to hold that the exclusion of evidence that is otherwise admissible due to procedural considerations would be “utterly inappropriate”, as long as the fairness of the trial remains guaranteed.\textsuperscript{225} Factors considered by the Court included (i) the fact that the violation was not of a particularly grave kind, (ii) the lesser impact on the integrity of the proceedings where the

\begin{itemize}
\item \textsuperscript{219} Article 69 (8) ICC Statute; ICC, Decision on the Confirmation of Charges, \textit{Prosecutor v. Lubanga Dyilo, Situation in the DRC}, Case No. ICC-01/04 01/06-803-EN, PTC I, 29 January 2007, par. 86.
\item \textsuperscript{220} The comparative study relied upon by the Court was M. DELMAS-MARTY and J.R. SPENCER (eds.), \textit{European Criminal Procedure}, Cambridge, Cambridge University Press, 2002.
\item \textsuperscript{221} \textit{Ibid.}, par. 86; See \textit{supra}, Chapter 6, I.7.2.
\item \textsuperscript{222} \textit{Ibid.}, par. 89; See \textit{supra}, Chapter 6, I.7.2.
\item \textsuperscript{223} \textit{Ibid.}, par. 90.
\item \textsuperscript{225} ICC, Decision on the Admission of Material from the “Bar Table”, \textit{Prosecutor v. Lubanga, Situation in the DRC}, Case No. ICC-01/04-01/06-1981, T. Ch. I, 24 June 2009, par. 42. See also ICC, Decision on the Confirmation of Charges, \textit{Prosecutor v. Lubanga Dyilo, Situation in the DRC}, Case No. ICC-01/04 01/06-803

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rights of a third person were violated, rather than the rights of the accused, and (iii) the fact that the illegal acts were committed by the Congolese authorities, albeit in the presence of an OTP investigator. The Trial Chamber concluded that the evidence, notwithstanding the breach of the right to privacy, was not to be excluded pursuant to Article 69 (7) ICC Statute. The clarification offered by the Trial Chamber that the “public interest in [the] prosecution and punishment [of crimes and cases of high seriousness] cannot influence a decision on admissibility under this statutory provision” is, laudable.

The Trial Chamber is also to be lauded for not disregarding the fact that the search and seizure operation, even though it was executed by the Congolese authorities, was attended by an investigator from the Prosecution. It follows that the Prosecution was not but the “fortunate recipient” of the evidence gathered by the national authorities. The Trial Chamber considered that “mere presence at an event of this kind does not serve to engage this exclusionary rule.” The investigator could only assist. Deterrence and discipline, “if they are to be given any sustainable meaning and purpose within the framework of exclusionary rules, should be directed at those in authority – the individuals who control the process or who have the power, at least, to prevent improper or illegal activity.” Hence, the Trial Chamber adopted the same approach as the ICTY Trial Chamber in the Brdanin case. While there is truth in the Trial Chamber’s argumentation, it is to be recalled that deterrence is one, but just one, of the purposes served by exclusionary rules. Moreover, it was previously argued that turning a blind eye to violations committed by domestic law enforcement authorities may, especially in a context where the participation of these authorities in the collection of evidence is normally a prerequisite, bear with it ‘perverse effects’.

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226 ICC, Decision on the Admission of Material from the “Bar Table”, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06-1981, T. Ch. I, 24 June 2009, par. 47; ICC, Decision on “Prosecution’s Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)”, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-2589, TC I, 21 October 2010, par. 30. As noted by TURNER, the factors considered by the Trial Chamber were somewhat different from those considered by the Pre-Trial Chamber. See J.I. TURNER, Policing International Prosecutors, in «International Law and Politics», Vol. 45, 2013, p. 201.

227 ICC, Decision on the Admission of Material from the “Bar Table”, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06-1981, T. Ch. I, 24 June 2009, par. 48.

228 Ibid., par. 44.

229 Ibid., par. 45.

230 Ibid., par. 46.

231 Ibid., par. 46.

232 See supra, Chapter 6, I.7.2.

The different international criminal tribunals seem less strict regarding the admission of evidence gathered through coercive measures that are in violation of individual rights (the right to privacy or the right to the peaceful enjoyment of property) which are not explicitly covered by the tribunals’ statutory documents. Irregularities in the adoption and execution of coercive measures, which amount to human rights violations, may lead to the exclusion of the resulting items of evidence. Since breaches of the right to privacy do not necessarily influence the reliability of the evidence, it seems that international criminal tribunals favour admission. Evidence which has been unlawfully obtained will not automatically be excluded under Rule 95 ICTY, ICTR, and SCSL RPE. Rather than resorting to the mandatory exclusion mechanism of Rule 95, the ad hoc tribunals engage in a balancing test of different interests under Rule 89 (D). In a similar vein, the ICC jurisprudence does not hold that any violation of internationally recognised human rights should lead to the exclusion of the resulting evidence. This approach is in line with the approach of the majority of national criminal justice systems towards the use of illegally obtained evidence, in cases where the credibility of the evidence obtained is not in doubt.

It is important to note the contrast between the jurisprudence of the international criminal tribunals concerning the admission of evidence obtained by coercive measures in violation of state sovereignty. The Court would exclude evidence improperly collected by a national police force in an effort to educate and discipline law enforcement agencies, this could be seen as a violation of state sovereignty. Although several values should be considered, it is submitted that the assessment should be focused on the reliability of the evidence and the seriousness of the specific violation, and that evidence should not be excluded in an effort to educate and discipline national law enforcement agencies.

234 Compare for example with the jurisprudence of the ad hoc tribunals on the admission of evidence gathered in violation of the right to counsel (Article 18 (3) ICTY Statute and Article 17 (3) ICTR Statute; Rule 42 ICTY RPE, ICTR RPE and SCSL RPE).

235 S. SWOBODA, Admitting Relevant and Reliable Evidence, in T. KRUESSMANN, ICTY: Towards a Fair Trial?, Antwerp, Intersentia, 2008, p. 392. It should be noted that the case law has consistently held that reliability of the evidence is not only relevant to the weight given to the evidence, but also to its admissibility (the requirement that evidence should have sufficient indicia of reliability is read into Rule 89 (C) ICTY, ICTR and SCSL RPE). See e.g. ICTY, Decision on Appeal Regarding Statement of a Deceased Witness, Prosecutor v. Kostić and Čerkez, Case No. IT-95-14/2-AR73.5, A. Ch., 21 July 2000, paras. III.5, III.7.

236 See infra, Chapter 6, II.2.

237 As was suggested by ZAPPALÀ. Consider S. ZAPPALÀ, Human rights in International Criminal Proceedings, Oxford, Oxford University Press, 2003, p. 152 (“it seems correct to argue that any violation of internationally recognized human rights ipso facto meets the requirement that the integrity of the proceedings should not be impaired”).

individual rights and the case law on the admission of evidence obtained in violation of procedural rights of the accused (or suspect) explicitly provided for under the statutory documents. It was discussed at length how evidence obtained in violation of these procedural safeguards (e.g. the right to counsel) is usually excluded. The ICTY Appeals Chamber confirmed that a pre-requisite for the admission of evidence is the compliance by the moving party with any relevant safeguards and procedural protections and that it has been shown that the evidence is reliable. In the absence of relevant safeguards the tribunals widely admit evidence that has been obtained illegally through coercive measures, in violation of individual rights, provided that the evidence is reliable. One commentator notes that “it is more likely than not that where clear human rights guidelines are missing, judges might tend to widen the scope of admissibility to the detriment of human rights.” Since the international criminal tribunals have to resort to broad and vaguely formulated international human rights norms (such as the right to privacy or the right to the peaceful enjoyment of property), some exceptions notwithstanding, the tribunals “rather argue around them by establishing either that no violation of human rights has occurred or that, even if there has been a violation, admitting the evidence would, on balance not seem overly unfair.”

It may be noted that a certain tension exists between the general right of the accused to a fair hearing and the provisions on the admissibility of evidence which guarantee much less, to know “a hearing consisting of evidence that is not ‘antithetical’ to fairness, or that simply ‘takes account of any unfairness’.” However, from a human rights point of view, it should be noted that the admission of evidence obtained by coercive measures that breached privacy rights or other individual rights is not per se incompatible with the right to a fair trial. The ECtHR held that the assessment of evidence is in the first place a matter for the national

239 See supra, Chapter 5.
courts. Indeed, in a number of cases the Court had to rule on the admission of unlawfully obtained evidence at trial (evidence gathered in breach of the right to privacy (Article 8)).\textsuperscript{244} The Court consistently held that its task is limited to a consideration of whether the proceedings as a whole were fair (some dissenting opinions notwithstanding).\textsuperscript{245} The ECtHR considers whether the illegally obtained evidence was the sole or the main evidence upon which the conviction was based, whether the accused’s defence rights were respected and whether he or she had the possibility to challenge the authenticity and the use of the evidence.\textsuperscript{246}

\textsuperscript{244} In Khan, the Court concluded to a breach of Article 8 where evidence was obtained through a secret surveillance by means of a listening device in the absence of a statutory framework regulating the use of covert listening devices. ECtHR, Khan v. the United Kingdom, Application No. 35394/97, Reports of Judgments and Decisions 2000-V, Judgment of 12 May 2000, par. 27-28. In the P.G. and J.H. case, the recording of the voices of persons while they were charged and in their police cells (par. 60) was found to be a breach of Article 8 (2) in the absence of a regulatory framework on the concerning covert surveillance of police premises. ECtHR, P.G. and J.H. v. The United Kingdom, Application No. 44787/98, Judgment of 25 September 2001, par. 63. In the Bykov case, the Court concluded that use of surveillance in the absence of specific and detailed regulations was in breach of Article 8 (2): ECtHR, Bykov v. Russia, Application No. 4378/02, Judgment (Grand chamber) of 10 March 2009, par. 81-82.

\textsuperscript{245} Notably, a partly dissenting opinion was attached to both the Khan v. The United Kingdom and P.G. and J.H. v. The United Kingdom judgments, from Judge Loucaides and Judge Tulkens respectively. Judge Loucaides argued that the requirement of a “fair” trial under Article 6 cannot be fulfilled where the guilt of an offence is established through evidence obtained in breach of the ECHR (the evidence gathered in breach of Article 8 was the only piece of evidence). The partly dissenting opinion of Judge Tulkens is worded in even stronger language where she considers that a trial cannot be “fair” in the meaning of Article 6 if evidence obtained in breach of the Convention has been admitted during trial (the evidence in breach of Article 8 was not the only piece of evidence). In her opinion, fairness presupposes compliance with the law and \textit{a fortiori} of the rights of the convention. The fairness requirement of Article 6 ECHR entails an element of lawfulness: a trial conducted in breach of domestic law or the ECHR can never be fair.

\textsuperscript{246} The principle was first established in Schenk v. Switzerland: ECtHR, Schenk v. Switzerland, Application No. 10862/84, Judgment of 12 July 1988, par. 46 (“While Article 6 […] of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. The Court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr. Schenk’s trial as a whole was fair.”); consider also Khan v. The United Kingdom, where the Court stated that “[i]t is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the “unlawfulness” in question and, where violation of another Convention right is concerned, the nature of the violation found.” See ECtHR, Khan v. the United Kingdom, Application No. 35394/97, Reports of Judgments and Decisions 2000-V, Judgment of 12 May 2000, par. 34; ECtHR, Bykov v. Russia, Application No. 4378/02, Judgment (Grand Chamber) of 10 March 2009, par. 89; ECtHR, P.G. and J.H. v. The United Kingdom, Application No. 44787/98, Judgment of 25 September 2001, par. 76; ECtHR, Gäfgen v. Germany, Application No. 22978/05, Reports 2010, Judgment (Grand Chamber) of 1 June 2010, par. 165.

\textsuperscript{247} Notably, a partly dissenting opinion was attached to both the Khan v. The United Kingdom and P.G. and J.H. v. The United Kingdom judgments, from Judge Loucaides and Judge Tulkens respectively. Judge Loucaides argued that the requirement of a “fair” trial under Article 6 cannot be fulfilled where the guilt of an offence is established through evidence obtained in breach of the ECHR (the evidence gathered in breach of Article 8 was the only piece of evidence). The partly dissenting opinion of Judge Tulkens is worded in even stronger language where she considers that a trial cannot be “fair” in the meaning of Article 6 if evidence obtained in breach of the Convention has been admitted during trial (the evidence in breach of Article 8 was not the only piece of evidence). In her opinion, fairness presupposes compliance with the law and \textit{a fortiori} of the rights of the convention. The fairness requirement of Article 6 ECHR entails an element of lawfulness: a trial conducted in breach of domestic law or the ECHR can never be fair.
II. SPECIFIC INVESTIGATIVE MEASURES

II.1. General

At the outset, it should be noted that it is almost impossible to provide an exhaustive overview of all non-custodial coercive investigative measures given the broad and potentially unrestricted powers to collect and examine evidence at the disposal of the Prosecutor of at least some of the international(ised) criminal courts and tribunals. Therefore, a selection has been made and is based on the criterion of the actual relevance of certain investigative measures according to the practice of the international(ised) criminal tribunals.

The Prosecutor’s powers derive from the general evidence-gathering powers as laid down in the statutory documents. Consequently, and the general requirements for the adoption of non-custodial coercive measures formulated in Part I above notwithstanding, the contours of these investigative measures remain vague. On the one hand, in cases where these coercive measures are executed by national authorities pursuant to municipal law, the applicable national procedural standards further delineate these coercive measures. On the other hand, in cases where these coercive actions are executed by the tribunal on the territory of the state concerned directly, the exact boundaries of these powers are less clear. Establishing general principles concerning these coercive powers proves to be an arduous (if not impossible) task. Human rights law only provides us with broad and vague standards which are difficult to apply to concrete situations.

II.2. Search and seizure operations

For the purposes of this chapter, the term ‘search and seizure’ should be interpreted in a broad sense, as including the searching of premises, persons and objects and the seizure of objects. The seizure of persons is excluded, as are body searches. The seizure or freezing of assets occupies an important place in international criminal investigations and will be discussed in the next subsection to the present chapter. It is clear that some forms of searches, such as

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248 Article 18 (2) of the ICTY Statute, Article 17 (2) of the ICTR Statute, Article 15 (2) of the SCSL Statute and Rule 39 (i) and (ii) of the ICTY, ICTR and SCSL RPE; Article 54 (2) and (3) ICC Statute.

249 The seizure of persons will be dealt with in Chapter 7, body searches are dealt with infra, Chapter 6, II.5.

250 See infra Chapter 6, II.3.
car searches or stop and frisk searches are less relevant in the investigation of crimes considerable time following their commission.251

In order to fall within the ambit of the working definition of ‘coercive measures’, previously proposed, the search and seizure should infringe upon the individual rights and liberties of the person concerned. With regard to searches, it should be noted that human rights law understands ‘home’ in a broad sense, including the workspace.252 Consequently, a search operation in the workspace of a defence counsel is protected by the right to privacy.253 The temporary seizure of property in criminal proceedings, in its turn, amounts to an interference with the peaceful enjoyment of property in the sense of Article 1 of Protocol 1 to the ECHR and Article 21 ACHPR (Article 14 ACHPR).254 Consequently, these seizure operations can also be labelled as a ‘coercive measure’ pursuant to our working definition.


252 HRC, CCPR General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Article 17), U.N. Doc. HRI/GEN/1/Rev.6, 8 April 1988, par. 5 (clarifying that ‘home’ should be understood “to indicate the place where a person resides or carries out his usual occupation”). The case law of the ECtHR has clarified that the protection of the right to privacy extends to the work space, relying, among others, on the meaning of the French term ‘domicile’ and the object and purpose of Article 8. See ECtHR, Niemietz v. Germany, Application No. 13710/88, Series A, No. 251-B, Judgment of 16 December 1992, par. 29-31; ECtHR, Buck v. Germany, Application No. 41604/98, Reports 2005-IV, Judgment of 28 April 2005, par. 31.


254 The Inter-American Court of Human Rights interpreted the notion of property in a broad way, including all movable and immovable, corporeal and incorporeal elements, and any other immaterial object that may be of value. See IACtHR, Case of the Sawhoyamaxa Indigenous Community, Series C, No. 146, Judgment of 29 March 2006, par. 121; IACtHR, Case of Palamaru Iribarne, Series C, No. 135, Judgment of 22 November 2005, par. 102; IACtHR, Case of the Ituango Massacres v. Colombia, Series C, No. 148, Judgment of 1 July 2006, par. 174. Similarly, the ECtHR has given an autonomous meaning to the term ‘possessions’ in Article 1 of Protocol No. 1. According to the Court, “possessions” are certainly not limited to ownership of physical goods. Certain other rights and interests constituting assets can also be regarded as ‘property rights’, and thus as ‘possessions’. See e.g. ECtHR, Gassus Dossier–und Fördertechnik GmbH v. The Netherlands, Application No. 15375/89, Series A, No. 306-B, Judgment of 23 February 1995, par. 53. According to the jurisprudence of the ECtHR, seizures fall within the ambit of the right of the state to ‘control the use’ of property as it sees fit pursuant to Article 1 (2) Protocol No. 1 ECHR. (see, e.g. ECtHR, Raimondo v. Italy, Application No. 12954/87, Series A, No. 281-A, Judgment of 22 February 1994, par. 27; ECtHR, Borchonov v. Russia, Application No. 18274/04, 22 January 2009, par. 57). A ‘fair balance’ should be struck between the general interests of the community and the requirement of the protection of individual fundamental rights. In other words, these interferences should be proportionate. (See e.g. ECtHR, AGOSI v. The United Kingdom, Application No. 9118/80, Series A, No. 106, Judgment of 24 October 1986, par. 52; ECtHR, Borchonov v. Russia, Application No. 18274/04, 22 January 2009, par. 59).
II.2.1. The ad hoc tribunals and the SCSL

§ General

No explicit provision detailing search and seizure powers can be found in the Statute or the Rules of Procedure and Evidence of the ad hoc tribunals or the SCSL. The power derives from Article 18 (2) of the ICTY Statute, Article 17 (2) of the ICTR Statute, Article 15 (2) of the SCSL Statute and Rule 39 (i) and (ii) of the RPE of the ICTY, ICTR, and SCSL. According to the Trial Chamber in Stakić, the absence of an explicit provision on search and seizure is “based in principle on the expectation that such matters would be governed by the law of the requested state.” These expectations ignore the competence of the tribunal, in exceptional cases, to directly enforce search and seizures, without directing a request to the state in which the search and seizure is to be executed. Indeed, in these cases, it is not clear what conditions apply to the search and seizure operation.

At least in theory, also the Defence can request the assistance of the tribunal, and can request the issuance of search and seizure warrants. However, as one commentator notes, “it is unlikely that an accused would be granted the same broad access to search for and seize material as the prosecution.” Not only will the Defence have to indicate the relevance of the material sought, but the ICTY has adopted a practice of securing the original materials from the relevant authorities, limiting the possibilities of the Defence to ‘fish’ through these materials. This was recognized by Judge Hunt, who noted that “[t]he power of seizure of the Office of the Prosecutor (“OTP”) is a very powerful weapon in its hands. By seizing material, the OTP denies the Accused access to that material. Experience has demonstrated that the results can be deleterious to the rights of the accused”. While the Defence may also seek the assistance of state authorities or state authorities, it is evident that the Prosecution is in an advantageous position in that regard as well.

256 See supra, Chapter 6, I.2.
258 Ibid., p. 280.
§ Items that can be seized

Respect for the rights of the accused (or suspect) necessitates limitations to the items or materials that can be seized. In *Gotovina et al.*, the ICTY Appeals Chamber held that limitations may follow from the functional immunity to which the Defence team members (including the investigators) are entitled, in case the items seized “derive from acts performed by members of the [...] Defence in fulfilment of their official functions before the Tribunal.”

In *casu*, search and seizure operations were executed by the Croatian authorities at several locations associated with Gotovina’s Defence and formed part of criminal investigations for the alleged involvement in the concealment of missing military documents relating to a military operation that formed part of the proceedings before the ICTY. The Appeals Chamber ordered that materials seized from the Gotovina Defence team be returned and that no further criminal prosecutions or further investigative steps be taken against members of the Gotovina Defence. This is in line with human rights law, which requires ‘special care’ when a search operation is conducted at a law office. The ECtHR held that “search warrants have to be drafted, as far as is practicable, in a manner calculated to keep their impact within reasonable bounds. This is all the more important in cases where the

260 Ibid., p. 281.
261 See ICTY, Decision on Gotovina Defence Appeal against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-A-AR73.5, A. Ch., 14 February 2011, par. 35-36 and 67-68. In *casu*, search and seizure operations were executed by the Croatian authorities at several locations associated with Gotovina’s Defence and formed part of criminal investigations for the alleged involvement in the concealment of missing military documents relating to a military operation that formed part of the proceedings before the ICTY. Remarkably, these investigations followed an administrative investigation undertaken by Croatia into the missing documents pursuant to an order by the ICTY Trial Chamber at the Prosecutor’s request. Consider also the interim order for Croatia to stop, until further notice, all inspections of the contents of all documents and other objects that was issued by the Trial Chamber on 11 December 2009, see ICTY, Transcript, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, T. Ch. I, 11 December 2009, pp. 26160-26161. A written decision stating reasons for the oral order of 11 December was issued on 18 December 2009. See ICTY, Decision on Requests for Temporary Restraining Orders Directed to the Republic of Croatia and Reasons for the Chamber’s Order of 11 December 2009, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, T. Ch. I, 18 December 2009. Previously, Trial Chamber I had held that the items seized could include materials which are protected from disclosure under Rule 70 (A) (according to which internal documents, prepared by a party in connection with the investigation or preparation of the case are not subject to disclosure) and/or may violate Rule 97 (lawyer-client privilege). Hence, the possible handing-over of these seized materials by Croatia to the Prosecutor could make internal documents prepared by the Defence or materials protected by the lawyer-client privilege available to the Prosecution. See ICTY, Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, T. Ch. I, 12 March 2010, par. 32-35. Also in Stakić, the ICTY Trial Chamber acknowledged that the lawyer-client privilege under Rule 97 ICTY, ICTR and SCSL RPE puts a limitation on the documents that can be seized by the Prosecutor.

262 Remarkably, these investigations followed an administrative investigation undertaken by Croatia into the missing documents pursuant to an order by the ICTY Trial Chamber at the Prosecutor’s request.
263 Ibid., par. 36, 67, 71.
premises searched are the offices of a lawyer, which as a rule contains material which is subject to legal professional privilege.” 264

Limitations to the places that can be searched and items that can be seized also follow from state or diplomatic immunities of property. For example, under customary international law, the premises of the diplomatic mission enjoy immunity protection.265 It has been argued that “there is little evidence in State practice that those immunities have suffered from an exception in the special case of investigative or other measures relating to proceedings for crimes under international law;”266 Whereas Article 7 (2) ICTY Statute and Article 6 (2) ICTR and SCSL Statute do away with personal immunities, immunities of property are not included in the said provision. Therefore, a request to a state for a search of premises or the seizure of objects subject to state or to diplomatic immunity may be at odds with a state’s obligations under international law. This problem has not, thus far at least, arisen in practice.267

§ Inventory of documents

It follows from Rule 41 (B) of the ICTR and SCSL RPE that the Prosecutor is under the obligation to draw up an inventory of all documents and objects seized from the accused and should return ‘without delay’ all materials that are of no evidentiary value.268 This provision puts an affirmative obligation upon the Prosecutor “to assess the evidentiary value of the seized materials in a timely manner in order to justify her retention of any seized materials [...]”269 The provision was inserted in the ICTR RPE following their amendment in May

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268 At the SCSL, it seems to be the practice that an inventory form for seized items is served on the national authorities of a state requested to execute an arrest warrant, see e.g. SCSL, Documents Served on the National Authorities Pursuant to Rule 55 (C), Prosecutor v. Gbao, Case No. SCSL-2003-09-1, 18 March 2003.
In earlier case law, the tribunal had acknowledged the existence of a lacuna in the Statute and Rules regarding the mandatory requirement for an inventory to be made during seizures and that therefore a seizure cannot be said to have been illegal when no such inventory had been drawn. Nevertheless, the Chamber recognised “that there is want of a mandatory specific legal provision for an inventory to be made.” Unfortunately, a similar provision is lacking in the ICTY RPE. According to ICTY jurisprudence, in the absence of such a requirement, the failure to make a complete inventory of all items seized during a search and seizure does not in itself lead to the exclusion of this evidence.

§ Urgency

An explicit provision regulates instances of urgency. In such event, the Prosecutor can request the state concerned to seize physical evidence pursuant to Rule 40 (ii) of the RPE of the ICTY and Rule 40 (A) (ii) of the RPE of the ICTR, and of the SCSL. It is clear from this rule that in case of urgency, no judicial warrant is required for the Prosecutor to request a state to seize evidence. This rule arguably reflects provisions in national criminal justice systems that no judicial authorisation is necessary regarding coercive measures in cases of urgency. The judicial authorisation can be given ex post in these cases. These search and


272 ICTY, Decision on Defence Request to Exclude Evidence as Inadmissible, Prosecutor v. Stakić, Case No. IT-97-24-T, T. Ch. II, 31 July 2002, p. 3.

273 Safferling argues that in these urgent cases, contrary to other situations where the legal justification for the interference with the privacy can be found in the authorisation of a judge, the legal basis for intrusion on a person’s privacy must be considered in the light of the domestic law of that state. However, what should then be done with the evidence seized if no legal justification can be found under the domestic law? See C.J.M. Safferling, Towards an International Criminal Procedure, Oxford, Oxford University Press, 2001, p. 159.


275 It was argued previously that the explicit provision of the possibility of a search without prior judicial authorisation of any sort may be seen as a further indication of the existence of such requirement outside a scenario of procedural urgency, see supra, Chapter 6, I.3.3.

276 K. Ambos, The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports, in «European Journal of Crime, Criminal Law and Criminal Justice», Vol. 8/2, 2000, p. 117. In several national criminal justice systems, the Prosecutor can order
seizure operations should be limited and should be justified by the exigencies of their urgency.\textsuperscript{277}

\section*{§ Searches incidental to arrest proceedings}

The Prosecutor may request the Judge confirming the indictment for an order to seize documents and search the premises where the accused is arrested, when seeking a warrant of arrest.\textsuperscript{278} What is more problematic is the situation where a search operation is conducted of the premises or of the immediate surroundings in which the accused is found at the moment of his or her arrest in the absence of such order.

ICTR Trial Chamber II clarified in the \textit{Nyiramasuhuko} case that search and seizures which are incident to an arrest can sometimes be characterised as urgent measures, particularly in the light of the risk of the destruction of evidence.\textsuperscript{279} However, the Trial Chamber equally underlined the importance of a judicial warrant in the absence of a context of procedural urgency.\textsuperscript{280} More importantly, the Trial Chamber did not accept the Prosecutor’s argument that the issuance of an arrest warrant implies the authorisation for a search and seizure operation of the surroundings incidental to the arrest.\textsuperscript{281}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{278} Rule 47 (H) (i) ICTY, ICTR RPE and SCSL RPE \textit{juncto} Article 19 (2) ICTY Statute, Article 18 (2) ICTR Statute.
\item \textsuperscript{280} Ibid., par. 23. The Trial Chamber stated that “searches and seizures violate, by their nature and their effect, fundamental individual rights, recognised by most legal systems in the world and enshrined in international law, including notably, the inviolability of a person’s home” and that “most legal systems make any operation of this type conditional upon explicit judicial authorisation, which may take the form of a warrant, an order, or rogatory letters.”
\item \textsuperscript{281} Ibid., par. 22-23.
\end{itemize}
\end{footnotesize}
In the *Muvunyi* case, the Defence argued that documents had been illegally seized at the time of Muvunyi’s arrest in the United Kingdom. The Trial Chamber referred to the holding of the Appeals Chamber in *Stakić* and held that the Defence should have shown how the documents collected were illegally seized either under the tribunal’s Rules or under international law. The Chamber argued that English law provides for the seizure of materials in the course of an arrest or after that arrest has been made. Consequently, the Chamber concluded that “a sufficient legal basis existed for the seizure of materials from the accused at the time of his arrest, and for their subsequent use in proceedings before this Tribunal.” The tribunal thus holds the view that a legal basis under national law suffices for the execution of a search and seizure operation incidental to arrest proceedings, without requiring any form of judicial authorisation by the tribunal.

II.2.2. The International Criminal Court (ICC)

§ General

Similar to the *ad hoc* tribunals, the power to conduct search and seizure operations is not explicitly mentioned in the ICC Statute. The power derives from Articles 54 (3) (a) and 93 (1) (h) of the ICC Statute. Further requirements and conditions for the adoption and execution of search and seizures are subject to the domestic laws of the country requested to execute the operation, coupled with any specific measures requested by the Court, pursuant to Article 99 (1) ICC Statute. Furthermore, it has already been argued above that some conditions follow from other sources of law. It has also been argued that international human rights law dictates


283 Ibid., par. 24.

284 Ibid., par. 24. The Chamber refers to the Police and Criminal Evidence Act, 1984, which states: Section 17 (1) (a) ‘...a constable may enter and search any premises for the purpose (A) of executing a warrant of arrest issued in connection with or arising out of criminal proceedings;...’; Section 18 (1) provides that ‘a constable may enter and search any premises occupied or controlled by a person who is under arrest for an arrestable offence, if he has reasonable grounds for suspecting that there is on the premises evidence...that relates (a) to that offence, or (b) to some other arrestable offence which is connected with or similar to that offence’. Section 18 (2): ‘A constable may seize and retain anything for which he may search under subsection (1) above’.

285 Ibid., par. 25. This confirms the view that the *ad hoc* tribunals do not require a judicial warrant before the Prosecutor can use search and seizures, *supra*, Chapter 6, I.3.5.
the requirement of a prior judicial authorisation before the Prosecutor can resort to search and seizure operations.286

Domestic regulations may have been conceived to regulate interferences with the fundamental rights of the suspect (accused) or third persons. The Court may therefore face a situation where it has to examine the execution of a request for cooperation from the Court by a state in order to determine whether it should apply the exclusionary rules on the admission of evidence contained in Article 69 (7) ICC Statute.287 As acknowledged by ORIE, it will be difficult for the Court to keep entirely away from it in that case as “the observing of these formal requirements might be decisive for the determination as to whether or not human rights have been violated while obtaining the evidence.”288

§ ‘Search and seizure privacy right’ proposal

During the negotiations on the Rome Statute, a proposal was made to include an explicit provision on ‘search and seizure privacy rights’ in the ICC Statute. The Zutphen draft of the ICC Statute contained the following provision:

“[The right of all persons to be secure in their homes and to secure their papers and effects against entries, searches and seizures shall not be impaired by the Court except upon warrant issued by the [Court] [Pre-Trial Chamber], on the request of the Prosecutor, in accordance with Part 9 [7] or the Rules of the Court, for adequate cause and particularly describing the place to be searched and things to be seized, or except on such grounds and in accordance with such procedures as are established by the Rules of the Court.]”289
The proposal to adopt an express privacy right as a safeguard against unauthorised search and seizure operations was first proposed by Australia and The Netherlands, but was not adopted.290 A slightly altered version of the proposed provision was reinserted in the Working Group on Procedural Matters ("WGPM") and taken over into the Zutphen draft, but was later deleted. It was argued by EDWARDS that the principal reason for the deletion of this provision was "because it was thought that those rights were covered in other Parts of the Rome Statute, including in Part IX."291

Whereas the provision should ideally have been formulated in broader terms considering that other investigative actions may equally infringe upon privacy rights, the provision would have had the welcome effect of clarifying that the Prosecutor should seek judicial authorisation before executing a search and seizure and of further limiting the prosecutorial power by setting clear conditions for the execution of search and seizures.

The failure to include an express search and seizure provision in the ICC Statute does not mean that the right to privacy is not protected under the ICC Statute. As confirmed by the Court’s case law, the right is included in the ‘internationally recognized human rights’ referred to in Article 21 (3) of the ICC Statute and is therefore binding upon the Court and upon the Prosecutor when conducting investigations.292

§ Items that can be seized

An improvement in comparison with the procedural frameworks of the ad hoc tribunals and the SCSL is the clarification under Article 98 (1) ICC Statute, restricting the power to request assistance in relation to property which is subject to state or diplomatic immunity. These immunities will prevail, unless the Court can first obtain the cooperation of the third state for the waiver of that immunity.293 Consequently, the ICC cannot request states to search

291 Ibid., p. 350.
292 See ICC, Decision on the Prosecutor’s Request Relating to three Forensic Experts, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. ICC-01/04-01/07-988, T. Ch. II, 25 March 2009, par. 5. See supra, Chapter 2, III.2.
293 Whereas the reference in Article 98 (1) may mean two things, to know ‘every state other than the state requested’ or, alternatively, ‘a non-State party’, the former interpretation is to be preferred, where the ICC Statute on other occasions uses the term ‘a State not party to the Statute’ to refer to non-States Parties. See C.
premises or seize objects protected by these immunities. Pursuant to Article 27 ICC Statute, States Parties do not renounce claims of state or diplomatic immunity of property.

In the Mbarushimana case, an issue arose with regard to items that had been seized at the suspect’s house in France. However, this litigation concerned the question of whether potentially privileged materials, which are not subject to disclosure pursuant to Rule 73 ICC RPE, had been seized rather than the question of whether these privileges put limitations on the kind of items which can be seized.294

II.2.3. Other tribunals with international elements

§ ECCC and SPSC

The procedural frameworks of the ECCC and the SPSC share that they both provide a detailed set of procedural conditions regulating the execution of search and seizures, akin to what is found in most national jurisdictions in common.295 Search and seizures could/can normally only be initiated by the Investigating Judge or Co-Investigating Judges respectively. During the preliminary investigation, the ECCC Co-Prosecutors can request that judicial police officers or investigators search premises and gather relevant information, only with the written approval of the owner or occupier of the premises.296 Nevertheless, if the owner or occupier is absent, or in cases where he or she refuses access, a written judicial authorisation by the President of the Pre-Trial Chamber is required.297

Both tribunals include exceptions in cases of urgency. At the ECCC an exception exists for the requirement to obtain a written approval for searches conducted during the preliminary investigation: the approval by the owner or occupier may be given orally and be confirmed in

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295 Section 15 TRCP; Rules 61 and 62 ECCC IR. The judicial police can conduct search and seizures upon rogatory letter. Exceptionally, search and seizures can be conducted by the Judge or Judges indicated by the Trial Chamber, when the Trial Chamber considers the conduct of additional investigations necessary (Rule 93 (2) ECCC IR).

296 Rule 50 (2) ECCC IR.

297 Rule 50 (3) ECCC IR.
written form within 48 hours. The SPSC also provided for warrantless searches in cases of urgency. In this scenario, the written record of the search had to be sent to the Investigating Judge immediately who would assess the regularity of the search and seizure \textit{ex post}.\footnote{Required are reasonable grounds to believe that evidence of a crime is located in or on the premises and that: (a) such evidence may be tampered with, removed or destroyed; or (b) it is necessary to safeguard or preserve the scene of a crime; or (c) the police are in hot pursuit of a suspect; or (d) there is an immediate danger to the safety or security of persons.}

At the ECCC, irrespective of whether the search and seizure has been authorised by the president of the Pre-Trial Chamber or by the Co-Investigating Judges, these measures should respect the general principles of proportionality and of necessity which are included in Rule 21 (2) ECCC IR.\footnote{See supra, Chapter 6, I.1.} In turn, the procedural framework of the SPSC included an important substantial requirement for the initiation of searches. It included a threshold for the issuance of a search warrant, to know ‘reasonable grounds to believe that this search would produce evidence necessary for the investigation or would lead to the arrest of a suspect whose arrest warrant has previously been issued’.\footnote{Section 15.2 TRCP.} Moreover, the provision detailed the necessary content of a search warrant, including the identification of the location or items to be searched, the reasons for the search, the restrictive measures that could be used by the police officers during the search and the time of day during which the search warrant could be executed.\footnote{Section 15.3 TRCP.} The search warrant had to be served to the occupant of the premises.

While the SPSC procedural framework limited searches to daylight hours, the ECCC only provides for a similar limitation for searches conducted during the preliminary investigation.\footnote{Rule 50 (2) ECCC IR (investigators or police can only enter the premises between six o’clock in the morning and six o’clock in the evening).} The ECCC procedural framework provides that a search operation should be executed in the presence of the occupant of the premise or two witnesses if this is not possible.\footnote{Rule 61 (1) ECCC IR (judicial investigation) and Rule 50 (3) ECCC IR (preliminary investigation).} The SPSC procedural framework stated that the police ‘may’ provide for at least one independent witness if nobody is present at the premises.\footnote{Section 15.6 TRCP.} A written record of the search, including an inventory of items seized should/had to be made at both the ECCC and the SPSC.\footnote{Rule 50 (2) and (5) ECCC IR (search during preliminary investigation); Rule 61 (2) and (3) ECCC IR (judicial investigation); Section 15.5 TRCP.}
At the STL, the prosecutorial power to conduct search and seizures derives from the general evidence-collecting powers. The Prosecutor or the Head of the Defence Office (at the request of the Defence) may either request Lebanon or a third state to execute the search and seizure directly or have the search and seizure executed by the judicial authorities, with or without the presence of OTP (or Defence) staff. In exceptional circumstances the Pre-Trial Judge can request a state to search premises or to seize evidence, at the request of a party or of a victim or proprio motu. This presupposes that the parties are not able to collect the evidence themselves, and collecting this evidence would be in the interests of justice. The Pre-Trial Judge can proprio motu gather evidentiary items, if he considers that the interests of justice, the need for the impartial establishment of the truth, and the necessity to ensure a fair and expeditious trial, in particular the need to ensure the equality of arms and to preserve evidence, make it imperative. The seizure seems limited to ‘probative materials’.

No other provisions regulate the adoption or execution of search and seizures. In the absence of an express provision establishing the need for a judicial authorisation to rely on search and seizure operations, the competence of the Pre-Trial Chamber to provide such warrants and orders, as are necessary for the conduct of the investigations, may be interpreted as including an obligation to request judicial authorisation.

II.3. Tracing, freezing, and seizure of property, proceeds or instrumentalities of the crime

II.3.1. Introduction

Seizure can also be unrelated to the search of premises. Notably, assets of a suspect or accused may be seized or frozen in the course of the investigation. Whereas the jurisprudence of the ad hoc tribunals in relation to such measures is scarce, these provisional measures

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306 Article 11 (5) STL Statute, Rule 61 (i) STL RPE.
307 Rule 16 (B) and (C) STL RPE; Rule 18 (B) and (C) STL RPE. Consider also Article 15 of the STL Agreement on the cooperation between Lebanon and the Tribunal.
308 Rule 92 (A) and (C) STL RPE.
309 Rule 77 (A) and (B) STL RPE. Consider also Article 18 (2) STL Statute which only refers to the Prosecutor.
prove more important at the ICC, especially in light of the reparation scheme envisaged in the ICC Statute.310

These provisional measures are not always aimed at gathering evidence or information to establish the guilt or innocence of the accused (e.g. by proving the role of those most responsible). They serve additional purposes. These acts may be supportive of the execution of other coercive measures. They may serve the administration of justice by ensuring the execution of the arrest warrant by means of drying up the accused’s support network. Furthermore, these measures may anticipate and safeguard the potential execution of the penalty of restitution of property. Finally, the nature of the ICC proceedings allows for the ordering of a fine or a forfeiture of proceeds, property, and assets, which may be used to compensate victims. In this regard, the provisional freezing of assets supports the goals of international criminal justice and of providing satisfaction to victims.

It will be illustrated that different problems surround the use of such measures. On the one hand, to some extent, these actions are at odds with the presumption of innocence. On the other hand, since assets (primarily moveable goods) can easily be moved and hidden, it will be important to freeze these assets at an early point in the investigation. Swift action is essential.311 In its turn, this raises questions regarding the minimum threshold required for adopting these orders. Furthermore, and to ensure the efficiency of freezing orders, it will be important that applications for these orders can be made on an *ex parte* basis, without the notification of the person concerned.

§ Working definition

Neither the statutory documents nor the relevant jurisprudence of any of the international criminal tribunals define what should be understood under the ‘freezing of assets’ (Rule 61 (D) ICTY and ICTR RPE) or the ‘identification, tracing, freezing or seizure of proceeds, property, assets and instrumentalities of crimes’ (Article 93 (1) (k) ICC Statute).312 The lack

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310 See infra, Chapter 6, II.3.3.
312 See the discussion of this provision, infra, Chapter 6, II.3.3.
of any definition is striking, since these measures by nature infringe upon the individual rights (right to the peaceful enjoyment of property) of suspects and accused persons.

In the absence of a definition, some relevant international instruments may provide us with a useful working definition. Firstly, ‘freezing’ or ‘seizure’ refers to a provisional measure. It entails a temporal infringement on the suspect’s (or the accused’s) property rights and deprives him or her of the availability of his financial resources. In that sense, it should be distinguished from permanent forms of deprivation of property (forfeiture, confiscation). The U.N. Convention against Transnational Organised Crime defines it as “temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority.”

Article 93 (1) (k) ICC Statute limits the objects that can be seized to proceeds, property, assets and instrumentalities of crimes. Again, international instruments may offer some guidance in defining these concepts. Firstly, ‘proceeds’ can be defined as any property, derived from or obtained, directly or indirectly, from the criminal offence (productum sceleris). Within this sub-section, secondly, ‘property’ will be defined as assets of any description, irrespective of its nature (corporeal or incorporeal, moveable or immovable) including legal documents evidencing title to or interests in these assets. Lastly, ‘instrumentalities’ can be defined as any property which is used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences (instrumentum sceleris).

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314 Article 2 (g) of the United Nations Convention against Transnational Organised Crime; Article 1 (a) of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism of the Council of Europe.

315 Article 2 (d) of the United Nations Convention against Transnational Organised Crime; Article 1 (b) of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism of the Council of Europe.

316 Article 1 (c) of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism of the Council of Europe.
II.3.2. The ad hoc tribunals and the SCSL

Provisional measures to freeze the assets of the accused are explicitly provided for in relation to Rule 61 (ICTY and ICTR RPE) proceedings (procedure in the case of a failure to execute an arrest warrant in a reasonable time). According to Rule 61 (D), the Trial Chamber can, *proprio motu* or upon request by the Prosecutor, order (a) State(s) to adopt provisional measures to freeze the assets of the accused, without prejudice to the rights of third parties.  

In the Milošević case, the Prosecution made an application for a consequential order to the arrest warrant to request that states provisionally freeze the assets of the accused.  

According to the Prosecution, the freezing of assets intends to prevent the accused at large from using these assets to evade arrest and from taking steps to disguise his assets or putting them beyond the reach of the tribunal. However, it also serves a second, separate purpose. Assets can be frozen for the purpose of granting the restitution of property or payment from its proceeds, which can be ordered by the Trial Chamber pursuant to Article 24 (3) ICTY Statute, Article 23 (3) ICTR Statute and Article 19 (3) SCSL Statute as well as to Rule 105 ICTY and ICTR RPE and Rule 104 SCSL RPE upon conviction.

The application was based on Rule 54 ICTY RPE. The ICTY Single Judge acknowledged that such recourse may be at odds with the more specific procedure that can be found in Rule 61 (D). This provision authorises the ordering, by the Trial Chamber (whereas pursuant to Rule 54, a Judge can issue such order), of provisional measures to freeze the accused’s assets and to have them frozen for the purpose of granting the restitution of property or payment from its proceeds, which can be ordered by the Trial Chamber pursuant to Article 24 (3) ICTY Statute, Article 23 (3) ICTR Statute and Article 19 (3) SCSL Statute as well as to Rule 105 ICTY and ICTR RPE and Rule 104 SCSL RPE upon conviction.

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317 Provisional measures can be ordered by the Trial Chamber for the preservation and protection of property or proceeds only after a judgement of conviction (Rule 105 (A) ICTY and ICTR RPE and Rule 104 (A) SCSL RPE).
319 Ibid., par. 27.
320 Provided that a finding pursuant to Rule 98ter (B) ICTY RPE (Rule 88 (B) ICTR and SCSL RPE) has been made in the judgement. Consider the argumentation of the Prosecution in the Milošević case referring to the indictment which alleged that property was unlawfully taken from the homes of victims and that many victims were robbed of money and other valuables. See ibid, par. 26. Similarly, in Musema, the ICTR Trial Chamber stated that it could only make an order for the restitution of property if the indictment contained a charge of the unlawful taking of property; see ICTR, Decision on an Application by African Concern for Leave to Appear as Amicus Curiae, Prosecutor v. Musema, ICTR-96-13-T, T. Ch. I, 17 March 1999, par. 10-11.
321 Ibid., par. 27, 28.
322 Notably, the 1999 Expert Group made the suggestion to leave this power to the single Judge in Rule 61 proceedings. See, UNITED NATIONS, Comprehensive report on the results of the implementation of the recommendations of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the
assets in the specific situation in which the arrest warrant has not been executed within a reasonable time. Although the Judge (Hunt) acknowledged that Rule 61 (D) ICTY RPE seems to limit the power under Rule 54 to order these provisional measures, the power ultimately derives from Article 19 (2) of the ICTY Statute and Rule 47 (H) (i) of the ICTY RPE. Consequently, no such limitation can be placed upon the power to issue orders to freeze assets.\(^{323}\) Hence, the freezing of assets may also be ordered by the Judge upon the confirmation of the indictment.

While the Prosecution in this case sought a court order, and the tribunal subsequently acknowledged the existence such power to order these provisional measures, this decision does not resolve the question of whether there is an obligation incumbent upon the Prosecution to obtain a court order or whether it can directly request States to freeze assets.\(^{324}\) Since the freezing order was issued in casu by the Confirming Judge based on Article 19 (2) ICTY Statute, a prima facie standard should be satisfied.\(^{325}\) Whether assets may be frozen before the confirmation of the indictment remains unclear.

The SCSL RPE do not envisage a provision similar to Rule 61 (D) ICTY and ICTR RPE. In the Norman case, an SCSL Judge declined to issue a similar order.\(^{326}\) Single Judge Thompson stated that “nowhere is it expressly provided that there is a law enforcement power to seek an order from a court to freeze the assets of an indicted person pending trial.”\(^{327}\) This freezing or

\(^{323}\) ICTY, Decision on Review of Indictment and Application for Consequential Orders, Prosecutor v. Milošević et al., Case No. IT-99-37-I, T. Ch., 24 May 1999, par. 27 - 28. It has been argued by SLUITER that “it would be undesirable if Judges, or other organs of the Tribunal, could circumvent the RPE by resorting exclusively to the “broad” provisions in the Statute. He argues that where Rule 61 (D) ICTY RPE limits the power conferred by Rule 54, it equally limits Article 19 (2) ICTY Statute (as Rule 54 further details the powers provided for under Article 19 (2)). To hold otherwise would violate the generalis-specialis principle. Whereas the Rule 61 (D) is not well-suited to deal with situations where urgent action is required, this provision governs the freezing of assets to facilitate the execution of an arrest warrant. G. SLUITER, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1997-1999, Vol. III, 2001, p. 48.

\(^{324}\) On this particular issue, see infra, Chapter 6, II.3.2, fn. 335 and accompanying text.

\(^{325}\) While a similar threshold exists before the ICTR, the threshold for the confirmation of the indictment at the SCSL seems to be considerably lower.

\(^{326}\) SCSL, Norman – Decision on Inter Partes Motion by Prosecution to Freeze the Account of the Accused Sam Hinga Norman at the Union Trust Bank (SL) Limited or at any Other Bank in Sierra Leone, Prosecutor v. Norman et al., Case No. SCSL-04-14-PT, T. Ch., 19 April 2004.

\(^{327}\) Ibid., par. 10. It should be noted that the SCSL RPE do not envisage a provision similar to Rule 61 (D) ICTY and ICTR RPE.
Forfeiture is only explicitly referred to in a post-conviction setting. Even then, these measures are limited to property that has been acquired unlawfully or as a result of criminal conduct. The Judge, consequently, set a high threshold for any order to freeze assets of an accused pending trial, to know: “whether there is clear and convincing evidence that the targeted assets have a nexus with criminal conduct or were otherwise illegally acquired.” In explaining this threshold, the Judge referred to the infringement of such course of action on the constitutionally and internationally recognised right to property and the presumption of innocence. This high a threshold, which resembles a standard for conviction, may render this prosecutorial tool useless. Indeed, the standard seems too high to be a provisional measure. Nevertheless, the question as to the link required between the assets frozen and the criminal conduct is a pertinent one.

In line with the ICTY and the SCSL, it seems that applications for orders to seize assets have only sporadically been made at the ICTR. Orders to seize assets were made in relation to Felicien Kabuga, who allegedly financed the genocide of Tutsis in Rwanda. Orders were made requesting different states to freeze the assets of the accused. These orders were not made for the goal of compensating the victims but to serve other goals, including the execution of the arrest warrant against the accused. Based on Rule 40 (A), the Prosecutor requested that the French authorities freeze certain bank accounts owned by Kabuga and of his family. Notably, the Prosecutor did not request a judicial order by a Judge or Trial Chamber. The French authorities complied. When Kabuga’s family filed a request to the President of the ICTR to lift the provisional measure they were informed that they did not

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328 Article 19 (3) SCSL Statute; Rule 88 (B) and Rule 104 (C) SCSL RPE.
329 Ibid., par. 11.
330 Ibid., par. 13. Single Judge Thompson further explained that what is ‘clear and convincing evidence’ will depend on the particulars of the case. The targeted property must be specifically identifiable as a product of criminality or illegality. Neither probable cause nor mere suspicion or speculation will suffice.”
331 Ibid., par. 14.
332 A. KLIP, Commentary, in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals: The Special Court for Sierra Leone 2003 - 2004, Vol. IX, 2001, p. 742. KLIP remarks that, where the Judge found that the SCSL provides for forfeiture as a final measure, it would only be logical that such measure is also provided for as a provisional measure. For a similar view, see L. VIERUCCI, "Freezing of assets", in A. CASSESE, The Oxford Companion to International Criminal Justice, Oxford, Oxford University Press, 2009, p. 327.
333 Interview with a member of the OTP, ICTR-09, Arusha, 20 May 2008, p. 9.
334 Interview with Dr. Alex Obote Odora of the OTP, ICTR-11, Arusha, 21 May 2008, p. 13 (“it has not been the context of compensating the victims”).
have *locus standi* before the tribunal. The Appeals Chamber overturned that decision. It entertained, somewhat enigmatically, that where the Judges drafted the Rules, they retain the responsibility to review the working of an investigative action undertaken by the Prosecutor pursuant to a Rule, on a complaint by a non-party about any hardship caused by such action. The Appeals Chamber remitted the matter to a Trial Chamber. Furthermore, the Appeals Chamber emphasised the principle that a decision of a non-judicial body, which affects the liberty of individuals or their property, should be subject to judicial review. From the foregoing, it appears that the inclusion of a right of non-parties to request for the return of items seized is to be preferred.

ICTR OTP staff often referred to the specific context of Rwanda when asked why more applications have not been made. They responded that in most cases, no property was left that could be frozen and restituted. The accused has usually lost their property. In addition, no victims have stood up to reclaim property.

Similar to other search and seizures, the issue of state or diplomatic immunity of property could arise. Whereas, pursuant to Article 22 (3) of the Vienna Convention on Diplomatic Relations, premises of the mission are immune to search, requisition, attachment or execution, this protection seems limited to protection of the premises of the mission. The question arises whether the tribunal can order the freezing of a bank account used by a diplomatic

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336 Ibid.
337 Ibid.
338 Ibid. (emphasis added). Judge Gunawardana attached a Declaration in which he emphasised that he does not agree with the inclusion of this principle, because it is “tantamount to a declaration of a principle, which is too broad for the purpose of this case, even if it is an accurate representation of international law” (emphasis added). Judge Shahabuddeen attached a declaration in which he concluded that, notwithstanding the hortatory character of such statement, “it is not safe to assume that a Trial Chamber, absent an enabling amendment of the Statute, necessarily has jurisdiction to make a jurisdictional review of any and every decision of a non-judicial organ of the Tribunal which affects the liberty of individuals or their property” (par. 3).
339 Compare Rule 74 (5) ECCC IR, which states that “[a]ny non-party to the investigation proceedings who has requested the return of seised items shall be entitled to appeal against any order of the Co-Investigating Judges denying such request.”
340 Interview with Dr. Alex Obote Odora of the OTP, ICTR-11, Arusha, 21 May 2008, p. 11 (The interviewee recalls that even where some of the accused may have some property on paper, the property has often been confiscated or appropriated by the government, or persons who previously lived in exile have been recognized as the new owners. The interviewee in that regard referred to the fact that the office used by the OTP in Kigali belonged to one of the accused).
341 Interview with a member of the OTP, ICTR-16, Arusha, 4 June 2008, p. 10.
mission to cover their daily expenses. In most jurisdictions where the possibility exists to execute against foreign states on a wide basis (thus not limited to property directly linked to the cause of action), courts have decided that embassy accounts are not subject to enforcement.344

II.3.3. The International Criminal Court

Pursuant to Article 57 (3) (e) of the ICC Statute, the Pre-Trial Chamber may proprio motu or at the request of the Prosecutor or of victims (who have made a request for reparations or have made a written undertaking to do so)345 seek cooperation from states in taking protective measures for the purpose of forfeiture.346 By restricting these requests for protective measures to situations in which a warrant of arrest or a summons has already been issued, a threshold has been included in the provision. Moreover, the Pre-Trial Chamber must have due regard to the strength of the evidence and the rights of the parties concerned. According to Rule 99 (2) ICC RPE, prior notification of the suspect against whom the protective measures are sought is not necessary unless such notification would not jeopardise the effectiveness of the protective measures.347

The Pre-Trial Chamber’s power is accompanied by the requirement that States Parties provide cooperation for the “identification, tracing and freezing or seizure of proceeds, property, assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice


345 The reference to a ‘written undertaking’ was included to have at least some formal indication where the property rights of the suspect are at stake, see P. LEWIS and H. FRIMAN, Reparations to Victims, in R.S. LEE (ed.), The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence, Ardsley, Transnational Publishers, 2001, p. 489.

346 Article 57 (3) (e) ICC Statute juncto Rule 99 (1) ICC RPE.

347 The draft provision prescribed notification, with the exception of cases of urgency. Where no prior authorisation had occurred, an inter partes hearing should be organised. Nevertheless, the procedure was changed out of concerns that the suspect could hide his or her assets before this formal procedure was completed. Now, where the order is made without prior notification, the Registrar should notify those against whom a request is made ‘as soon as is consistent with the effectiveness of the measures requested’. (Rule 99 (3) ICC RPE). See P. LEWIS and H. FRIMAN, Reparations to Victims, in R.S. LEE (ed.), The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence, Ardsley, Transnational Publishers, 2001, pp. 489-490.
to the rights of bona fide third parties” (Article 93 (1) (k) ICC Statute).\textsuperscript{348} It follows from the reference in Article 57 to Article 93 (1) (k) ICC Statute that the latter provides an exhaustive list of protective measures that can be ordered by the Chamber by way of a request for assistance under Article 57 (3) (e).\textsuperscript{349}

In its turn, this latter provision is linked to Article 77 (2) (b) ICC Statute, providing the legal basis for the Court to order, upon conviction, “a forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.” No explicit reference to the seizure or freezing of assets to support the execution of a warrant of arrest can be found in the ICC Statute or the RPE. Nevertheless, the Court itself has previously underlined the importance of these measures for the arrest of a suspect or accused person, in order to disrupt the suspect’s support network.\textsuperscript{350} In this regard, the freezing of assets serves a twofold purpose of facilitating enforcement and supporting the arrest and surrender.\textsuperscript{351}

In the \textit{Lubanga} case, Pre-Trial Chamber I interpreted Article 57 (3) (e) ICC Statute as including protective measures for the purpose of eventual reparations of victims.\textsuperscript{352} From a strict literal reading of Article 57 (3) (e) ICC Statute, one may conclude that such cooperation requests can only be aimed at the enforcement of a future penalty of forfeiture. However, the provision includes a reference to ‘the ultimate benefit of victims’. The Pre-Trial Chamber, on the basis of a contextual\textsuperscript{353} and a theological\textsuperscript{354} interpretation of the provision, concluded that

\textsuperscript{348} Article 93 (1) (k) ICC Statute also refers to the freezing or seizure of the ‘instrumentalities of the crimes for the purpose of eventual forfeiture’. Nevertheless, it has been argued that such reference to the \textit{instrumentum sceleris} “is widely believed to be an error.” The restraint of the instrumentalities of the crime was removed as a possible sanction under the Statute during the negotiations at Rome. Consider: W.A. SCHABAS, The International Criminal Court: A Commentary on the Rome Statute, Oxford, Oxford University Press, 2010, p. 1021; C. KRESS and K. PROST, Article 93 in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, München, Verlag C.H. Beck, 2008, p. 1578. It should be noted that a request under Article 93 (1) (k) can also be made in conjunction with Article 75 (4) ICC Statute to ensure the enforcement of a reparations order. Nevertheless, a conviction is required for such order to be taken.


\textsuperscript{350} ICC, Report of the Bureau on Cooperation, ICC-ASP/6/21, par. 41.


\textsuperscript{352} ICC, Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, \textit{Prosecutor v. Lubanga, Situation in the DRC}, Case No. ICC-01/04-01/06-8, PTC I, 24 February 2006, par. 130 and following.

\textsuperscript{353} \textit{Ibid.}, par. 130-134. In particular, the Pre-Trial Chamber argued that Rule 99 (1) ICC RPE, which further details Article 57 (3) (e) ICC Statute, is to be found in the subsection dealing with reparations to victims.
this provision also includes requests for the taking of protective measures for the purpose of providing reparations to victims. In addition, this feature derives from the Statute’s ‘key feature’, to know the reparation scheme.\(^\text{355}\) The Pre-Trial Chamber underlined the importance of the early seizure or freezing of assets:

“Existing technology makes it possible for a person to place most of his assets and moveable property beyond the Court’s reach in only a few days.” “Therefore, if assets and property are not seized or frozen at the time of the execution of a cooperation request for arrest and surrender, or very soon thereafter, it is likely that the subsequent efforts of the Pre-Trial Chamber, the Prosecution or the victims participating in the case will be fruitless.”\(^\text{356}\)

Indeed, without the Court exercising its power to seize assets as early as possible in the proceedings, the prospects of monetary awards for the victims will remain limited.\(^\text{357}\)

A request to the DRC to trace, identify, freeze and seize assets and property belonging to Lubanga (pursuant to Articles 57 (3) (e) and 93 (1) (k) ICC Statute) was later made, alongside the request for cooperation in the execution of the warrant of arrest. Since the warrant was issued under seal, the Pre-Trial Chamber required the Registrar to wait until the decision to unseal the warrant of arrest before transmitting a similar cooperation request to the States Parties.\(^\text{358}\) The latter request was, thus, made public. The decision to issue a public

\(^{354}\) Ibid., par 135 (The power the Court has to grant reparations is a distinctive feature, intended to alleviate the negative consequences of victimisation. If cooperation can be sought only to take protective measures to guarantee the future enforcement of a residual penalty, this would be contrary to the “ultimate benefits of victims”).

\(^{355}\) In the wording of the Pre-Trial Chamber, “early tracing, identification and freezing or seizure of the property and assets of the person against whom a case is launched through the issuance of a warrant of arrest or a summons to appear is a necessary tool to ensure that, if that person is finally convicted, individual or collective reparation awards ordered in favour of victims will be enforced.” Otherwise there may be no property or assets available to enforce the award (ibid., par. 136).

\(^{356}\) Ibid., par. 137. Such could, according to the Pre-Trial Chamber, also occur in the Lubanga case. While Lubanga had been imprisoned, he had access to unmonitored satellite phone communications and could receive external phone calls. Moreover, the Pre-Trial Chamber acknowledged that Lubanga had the incentive and means to place his property and assets beyond the reach of the Court as soon as he becomes aware of the issuance of an arrest warrant against him (ibid., par. 138).


\(^{358}\) ICC, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06-8, PTC I, 24 February 2006, par. 139; ICC, Request to States Parties to the Rome Statute for the Identification, Tracing and Freezing or Seizure of the Property and Assets of Mr. Lubanga
request was criticised as such requests may be self-defeating, since assets can easily and rapidly be moved.359

Remarkably, in Lubanga, the Pre-trial Chamber criticised the Prosecutor for not having made an application for protective measures for the purpose of forfeiture together with the application for a warrant of arrest. While the Chamber in the instant case consequently decided to act proprio motu, it opined that where the Prosecutor is the organ of the Court primarily in charge of the investigation of the situation in the DRC, the Prosecutor should take this matter into consideration in view of future applications for a warrant of arrest or a summons to appear as such would greatly benefit the effectiveness of the reparation system.360

The Regulations of the OTP address these concerns and determine that the OTP should consider, at the time when an application for a warrant of arrest or summons to appear is considered, to request measures for the identification, tracing, and freezing or seizure of property, assets or the instrumentalities of the crimes, in particular for the ultimate benefit of victims.361

Similar requests for the identification, tracing and freezing or seizure of property and assets have been issued to the competent national authorities by the Pre-Trial Chamber regarding a number of other suspects.362 The Prosecutor acknowledged that in the future it will seek to

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360 ICC, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06, PTC I, 24 February 2006, par. 141.

361 Regulation 54 (1) of the Regulations of the Office of the Prosecutor. According to Regulation 54 (2), the OTP will consider: (a) the availability of specific information regarding the existence of proceeds, property, assets or instrumentalities of crimes to be identified, traced or frozen within a given jurisdiction; and (b) any relevant information regarding persons enjoying the power of disposal with regard to such proceeds, property, assets or instrumentalities of crimes. Regulation 49 adds to this that “for the purposes of article 57, paragraph 3 (e), article 77, paragraph 2 (b) and article 93, paragraph 1 (k), the Office shall pay particular attention in its investigations to the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes, in particular for the ultimate benefit of victims.”

362 Consider, e.g. ICC, Urgent Request to the Democratic Republic of the Congo for the Purpose of Obtaining the Identification, Tracing, freezing and Seizure of the Property and Assets of Germain Katanga, Prosecutor v.
rely more on financial information not only to prove the role of those most responsible, but also to assist in providing reparations to victims.365

§ What can be seized?

The use of the term ‘forfeiture’ in Article 57 (3) (e) ICC Statute suggests that only proceeds, assets or property which are directly or indirectly related to the crime can be seized.364

Nevertheless, as discussed previously, the Pre-Trial Chamber held in Lubanga that, since “forfeiture is a residual penalty pursuant to Article 77 (2) (a) of the ICC Statute, it will be contrary to the ‘ultimate benefit of victims’ to limit to guaranteeing the future enforcement of this residual penalty the possibility of seeking the cooperation of states parties to take protective measures under Article 57 (3) (e) of the Statute.”365

Consequently, requests for provisional freezing or seizure should not be limited to the proceeds, property or assets which have been derived directly or indirectly from a crime within the jurisdiction of the court. Protective measures may relate to other proceeds, property or assets owned or controlled by the suspect.366 It is evident that when all assets of a suspect or accused have been frozen, this may frustrate the payment of his or her defence counsel. In such a case, the Court can order the States Parties to (partially) lift the freeze.367 States Parties

Katanga, Situation in the DRC, Case No. ICC-01/04-01/07, PTC I, 6 July 2007; on 27 May 2008, a request for cooperation was addressed to the Republic of Portugal to identify, trace, freeze and seize any property and assets of Mr. Jean-Pierre Bemba located on its territory, subject to the rights of bona fide third parties, which was subsequently executed by the Portuguese authorities. Nevertheless, some of the money frozen on Portuguese bank accounts by the Portuguese authorities, allegedly seemed to have disappeared. Subsequently, the Pre-Trial Chamber requested the competent judicial authorities to initiate an investigation into the alleged disappearance of the money that had been frozen. See ICC, Request for Cooperation to Initiate an Investigation Addressed to the Competent Authorities of the Republic of Portugal, Prosecutor v. Bemba Gombo, Situation in the CAR, Case No. ICC-01/05-01/08, PTC II, 17 November 2008, par. 3. In relation to other suspects, similar requests for protective measures have been issued. Nevertheless, these requests remain confidential. See for example the reference to Ngudjolo Chui, Al Bashir, Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman in ICC, Prosecution Reponse to the Defence’s Urgent “Requête aux fins de suspension de toute la procedure en cours”, Prosecutor v. Bemba Gombo, Situation in the CAR, Case No. ICC-01/03-01/08, PTC II, 7 August 2009.


364 See the definition of “forfeiture” in Article 77 (2) (b) ICC Statute.

365 ICC, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06, PTC I, 24 February 2006, par. 135.

366 Consider, for example, ICC, Request for Cooperation to Initiate an Investigation Addressed to the Competent Authorities of the Republic of Portugal, Prosecutor v. Bemba Gombo, Situation in the CAR, Case No. ICC-01/05-01/08, PTC II, 17 November 2008, par. 3 (the Pre-Trial Chamber requested the assistance of Portugal in the identification, tracing, freezing or seizure of any assets or proceeds of Bemba (emphasis added)).

367 Ibid., par. 7-8.
should comply with requests for the identification, tracing, and freezing of assets without prejudice to the rights of *bona fide* third parties.\(^{368}\)

II.3.4. Other tribunals with international elements

As far as the international(ised) criminal courts are concerned, only the RPE of the STL refer to the possibility of freezing the accused’s assets. According to Rule 82 (C) STL RPE, the Pre-Trial Judge may request state(s) to freeze the accused’s assets, without prejudice to the rights of third parties. The Pre-Trial Judge can issue such a request after having heard the Defence, either *proprio motu*, or upon request by the Prosecutor or the Registrar.

II.4. Interception of communications

II.4.1. Generally

The interception of communications may take different forms, and is done covertly. It may take the form of wire taps, video-surveillance and other forms of electronic surveillance, or be limited to forms of metering (storage of information in relation of numbers dialled (e.g. time, duration...)).\(^{369}\) The suspect or accused person is not normally aware of the interception. In most cases, the interception of private communications interferes with the right to privacy.\(^{370}\)

\(^{368}\) Article 93 (1) (k) ICC Statute.

\(^{369}\) Also forms of metering fall within the ambit of the right to privacy, see *e.g.* ECHR, *Malone v. United Kingdom*, Application No. 8691/79, Judgment of 2 August 1984, par. 81.

\(^{370}\) The applicable provisions (Article 8 (1) ECHR, Article 17 (1) ICCPR, Article 11 (2) ACHR and Article 12 UDHR) refer to ‘correspondence’. Only Article 7 of the EU Charter of fundamental freedoms refers to ‘communications’. Nevertheless, the ECtHR held that other communications are covered by the notions of ‘private life’ and ‘correspondence’. See ECHR, *Klass and Others v. Germany*, Application No. 5028/71, Series A, No. 28, Judgment of 6 September 1978, par. 41; ECHR, *Khan v. United Kingdom*, Application No. 35304/97, Reports of Judgments and Decisions 2000-V, Judgment of 12 May 2000, par. 22-28; ECHR, *Schenk v. Switzerland*, Application No. 10862/84, Judgment of 12 July 1988, par. 52-53. The interception of communications may also touch upon other rights, including the right to express opinions and to obtain information. However, there will not always be an interference. Whereas according to General Comment No. 16 (par. 8) all sorts of surveillance and interception of communications are prohibited, the HRC clarified that interception of communications are compatible with Article 17 as long as they are strictly controlled and overseen by an independent, preferable judicial body. See, e.g. HRC, Concluding Observations of the Human Rights Committee: Zimbabwe, U.N. Doc. CCPR/C/79/Add. 89, 6 April 1998, par. 25. (stating that “as regards telephone tapping, the Committee is concerned (a) that the Prosecutor (without judicial consent) may permit telephone tapping; and (b) that there is no independent monitoring of the use of the entire system of telephone telephones”); HRC, Concluding Observations of the Human Rights Committee: Lesotho, U.N. Doc. CCPR/C/79/Add.106, 8 April 1999, par. 24 (stressing the importance of independent supervision).
There will be interference in cases where the person does not have the expectation that their communications are intercepted or recorded, also outside his or her home.\textsuperscript{371} Since the interception of private communications is of a secret character and interferes with the right to respect for private life and correspondence, human rights law requires a law which is sufficiently clear to give an adequate indication as to the circumstances and the conditions in which the authorities can resort to this power (foreseeability).\textsuperscript{372} As argued previously, the absence in international criminal procedural law of detailed procedures and detailed conditions which need to be met supports the argument that a judicial authorisation by a tribunal Judge or Trial Chamber should be required.\textsuperscript{373} The jurisprudence of the ECtHR underlined that where the implementation of secret surveillance is not open to scrutiny by the persons concerned, or by the general public, it would be a violation to the rule of law if the legal discretion granted to the executive (or to the Judge) is expressed in terms of an unfettered power.\textsuperscript{374} Consequently, the Court applies a higher standard on the basis of the covert nature of the interception of communications.\textsuperscript{376} Hence, a legal basis for the investigative method which is “particularly

\textsuperscript{371} Consider in this regard, e.g. ECHR, P.G. and J.H. v. The United Kingdom, Application No. 44787/98, Judgment (Grand Chamber) of 25 September 2001, par. 57 (“Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person’s reasonable expectations as to privacy may be a significant, although not necessarily conclusive”); S. TRECHEL, Human Rights in Criminal Proceedings, Oxford, Oxford University Press, 2005, p. 546.  

\textsuperscript{372} See supra, Chapter 6, I.3.1 ECHR, Malone v. United Kingdom, Judgment, Application No. 8691/79, Judgment of 2 August 1984, par. 67.  

\textsuperscript{373} See supra, Chapter 6, I.3.1.  


\textsuperscript{376} ECHR, Weber and Saravia v. Germany, Application No. 54934/00, Reports of Judgments and Decisions 2006-XI, Judgment of 29 June 2006, par. 93 (“In view of the risk of abuse intrinsic to any system of secret surveillance, such measures must be based on a law that is particularly precise, especially as the technology available for use is continually becoming more sophisticated”). In turn, where the interference is considered less, less stringent safeguards against arbitrary interference apply. See ECHR, Uzun v. Germany, Application No. 35623/05, Reports of Judgments and Decisions 2010, Judgment of 2 September 2010, par. 66 (“these rather strict standards, set up and applied in the specific context of surveillance of telecommunications […] are not applicable as such to cases such as the present one, concerning surveillance via GPS of movements in public places and thus a measure which must be considered to interfere less with the private life of the person concerned than the interception of his or her telephone conversations”). Consider M.F.H. HIRSCH BALLIN, Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States, The Hague, T.M.C. Asser Press, 2012, p. 115 ("The Court seems to impose higher standards for covert investigative techniques").
precise” is necessary.377 The Court advanced a number of minimum safeguards to ensure foreseeability and avoid arbitrariness in relation to secret measures of surveillance. The statute law should set forth: (i) the nature of the offences which may give rise to an interception order, (ii) a definition of the categories of people liable to have their telephones tapped, (iii) a limit on the duration of telephone tapping, (iv) the procedure to be followed for examining, using and storing the data obtained, (v) the precautions to be taken when communicating the data to other parties, and (vi) the circumstances in which recordings may or must be erased or the tapes destroyed.378

II.4.2. The ad hoc tribunals and the SCSL

Previously intercepted evidence has played an important role in proceedings before the ad hoc tribunals.379 Most case-law concerns the admission of evidence resulting from unlawful interceptions or the reliability of the intercepted evidence.380 One noteworthy example is the important role intercepted communications between VRS members have played in several cases before the ICTY, often to prove key elements of the prosecution’s case.381 Usually, the communications that have been intercepted have previously been gathered by intelligence organisations, often outside and in disrespect of existing procedural frameworks, in war-like situations.382 The presence of a ‘war-like situation’ is not without importance. The ICCPR, the ECHR and the ACHR provide that the right to privacy is not absolute and may be derogated


380 Consider the case law referred to supra, Chapter 6, I.7.2. and accompanying footnotes.

381 ICTY, Judgement, Prosecutor v. Krstić, Case No. IT-98-33-A, T. Ch., 2 August 2001, par. 105. Within the OTP, a special project, known as the “intercept project” was set up which assembled, analysed and translated the transcripts and checked the reliability of the intercepts by checking their internal consistency and by corroborating the information with information that had been obtained by other sources.

382 The use of the fruits of previously intercepted communications recorded by intelligence organisations raises interesting questions on the use of intelligence in international criminal proceedings, but it is outside of the scope of this chapter. Caution is necessary when relying on intelligence information. Intelligence gathering is not ‘carried out with a constant eye on documenting and preserving a chain of evidence for use at a future trial. Intelligence gathering and evidence gathering serve different purposes.’ See L. MORANCHIEK, Protecting National Security Evidence while Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY, in «Yale Journal of International Law», Vol. 31, 2006, p. 493.
from in emergency situations.\textsuperscript{383} Derogations are permissible only when the substantive and procedural requirements for such derogations have been met.

The Prosecutor may want to intercept communications him or herself. One such example is provided by the \textit{Haraqija and Morina} (contempt) case.\textsuperscript{384} Conversations between the accused Morina and a protected witness during which he allegedly dissuaded the witness from testifying in the \textit{Haradinaj} case were covertly recorded by the police of an unnamed European country in consultation with the ICTY Prosecutor.\textsuperscript{385} This investigative action, whereby a witness had been fitted with hidden electronic recording devices, apparently followed from the strong impression held by the Trial Chamber in the \textit{Haradinaj} case that “the trial was being held in an atmosphere where witnesses felt unsafe.”\textsuperscript{386} Morina argued on appeal that the interception of conversations violated his right to privacy under international human rights law (Article 8 (1) ECHR and 17 (1) ICCPR) because the interception occurred in violation of domestic law and was not ‘in accordance with law’. Moreover, he argued that “the use of secret recordings during his suspect interview violated his right against self-incrimination, since it prompted him to give a detailed account of the meeting which the Trial Chamber relied upon to convict him.”\textsuperscript{387} However, the Appeals Chamber held that even if the recordings violated domestic law, Rule 89 (D) and Rule 95 did not require that the evidence intercepted be excluded.\textsuperscript{388}

\textsuperscript{383} See Article 4 ICCPR, 15 ECHR and Article 27 ACHR. As noted in ICTY, Decision on the Defence “Objection to Intercept Evidence”, \textit{Prosecutor v. Brđanin}, Case No. IT-99-36-T, T. Ch. II, 3 October 2003, par. 30 and par. 63 (3) (noting that “there is enough evidence to prove on a \textit{prima facie} basis that the country was, at the time, on the brink of armed conflict and the purpose of the proposed interceptions was to uncover the extent or the expected extent of the threat to the internal security of Bosnia and Herzegovina”); ICTY, Decision on the Accused’s Motion to Exclude Intercepted Conversations, \textit{Prosecutor v. Karadžić}, Case No. IT-95-5/18-T, T. Ch., 30 September 2010, par. 11.


\textsuperscript{386} ICTY, Decision on Morina and Haraqija Second Request for a Declaration of Inadmissibility and Exclusion of Evidence, \textit{Prosecutor v. Haraqija and Morina}, Case No. IT-04-84-R77.4-A, T. Ch. I, 27 November 2008, par. 20.


\textsuperscript{388} \textit{Ibid}, par. 28.
The power to resort to the interception of communications derives from the general power to collect evidence.389 No specific reference to the interception of communications can be found in the statutory documents of either the *ad hoc* tribunals or the SCSL. The interception of communications will normally be executed by a national state following a request to that effect. Hence, national procedures on the interception of such evidence will be followed. It is argued here that in the absence of any explicit conditions for the interception of communications, the general formal and material conditions for the use of coercive measures, which were previously identified, should be respected. A judicial warrant should be requested. Furthermore, any such request should respect the requirements of necessity and specificity and honour the principle of proportionality.

It should be reiterated that in cases where such interception is conducted under domestic law, by national law enforcement officials, the violation of the domestic law and the resulting violation of the right to privacy will not automatically lead to the non-admissibility of the evidence.390

II.4.3. The International Criminal Court

The prosecutorial power to resort to the interception of communications derives from the general prosecutorial power to collect and examine evidence (Article 54 (3) (a) of the ICC Statute). Again, the law does not provide further guidance as to the limits of this power. Unless so authorised under Article 57 (3) (d) ICC Statute, the Prosecutor will lack the power to directly intercept communications by means of on-site investigations.391 Of course, the state concerned may voluntary accept Prosecutor’s conducting these investigative measures.392

If these investigative acts cannot be undertaken by the Prosecution by means of on-site investigations, the Prosecutor will have to rely on state cooperation. In this regard, KRESS notes that during the negotiations of the Statute it was understood that requests for other types

389 Article 18 (2) of the ICTY Statute, Article 17 (2) of the ICTR Statute, Article 15 (2) of the SCSL Statute and Rule 39 (i) and (ii) of the ICTY, ICTR and SCSL RPE.

390 See supra, Chapter 6, I.7.2.

391 Exceptionally, in case of a ‘failed state’ scenario, the Prosecution may itself intercept communications upon authorisation by the Pre-Trial Chamber (Article 57 (3) (d) ICC Statute).

392 Article 54 (3) (c) and (d) ICC Statute.
of assistance under Article 93 (1) (i) ICC Statute would also encompass modern intrusive methods such as telecommunication intercepts. Alternatively, if the intercepts have been previously undertaken by the national authorities on their own initiative, the request would be for “the provision of records and documents, including official records and documents” (such as evidence contained in domestic investigative dossiers or police files) under Article 93 (1) (i) ICC Statute.

However, the reliance on 93 (1) (i) ICC Statute to request States Parties to intercept communications potentially violates human rights norms. This provision refers to the duty of States Parties to comply with requests for assistance regarding ‘any other type of assistance which is not prohibited by the law of the requested state, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court’. It should be recalled that under human rights law, the use of coercive measures requires a legal basis (lawfulness requirement). However, in cases where no legal basis exists under domestic law for the interception of communications, the State Party requested would still be required to cooperate, unless domestic law prohibits this conduct. In this scenario, because of the absence of a precise legal basis under domestic law, this would entail a violation of international human rights norms (the right to privacy). For this reason, it has been suggested by one commentator that Article 93 (1) (i) ICC Statute, in relation to coercive measures, is read as requiring not only that such measures are not prohibited under domestic law but also that the measures requested are allowed for by national law.

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393 C. KRESS and K. PROST, Article 93, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, München, Verlag C.H. Beck, 2008, p. 1574. Article 93 (1) (i) ICC Statute concerns requests by the Court for “[a]ny other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.” Consider also ICC, Decision on “Defence Application Pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an Order for the Preparation and Transmission of a Cooperation Request to the Government of the Republic of the Sudan”, Prosecutor v. Abdallah Banda Abakaer Nourain and Salih Mohammed Jerbo Jamus, Situation in Darfur, Sudan, ICC-02/05-03/09-169, T. Ch. IV, 1 July 2011, par. 19.

394 For example, in Mbarushimana, communications previously intercepted by French and German authorities were admitted into evidence for the purpose of the confirmation of charges. See ICC, Decision on the Confirmation of Charges, Prosecutor v. Mbarushimana, Situation in the DRC, Case No. ICC-01/04-01/10-465-Red, PTC II, 16 December 2011, par. 66-74. It seems that at least the German intercepts did not result from a request by the Prosecutor to that extent. See e.g. the reference in ICC, Defence Request for a Ruling on the Admissibility of Two Categories of Evidence, Prosecutor v. Mbarushimana, Situation in the DRC, Case No. 01/04-01/10-329-Corr, PTC I, 10 August 2008, par. 14.


II.4.4. Other tribunals with international elements

In relation to the other internationalised criminal tribunals under review, it can be observed that the power to intercept communications is explicitly mentioned in the statutory frameworks of the ECCC and the SPSC. The SPSC required judicial authorisation to intercept communications.397 At the ECCC, this power rests with the Co-Investigating Judges. In turn, the Co-Prosecutors lack the authority to take these measures.398

II.5. Examinations of body and mind

II.5.1. The ad hoc tribunals and the SCSL

Persons can be requested to undergo certain tests in the course of the investigation for the purpose of collecting evidence. These tests may include medical, psychological or psychiatric examinations. In addition, biometric data, fingerprints, photographs as well as voice and handwriting samples may be requested. Body samples (including breath, blood, urine or other bodily specimens) may also be requested, which may be used for DNA identification. These examinations may serve in identifying a person or may help clarify the factual circumstances of a case.399 The gathering of such samples is not expressly provided for. This is surprising, since “such evidence is often key to modern investigations.”400 These measures risk interfering with the privacy rights or the privilege against self-incrimination of the person concerned. In the absence of a provision detailing this power, the power derives from the

397 Section 9 (1) (i) TRCP. According to Section 9 (8) (i) the requesting Prosecutor may execute the warrant.
398 Rule 52 ECCC IR.
399 C.J.M. SAFFERLING, Towards an International Criminal Procedure, Oxford, Oxford University Press, 2001, p. 162. It should be noted that the ICTY Appeals Chamber held in Alekovski that neither the Statute nor the Rules oblige a Trial Chamber to require medical reports or other scientific evidence as proof of a material fact: ICTY, Judgement, Prosecutor v. Alekovski, Case No. IT-95-14/1-A, A. Ch., 24 March 2000, par. 62-64. Consequently, the Appeals Chamber held that the Trial Chamber did not err in convicting the accused without medical reports or other scientific evidence. Medical evidence is not required in relation to evidence of witnesses in relation to crimes such as rape, torture, outrages upon personal dignity and enslavement, and the circumstances in which expert medical evidence would even be relevant are rare. For an example, see ICTY, Order on Defence Experts, Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, T. Ch., 29 March 2000, par. 5 (the Trial Chamber mentions on example where such evidence may be relevant, to know the situation where a witness claims that a particular scar resulted from a cigarette burn, but the expert was able to say that the scar was the result of a surgical procedure).
general evidence-gathering powers of the Prosecutor.\textsuperscript{401} In turn, the RPE of the *ad hoc* tribunals and the SCSL deal only with the medical, psychiatric or psychological examination of the accused in relation to proceedings before the Trial Chamber, not in the course of the investigation.\textsuperscript{402} Hence, and likewise, this power derives from the general powers of the Prosecutor in collecting evidence.

§ Privilege against self-incrimination

It can rightly be asked how far the privilege against self-incrimination protects against compelling the suspect or the accused from providing materials for the execution of certain tests, including DNA tests. This question arose in the *Delalić et al.* case.\textsuperscript{403} At stake was a request by the Prosecution for an order, pursuant to Rules 39 (iv) and 54 ICTY RPE to direct Mucić to provide a sample of his handwriting for analysis and identification. This sample would be necessary to determine the authorship of a letter, considered to be a threatening letter, which was allegedly written by the accused and sent to a witness. According to the Prosecution, this order was sought only because of its value for identification purposes. The Defence objected to this order insofar that requesting an accused to provide a handwriting sample against his will would be in violation of Article 21 (4) (g) ICTY Statute and would have the effect of compelling the accused to contribute to the process of incriminating himself.\textsuperscript{404}

The Trial Chamber was not satisfied that a handwriting sample *per se* can be regarded as forming material proof against an accused. Nevertheless, the Chamber held that “where the material factor absent in the incriminating elements is the handwriting sample of the accused, the Trial Chamber cannot compel the accused to supply the missing element. Doing so will infringe the provisions of Article 21 (4) (g) ICTY Statute protecting the accused from self-incrimination.”\textsuperscript{405} Importantly, the fact that the handwriting sample *per se* is neutral is not the

\textsuperscript{401} Article 18 (2) of the ICTY Statute, Article 17 (2) of the ICTR Statute, Article 15 (2) of the SCSL Statute and Rule 39 (i) and (ii) of the RPE of the ICTY, ICTR and SCSL.

\textsuperscript{402} Rule 74bis ICTY, ICTR and SCSL RPE.

\textsuperscript{403} ICTY, Decision on the Prosecution’s Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucić, to Provide a Handwriting Sample, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, T. Ch., 19 January 1998.

\textsuperscript{404} Ibid., par. 24.

\textsuperscript{405} Ibid., par. 47.
issue. The situation is different where the accused consents with this request. If the handwriting sample, taken together with the other evidence, will constitute material evidence to prove the charge against the accused then the order of the Trial Chamber would have compelled the production of self-incriminating evidence.

The Prosecution contended, based on United States jurisprudence and the Fifth Amendment to the U.S. Constitution, that a distinction should be drawn between testimonial evidence ('communications') which is protected by the privilege and non-testimonial or physical evidence ('real evidence') which is not protected. The Trial Chamber noted that powerful judicial and academic voices criticise this division in U.S. jurisprudence and, subsequently, argued that the wording of Article 21 (4) (g) ICTY Statute is 'clear and unambiguous' and does not require modification or qualification. Reading this distinction into the provision (in the absence of an express limitation) would be reading a condition into it which had not been contemplated by the drafters.

The holding of the Trial Chamber is perhaps surprising in light of human rights jurisprudence concerning the privilege against self-incrimination. Whereas, since Saunders, constant ECtHR jurisprudence has held that the privilege against self-incrimination lies at the heart of a fair procedure (Article 6 (1) ECHR), the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent and does not extend to the use in the criminal proceedings of material which may have been obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the accused. The privilege does not extend to the taking of samples of blood, breath,
From this enumeration, it follows that even some level of coercion would be allowed for, e.g., in order to obtain a blood or urine sample. Later case law, and in particular the Judgment of the Grand Chamber in the Jalloh case has nuanced this picture substantially. Whereas the Court held that “drugs hidden in the applicant’s body which were obtained by the forcible administration of emetics, could be considered to fall into the category of material having an existence independent of the will of the suspect”, it held that this evidence fell within the ambit of the privilege against self-incrimination. The Court then sought to distinguish the situation from that of the Saunders case. Whereas in the former case, “the administration of emetics was used to retrieve real evidence in defiance of the applicant’s will […] the bodily material listed in Saunders concerned material obtained by coercion for forensic examination with a view to detecting, for example, the presence of alcohol or drugs.” Additionally, the degree of force used in Jalloh differed “significantly” from the Saunders case. Where the taking of a body or blood sample entails “a minor interference with his physical integrity”, in Jalloh the accused was compelled to regurgitate evidence sought through the “forcible introduction of a tube through his nose and the administration of a substance so as to provoke a pathological reaction in his body.” Lastly, in Jalloh, evidence was obtained through a procedure which violated article 3 ECHR. Hence, the distinction seems to consist of the level of coercion applied. Doubtless, this distinction further obfuscates the matter. In the aforementioned Delalić et al. case, the Trial Chamber did not make any reference to the jurisprudence of the ECtHR. Consequently, by interpreting Article 21 (4) (g) ICTY Statute as a self-standing provision without having reference to the jurisprudence of the international

413 Ibid., par. 116.
414 Ibid., par. 113.
415 Ibid., par. 114.
416 Ibid., par. 115.
417 Critical, consider e.g. J.D. JACKSON and S.J. SUMMERS, The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions, Cambridge, Cambridge University Press, 2012, pp. 251-255 (the authors criticize the distinctions made by the Court. They conclude that “[i]t is hard to escape the view that the court wanted to include the authorities’ actions in Jalloh within the scope of the privilege because of the extreme degree of force and coercion that was used in obtaining the incriminating material”).
human rights courts, the Trial Chamber’s decision widened the scope of the privilege against self-incrimination, surpassing the existing human rights protection.  

§ Right to privacy

The taking and retention of materials from the suspect or accused may also give rise to privacy concerns. The concept of privacy covers the physical and moral integrity of the person. That said, not each instance of interference with the physical or moral integrity will constitute an interference with the right to privacy. The ECommHR in McVeigh, O’Neill and Evans v. UK held that some identification measures, such as the taking of fingerprints or the taking of photographs, may interfere with the right to privacy under Article 8 ECHR, but the Commission left the question of what measures exactly interfere with the said right open. The HRC and the ECtHR found that the taking of cellular material to establish a DNA profile constitutes an interference with the right to respect for private life, as is the retention of fingerprints. The taking and retention of a voice sample equally constitutes an interference with the right. Likewise, forced blood tests were found to constitute an interference with Article 8 ECHR.

In addition, it was held by the HRC that, since these measures interfere with the right to bodily integrity, body searches should be carried out in a manner which is consistent with the

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422 The HRC acknowledged the important implications the taking of DNA has for the right to privacy as guaranteed under Article 17 ICCPR in the context of immigration law. See HRC, Concluding Observations of the Human Rights Committee: Denmark, U.N. Doc. CCPR/CO/70/DNK, 31 October 2000, par. 15; ECtHR, Van der Velden v. The Netherlands, Application No. 29514/05, Decision of 7 December 2006, par. 2; ECtHR, S. and Marper v. The United Kingdom, Application Nos. 30562/04 and 30566/04, Judgment (Grand Chamber) of 4 December 2008, par. 70-77 (the latter case deals with the question of the retention of a DNA profile and fingerprints).
dignity of the person searched. Persons subjected to a body search should only be examined by a person from the same sex.\footnote{HRC, CCPR General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Article 17), U.N. Doc. HRI/GEN/1/Rev.6, 8 April 1988, par. 16.}

§ Inhuman and degrading treatment

It cannot be excluded that examinations of body and mind amount to inhuman or degrading treatment, which is prohibited under international human rights law.\footnote{1984 Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment; 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Council of Europe); Art. 7 ICCPR; Art. 3 ECHR; Art. 5 ACHR; Art. 5 ACHPR.} The leading case of the ECtHR in this regard is \textit{Jalloh}.\footnote{ECtHR, \textit{Jalloh v. Germany}, Application No. 54810/00, Judgment (Grand Chamber) of 11 July 2006.} If forcible medical intervention, interfering with a person’s physical integrity, is used to retrieve evidence of the crime from the inside of the individual’s body, “rigorous scrutiny” of all surrounding circumstances is required. This includes the availability of alternative methods of recovering the evidence, the seriousness of the offence, the risks involved for the health of the suspect, the manner in which the procedure is carried out and the degree of medical supervision available.\footnote{\textit{Ibid.}, par. 71 and 76.} This intervention must attain the minimum level of severity that would bring it within the scope of Article 3 ECHR (torture or inhuman or degrading treatment or punishment). In \textit{Jalloh}, the Court found that the forcible administration of emetics to obtain evidence (drugs) constituted inhuman and degrading treatment or punishment insofar that it attained the minimum level of severity required, and provided (i) that less intrusive methods were available, where (ii) the manner in which the procedure was executed “was liable to arouse in the applicant feelings of fear, anguish, and inferiority that were capable of humiliating and debasing him”, (iii) where the procedure involved health risks, and (iv) where the measure resulted in both physical and mental pain.\footnote{\textit{Ibid.}, par. 82–83.}

II.5.2. The International Criminal Court

At the Rome conference, the possibility to include medical examinations of persons to whom Article 55 (2) ICC Statute applies (‘suspects’) was advanced.\footnote{H. FRIMAN, Investigation and Prosecution, in R.S. LEE (ed.), The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence, Ardsley, Transnational Publishers, 2001, p. 504.} According to reports, the debate focused on the question of whether the person’s consent would be required for medical
examinations, as such examinations may interfere with the right to physical integrity. While it could be argued that for medical examinations that serve the purpose of assessing the fitness to stand trial, no consent should be required; delegates disagreed on the question whether a medical examination could be ordered for the purposes of obtaining incriminating evidence. 431 It was suggested that the intrusiveness of the examination should be taken into consideration (blood or urine samples may not require the consent of the person concerned). 432 Nevertheless, there was a broad understanding that the ‘suspect’ should have access to the results of the examination. 433

A provision was included in the RPE concerning the ‘collection of information regarding the state of health of the person concerned’ (Rule 113 ICC RPE). It allows the Pre-Trial Chamber to order, either proprio motu or at the request of the Prosecutor or the person concerned, that the person be given a medical, psychological or psychiatric examination. 434 The provision gives considerable discretion to the Pre-Trial Chamber but underlines that the Chamber should consider the nature and purpose of the examination and whether the person has consented or not. The expert executing the examination will be chosen from the list of experts or an expert approved by a party, following approval by the Pre-Trial Chamber. 435 It follows from the formulation of the provision that this power ensures the administration of justice, and does not solely aim at gathering evidence.

Neither the ICC Statute nor the RPE detail the prosecutorial powers to gather biometric data. 436 The OTP will, in cases where the taking of cellular materials is required for identification purposes including the execution of DNA analysis, transmit a request to the competent national authorities. These tests should be executed in compliance with the national laws. 437

431 Ibid., p. 505.
432 Ibid., p. 505.
433 Ibid., p. 505.
434 Rule 113 (1) ICC RPE.
435 Rule 113 (2) ICC RPE.
437 For example, the government of Uganda requested the OTP for assistance on two occasions in the execution of DNA tests on the body of an alleged suspect. See, ICC, Notification that Government of Uganda has Requested the Office of The Prosecutor to Provide Assistance in Conducting DNA Tests on the Alleged Body of Raska Lukwiya, Situation in Uganda, Case No. ICC-02/04-01/05-269, PTC II, 28 August 2006; ICC, Press Release: ICC Unseals Results of Dominic Ongwen DNA Tests, ICC-OTP-20060707-147, 2006.
II.5.3. Other tribunals with international elements

In line with the procedural norms concerning other coercive measures, examinations of the body and mind will normally require judicial intervention at the ECCC and SPSC. The TRCP required a warrant or an order for the execution of physical examinations, including blood tests and the taking of DNA and other bodily specimen.\(^{438}\) Furthermore, the TRCP included limitations as to the persons that can lawfully execute the warrant or order for physical examination and required these persons to have ‘appropriate medical qualifications’.\(^{439}\) The ECCC require judicial intervention for medical, psychiatric, and psychological examinations of the charged person.\(^{440}\) This examination by an expert may be ordered by the Co-Investigating Judges \textit{pro proprio motu} or at the request of a party. It can be ordered to determine the person’s fitness to stand trial or ‘for any other reason’. The provision seems broad enough to include examinations for identification purposes or in order to clarify the factual circumstances of the case in the course of the judicial investigation.\(^{441}\) The examination can also be organised in the absence of the counsel of the accused.\(^{442}\)

III. CONCLUSION

Formal and material requirements

Firstly, the comparative analysis revealed that no general requirement for the Prosecutor to obtain a judicial authorisation for the initiation of non-custodial coercive measures currently exists in either the law or in the practice of the \textit{ad hoc} tribunals, the ICC and the SCSL. However, in cases where the ICC Prosecutor directly executes a coercive measure on the territory of a state (failed state scenario), an authorisation by the Pre-Trial Chamber is required. In contrast, the procedural frameworks of the ECCC and the SPSC require a judicial

\(^{438}\) Section 9.3 (h) TRCP.
\(^{439}\) Section 9.8 (h) and Section 16.5 TRCP.
\(^{440}\) Rule 32 ECCC IR. Rule 31 sets out the procedure to be followed by the Co-Investigating Judges in seeking an expert opinion.
\(^{442}\) Rule 31 (6) ECCC IR.
authorisation, normally *ex ante*, for the use of non-custodial coercive measures. Finally, the STL does not make such requirement explicit, with the possible exception of the direct gathering of evidence on the territory of Lebanon. It was explained how in light of the broad and unrestricted coercive powers of the Prosecutor, a requirement to obtain a judicial authorisation from the tribunal or Court follows from the application of international human rights norms. Furthermore, it was argued that this judicial authorisation should be preferable be sought at the international, rather than at the national level. Only in this manner can *lacunae* in the protection of suspects and accused persons be avoided. In addition, the requirement to obtain authorisation by a Judge or Chamber of the international criminal court guarantees judicial intervention for all scenarios of evidence gathering by the Prosecutor, including independent evidence gathering by the Prosecutor in the state concerned. It enables the role of the international Judge as guarantor of individual rights and liberties in the course of the investigation. Finally, it was argued that an *ex ante* judicial authorisation, rather than an *ex post* one, should be preferred, because of its potential to prevent the violation of international human rights norms. In cases of urgency, an *ex post* judicial authorisation should suffice.

Secondly, a principle of proportionality in the broad sense, could be inferred from the practice of the *ad hoc* tribunals and the ICC. It requires that coercive measures are (1) suitable, (2) necessary and (3) their degree and scope are in a reasonable relationship to the envisaged target. This principle is in line with international human rights law. It is also reflected in the procedural frameworks of the ECCC and the SPSC (reasonableness).

Thirdly, no specific threshold for the use of non-custodial coercive measures could be discerned. As far as the internationalised criminal tribunals are concerned, only the SPSC require the existence of ‘reasonable grounds’ before coercive measures can be authorised by the Investigating Judge.

Lastly, it was concluded that the different international criminal tribunals are less strict regarding the admission of evidence gathered through coercive measures that are in violation of individual rights (right to privacy or right to the peaceful enjoyment of property) which are not explicitly covered by the tribunals’ statutory documents. Breaches of individual rights *may* lead to the exclusion of the evidence. Since breaches of the right to privacy do not necessarily influence the reliability of the evidence, it seems that international criminal
tribunals favour admission of the evidence. Rather than automatically excluding such evidence, the international tribunals engage in a balancing test of different interests.

*Individual non-custodial coercive measures*

In the absence of specific norms in the procedural frameworks of the international(ised) courts and tribunals under review, the Prosecutor’s powers to conduct specific non-custodial coercive measures derive from the Prosecutor’s general evidence-gathering powers. The law and practice of the different international criminal tribunals establish the prosecutorial power to initiate search and seizure operations. The RPE of the *ad hoc* tribunals and the SCSL expressly provide for the possibility of urgent requests to national authorities for the seizure of physical evidence. Limitations to the places that can be searched were found to follow from the functional immunity to which members of the defence team are entitled as well as from immunities of property. An inventory should be made of all the documents and objects seized.

Unlike the rudimentary regulation of search and seizures in the procedural frameworks of the different international criminal tribunals, the ECCC and the SPSC provide for a detailed set of procedural conditions. These conditions include requirements as to the content of the search warrant (SPSC), the condition that the search warrant is served on the occupant of the premise (SPSC), limitations regarding the time when search and seizure operations can be executed (SPSC, ECCC) or requirements regarding the persons that should be present during search and seizures (SPSC, ECCC). Importantly, the procedural framework of the SPSC requires the existence of ‘reasonable grounds to believe that such a search would produce evidence necessary for the investigation or would lead to the arrest of a suspect whose arrest warrant has previously been issued’, before a warrant can be issued.

Substantial differences were identified between the international criminal tribunals regarding the possibility to provisionally freeze the accused’s assets in the course of the investigation. While the jurisprudence of the ICTY and the SCSL is in agreement on the existence of such power, the SCSL Trial Chamber ruled that a high threshold should be applied and that such seizure or freezing should be limited to property that has been acquired unlawfully or as a result of criminal conduct. The ICC Statute provides that the Pre-Trial Chamber may, either *proprio motu* or at the request of the Prosecutor or of the victims, seek cooperation from states in taking protective measures for the purposes of forfeiture. The Court’s case law clarified
that protective measures for the purposes of eventual reparations of victims are included. Furthermore, the ICC has interpreted its procedural framework as allowing for the freezing or seizure of property and assets to support the execution of arrest warrants. The applicable threshold requires that a warrant of arrest or a summons should already have been issued.

While the laws of the different international criminal tribunals do not expressly provide for the power of the Prosecutor to intercept communications (with the exception of the ECCC and the SPSC), the broad prosecutorial powers to gather evidence do include this power.

Lastly, it was shown how the suspect or the accused can be subjected to certain tests or be required to provide certain samples in the course of the investigation. No common ground could be identified between the international criminal tribunals. It was noted that the ICTY gave a broad interpretation to the privilege against self-incrimination, since it held that an accused cannot be compelled to provide materials, including a sample of their handwriting or a DNA sample.