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

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SECTION V: CONCLUSIONS

Chapter 9: General Conclusions and Recommendations

I. INTRODUCTION
This concluding chapter summarises and synthesises the main findings of this study and formulates a number of recommendations. Tendencies which have been noted have been included where relevant. In this manner, it seeks to answer the central research question formulated at the beginning. It should be recalled that in this study, an answer was sought to the question of (i) whether any rules and/or practices on the investigation phase in international criminal procedure are commonly shared by the different international(ised) criminal courts and tribunals under review? This question will be discussed in Parts II (Main Findings) and III (Commonly Shared Rules Identified) below. Additionally, (ii) what changes to these rules are necessary to guarantee the fairness of these investigations has been asked. This question will be answered in Part IV of this Chapter (Recommendations).

II. MAIN FINDINGS

II.1. The obstacles in identifying commonly shared rules
Several obstacles have been identified at the outset of this study, which make the identification of common rules on the conduct of investigations a hazardous undertaking. Overall, it was found that international criminal procedure lacks a strong theoretical foundation, which takes its specific characteristics and its intended goals into consideration. International criminal procedure is still at a nascent stage. Some uncertainties still surround its sources. Among others, it was found that the prospects of identifying rules of customary international law or general principles of law on criminal procedure are limited considering the important differences which exist between domestic criminal justice systems. However, contradicting this observation, the jurisprudence of the international criminal courts and tribunals often draws from certain national practices, resolving procedural questions in a rather 'freestyle' manner. In addition, a lack of clarity persists as to the goals international criminal justice and international criminal procedure are intended to serve. Where these international(ised) criminal courts and tribunals proclaim to serve a plethora of goals, their
(hierarchical) relationship remains unclear. This takes a great deal away from the normative force of these objectives. While it is possible to say something meaningful on the manner in which proceedings should be designed on the basis of any of these goals in isolation, different goals call for different answers which are not compatible per se. How a clear ranking order and understanding on the compatibility of different goals is a prerequisite for the tailoring of the courts’ procedural set-up to match the most important goals these courts are set to achieve has also been illustrated. A potential solution could be the singling out of those goals which international criminal justice and procedure do not share with domestic criminal justice systems. However, this does not resolve all of the remaining questions. An example may illustrate how certain goals may influence the procedural design. The present study has shown how the affiliation of a suspect to a certain faction or group is sometimes taken into account by the international Prosecutor in order to have a balanced approach and to prosecute all the parties that committed crimes within the jurisdiction of the court or tribunal. It may be argued that this approach is legitimate in light of at least some of the goals these courts and tribunals were intended to serve. In particular, the goals of restoring peace and security or reconciliation may be better served by this ‘balanced approach’.

Lastly, uncertainty remains as to the extent to which human rights norms may be tailored to the specific exigencies and unique characteristics of proceedings before international(ised) criminal tribunals (‘contextualised’). It was found that the jurisdictions included are internally bound by human rights law. In addition, a number of jurisdictions covered explicitly attribute an interpretative function to these norms. Furthermore, it was held that some adaptation of international human rights norms is necessary. However, it proved to be much more difficult to determine the level of adaptation or contextualisation which would be acceptable. A cautionary approach is called for where the specific characteristics of international criminal proceedings are relied upon to justify the contextualisation of international human rights norms. In most instances where the adaptation has been suggested, this has had the effect of lowering the protection offered by these norms. Risks are involved where international(ised) criminal courts and tribunals can adjust international human rights norms they are bound to respect to suit their own needs and this in the absence of outside scrutiny. It was shown how in general, international human rights norms are flexible enough not to require any adjustment or re-orientation. In most instances, the necessity of contextualisation falls within the ambit, of and is accommodated by, the flexibility inherent to international human rights norms. It
allows for the balancing of different interests and the adaptation to the unique circumstances of international criminal proceedings.

Any contextualisation surpassing these boundaries should be treated with caution. If not, the contextualisation of international human rights may well prevent these norms from realising to the full extent their potential as ‘minimum standards’, which should not only be upheld by the international(ised) criminal courts and tribunals, but also by national criminal justice systems and other international actors involved in the investigation. After all, this presupposes that the same minimum level of protection is guaranteed by the different jurisdictions involved in the conduct of investigations (the court or tribunal, national criminal justice systems and other international actors). Of course, this presupposes in turn that these international human rights norms are also binding on the national jurisdictions and international organisations (be it in the form of treaty obligations, or in so far as they reflect a rule of customary international law or a general principle of law). In this manner, international human rights norms have the ability to prevent, to some extent, that the fragmentation, which results from the division of labour between the international and national level in investigating these crimes would be to the detriment of the protection of the suspect or accused person.

A good illustration of this potential was offered by ICC Trial Chamber II in the Katanga and Ngudjolo Chui case. Where the Chamber held that the procedural right to remain silent under Article 55 (2) (b) ICC Statute only applies where a suspect is interrogated by the Court or by national authorities ‘at its behest’, the Trial Chamber still decided to exclude from evidence a self-incriminating statement made by the accused during national proceedings which were unrelated to the Court, provided that the interrogation breached ‘internationally recognized human rights’.

One important shortcoming has also been noted regarding the use of international human rights norms as an evaluative tool to answer the second part of the central research question (‘what changes to these rules are necessary to guarantee the fairness of these investigations’). Human rights are not sufficiently detailed to determine the manner in which international criminal proceedings ought to be organised and what procedural system should be preferred. Different procedural solutions may be considered that are in conformity with these more abstract minimum rules. This holds equally true for the organisation and structure of the investigation phase.
In general, many hurdles exist for every attempt to determine any common norms of international criminal procedure on the investigation phase. These obstacles may well frustrate any effort to discern commonly shared rules on the conduct of investigations in the law of international criminal procedure. Nevertheless, and notwithstanding the important inconsistencies, the identification of some common rules proved to be possible.

II.2. The importance of the status of person(s) affected by the investigation

On several occasions, the importance of objective definitions of the status of the individuals involved in the investigation (witnesses, suspects or accused persons) was highlighted, where different rights and safeguards apply to these categories of individuals. The definitions of ‘suspect’ and ‘accused persons’ have important protective consequences. In addition, the status of the person concerned may determine whether that person can be arrested or not. These definitions should strictly be applied in international criminal investigations. For example, from the moment any facts arise during the questioning of a witness, on the basis of which there are grounds to believe that the witness has committed a crime falling within the jurisdiction of the court or tribunal, he or she should be treated as a suspect.

II.3. The ‘under regulation’ of the investigation stage of proceedings

On several occasions throughout this study, it was felt that the law of international criminal procedure relevant to the investigation phase lacks the detail to sufficiently safeguard the fairness of these investigations vis-à-vis the persons targeted thereby. While a tendency towards more detailed regulation can be noted (consider e.g. Article 59 ICC Statute on arrest proceedings in the custodial state), further regulation seems required to ensure the fairness of proceedings.

This is best felt with regard to the investigative powers of the international Prosecutor, which, in many instances, are generic at best. It was concluded that the applicability of a procedural principle of legality to the law of international criminal procedure cannot easily be established, and how the incorporation thereof in the ICC Statute was explicitly rejected during the negotiations. However, even in the absence of this principle, in cases where investigative acts infringe upon the rights and liberties of the individuals concerned, it follows from the lawfulness requirement (‘in accordance with the law’) under human rights law that
sufficient procedural safeguards should be in place. More precisely, international human rights law requires a regulation which is sufficiently detailed and precise (foreseeable) as well as adequately accessible for any infringement of the rights of individuals. It is doubtful whether the current state of international criminal procedure is in full conformity with this requirement. In addition, the ECtHR has confirmed the requirement that procedures be laid down by law on several occasions.

It could be objected that the broad nature of investigative powers should be understood in light of the necessity to rely on the cooperation of states and in light of the fact that these investigative actions are normally executed under domestic law. However, this response is insufficient. Domestic requirements may not be provided for in the specific case or are circumvented. In addition, practice has proven that investigative acts are sometimes executed through an agency (e.g. the execution of a search and seizure operation by SFOR on behalf of the ICTY Prosecutor in Bosnia and Herzegovina). Furthermore, the Prosecutor may sometimes execute coercive measures directly on the territory of the state concerned. In all of the above situations, gaps in the protection of suspects, accused persons or persons otherwise affected by the investigation may arise. In general, where these broad powers result in much discretion being left to the actors involved in the investigation, and where these actors tend to borrow from municipal criminal procedure, this may lead to unclear situations and incoherencies, especially where domestic concepts undergo a transformation when they are adopted by international(ised) criminal tribunals.

The rudimentary regulation of the Prosecutor’s power to conduct non-custodial coercive investigative actions has clearly been shown. Most international(ised) criminal courts were found to regulate individual non-custodial coercive measures (including search and seizure operations, interception of communications, etc.) in a very limited manner only, or even do not provide for any regulation, in which case the power to rely on these investigative measures follows directly from the overarching prosecutorial power to collect evidence. This contrasts greatly with the more ‘civil law style inspired’ design of the investigation phase at the SPSC and the ECCC. In general, the ECCC and the SPSC provide for a detailed set of formal and material procedural conditions for the use of individual investigative actions. Particularly problematic is the absence of any provision concerning the rights of suspects or accused persons (or persons otherwise involved) with regard to these coercive investigative actions. As an example, it was noted how Article 55 (2) ICC Statute only focuses on the rights
of suspects during questioning. A proposal, during the negotiations on the Rome Statute, to include an express search and seizure privacy right has also been rejected.

On other occasions, procedural norms were also judged to lack in detail. For example, how only the procedural frameworks of the ICC and the ECCC provide for detailed procedural rules on the taking of witness statements has been discussed. The case law of the \textit{ad hoc} tribunals merely provides us with guidelines as to the ideal standard for the taking of witness statements. Nevertheless, in light of the possibility of introducing these statements in evidence, public, detailed, and standardised procedures for the taking of witness statements are an important tool in enhancing the transparency of the questioning and the statement-taking process. While the inclusion of these detailed technical rules in the RPE may be objected to, these rules may for example be included in practice directions (cf. STL) or standard operating procedures, provided that they are made publicly available.

II.4. Gaps in the legal protection of suspects and accused persons

How the fragmentation of investigations over different jurisdictions may lead to a reduction in the legal protection of the persons affected and may lead to \textit{lacunae} in their protection has been highlighted. This will be the case if international(ised) criminal courts and tribunals decline responsibility for acts carried out by states at the tribunal’s request or for other external events from which they benefit.

The shared responsibility of the tribunals and the states whose cooperation is sought in protecting the human rights of the individual(s) concerned should be accepted, in order to address these potential reductive effects. Consequently, both the court and the requested state have the responsibility to protect the rights of the individual(s) concerned where cooperation is sought from states or other international actors. In this regard, some jurisprudence to the contrary notwithstanding, the case law of the \textit{ad hoc tribunals} concerning arrest and detention confirmed that shared responsibilities exist between the tribunal and the requested state in the effectuation of the arrest and detention in the requested state. The tribunal is responsible for some aspects of the deprivation of liberty at its behest. In this regard, the Prosecutor has a duty of due diligence. Where it has been argued that the court should take responsibility for all violations that occurred in the context of the case, this stance seems only to be confirmed with regard to the remedy of setting jurisdiction aside. Nevertheless, it is illogical to take
responsibility for the violations of third parties where these amount to an abuse of process but to refuse to take this responsibility for lesser violations by third parties. It was shown how none of the jurisdictions under review proved willing to take responsibility for all violations of the person’s rights, even where they cannot be attributed to the tribunal. The ICC has so far refused to take responsibility for violations which occurred prior to the sending of the cooperation request where there had not been a concerted action, even in relation to violations that would warrant a permanent stay of proceedings, if they were committed by one or more court organs. In general, and in order to prevent gaps in the protection of the suspect or accused person, it will be recommended below that the Court should take responsibility for all violations in the context of a case.

As a caveat, the acceptance of the shared responsibility of states and international(ised) criminal courts and tribunals may occasionally lead to a reduction of efficiency. An example may serve to clarify this point. Judicial supervision by the international(ised) criminal tribunal or court should be provided for where the Prosecutor resorts to the use of coercive investigative measures, in order to safeguard the rights of the suspect or accused person, as will be recommended below. However, where a coercive measure is then normally carried out by national law enforcement officials under domestic law, following a request from the Prosecutor, it may well be that a judicial authorisation should also be obtained at the national level, which in turn, results in the duplication of work and a loss of efficiency.

The potential reductive effects of the fragmentation of international criminal investigations is also why provisions such as Article 59 ICC Statute are important. This provision details how a State Party, which receives a request from the Court for the (provisional) arrest and surrender of a person, should execute this request. In this manner, this provision has the potential of preventing gaps in the protection of the rights of the person arrested, and guarantees at least the protection of international criminal procedure. It was nevertheless shown that several aspects of this provision are not entirely clear, including the precise scope of the rights persons arrested are entitled to and what the proper process to be followed is. In addition, whether the right of every person deprived of liberty under human rights law to be promptly brought before a judge or a ‘judicial officer’ is fully protected by Article 59 (2) ICC Statute remains uncertain, where the competent judicial authority cannot review whether the warrant of arrest was issued properly and where it cannot order release. The mechanism providing that the legality of the warrant of arrest may be challenged before the Pre-Trial
Chamber may not fully resolve these shortcomings where this procedure is not automatic in nature.

III. Commonly shared rules Identified

III.1. Procedural safeguards (shield dimension of international criminal procedure)

The many differences in the procedural constellations of the jurisdictions covered notwithstanding, some similarities could be identified through the comparative analysis of the procedural frameworks. Furthermore, many of the rules so identified reflect or confirm (or occasionally even surpass) international human rights norms. In particular, a number of procedural safeguards were identified which were earmarked as firmly established in international criminal procedure. Still, regarding other rules, how far newer courts and tribunals will follow the established practice of their predecessors, and of the ad hoc tribunals in particular, remains to be seen. So far, the practice of the ICC has proven that the willingness to accept this practice should not necessarily be taken for granted.

A substantial number of procedural safeguards were identified with regard to the interrogation of suspects and accused persons under international criminal procedure: (i) the right for suspects and accused persons to have the assistance of counsel during interrogation, (ii) the right for the suspect or the accused person to be informed about the right to be assisted by counsel during the interrogation as well as the possibility to waive it, provided that this waiver is given voluntarily, (iii) the right for the suspect or accused person to remain silent during questioning, of which right the suspect or the accused person should be informed prior to the start of the interrogation, (iv) the prohibition of the use of forms of oppressive conduct, including coercion, duress, threats as well as torture or other forms of cruel, inhuman or degrading treatment or punishment as well as (v) the right of the accused person to be informed in detail about the nature and cause of the charges against him or her, in a language he or she understands, and prior to the start of the interrogation. Lastly, (vi) the suspect or accused person enjoys the right to the free assistance of an interpreter during interrogation, if he or she cannot understand or speak the language used.
Moreover, a number of safeguards, while not commonly shared by all jurisdictions, are provided for by the procedural frameworks and/or practice of the majority of them. These include (i) the right that in cases where the waiver of the right to counsel is revoked, the questioning should stop immediately and only start again when counsel has been assigned to the suspect or accused. Neither the ICC Statute nor the RPE explicitly mention this requirement. Moreover, and with the exception of the ECCC and the SPSC, the international(ised) criminal courts and tribunals reviewed provide that (ii) the suspect or accused should be cautioned that his or her statement can be used in evidence at trial. Furthermore, the case law or the relevant procedural rules of the majority of tribunals and courts hold that (iii) no adverse inferences can be drawn from the silence of the suspect or the accused person and that (iv) the suspect is to be informed, prior to the start of the interrogation, that there are reasonable grounds to believe that he or she has committed a crime within the jurisdiction of the court. All but one (SPSC) of the tribunals and courts reviewed require that normally, the interrogation of the suspect or accused person is video-recorded or audio-recorded. Some courts allow for an exception if the circumstances prevent this recording from taking place (ICC and the ECCC), or where circumstances make it absolutely impractical for this recording to take place (STL).

Only one procedural safeguard could be established which is shared by the majority of jurisdictions under review with regard to the questioning of witnesses. The use of forms of oppressive conduct, including coercion, duress, threats as well as torture or other forms of cruel, inhuman or degrading treatment during witness interviews is clearly prohibited. Other procedural safeguards, including the obligation to make a record of the witness interview or a privilege for the witness against self-incrimination are not commonly shared.

In a similar vein, the identification of commonly shared safeguards concerning the use of non-custodial coercive measures turned out to be difficult. The primary reason thereof is the lack of detailed regulations of these investigative measures in the procedures of most jurisdictions under review (as was discussed supra). International criminal procedure lacks clear and express, formal, and material requirements for the use of non-custodial coercive measures. Save for a few exceptions (e.g. the execution of coercive measures directly on the territory of a state by the ICC Prosecutor in cases of a ‘failed state’ scenario), no general and explicit requirement for the Prosecutor to obtain a judicial authorisation is provided for in the procedures of the international(ised) criminal courts and tribunals, nor is it confirmed in
practice. This contrasts with the procedures of the ECCC and the SPSC, which require a judicial authorisation, normally \textit{ex ante}, for the use of non-custodial coercive measures. However, it was argued that this requirement to obtain a judicial authorisation \textit{from the tribunal or court} derives from the application of human rights norms. Moreover, the principle that non-custodial coercive measures should be proportionate follows clearly from the procedural frameworks of the ECCC and the SPSC and is confirmed by the practice of some other tribunals (ICTY, ICC). Hence, this rule seems to be confirmed by the majority of the tribunals and courts. In a similar vein, this proportionality requirement ultimately derives from international human rights law.

The picture is different with regard to custodial coercive measures. The formal requirement according to which the issuance of an arrest warrant presupposes a judicial authorisation is firmly established in international criminal procedure. In addition, all tribunals provide for a material threshold for the issuance of an arrest warrant. Whether and in how far these thresholds differ, considering their different phrasing, remains to be determined. The threshold of the SCSL was found to fall below what is required under international human rights law and should be faulted.

The procedural frameworks of most tribunals do not provide for the rule according to which the suspect or accused person holds the right to be free from arbitrary arrest and detention. This was noted with surprise, where this right clearly follows from international human rights law. In a similar vein, other safeguards surrounding the deprivation of liberty are often not expressly provided for. Among others, the right to be promptly informed of the reasons for one’s arrest is not always explicitly provided for in all situations where a person is deprived from liberty. For example, no right of \textit{suspects} to be informed without delay about the reasons for their arrest in cases of a provisional arrest, pursuant to Rule 40 ICTY, ICTR, and SCSL RPE, could be found. However, in cases where this right is not clearly provided for, it has been confirmed by the jurisprudence. Hence, this safeguard constitutes a rule which is consistently applied by the different international(ised) criminal tribunals and courts. The importance of this right lies where it enables persons to challenge their detention, provided that information is given ‘promptly’ or ‘at the time of the arrest’. The existence of the right of every person deprived of liberty to be brought before a judge or a ‘judicial officer’ promptly, while not always explicitly provided for, has been confirmed in practice and ultimately derives from international human rights norms. Furthermore, the right to challenge the
lawfulness of detention (*habeas corpus*) was found to be fully established in international criminal procedural law. It has been confirmed by the practice of all international criminal tribunals, and was provided for in the TRCP, including a strict time limitation to hear this challenge.

Finally, in cases where serious violations of the rights of the suspect or the accused person occur in relation to the deprivation of liberty, which render a fair trial impossible, the court or tribunal should refuse to exercise jurisdiction and should stay the proceedings permanently. In addition, while none of the statutory frameworks of the *ad hoc* tribunals and the Special Court provide for this, the practice of these institutions acknowledged the existence of an inherent or implied power to provide compensation to persons who have been the victim of unlawful or arbitrary arrest or detention. Where these remedies are imposed, they should be proportionate. In turn, the ICC’s Statute as well as the TRCP explicitly provide for a right to compensation. The STL, short of providing a right to compensation for unlawful arrest or detention, provides for a right to request such compensation, and the awarding of this compensation is made dependent from a showing of a ‘serious miscarriage of justice’. The majority of international(ised) criminal tribunals proved willing to acknowledge that the right to an effective remedy encompasses a right to financial compensation in cases of unlawful or arbitrary arrest or detention, provided that no other remedies would be effective.

Even though a substantial number of commonly shared rights and safeguards for suspects and accused persons could be identified, which are in accordance with international human rights norms, this does not imply that no discrepancies were found. Quite to the contrary, it was found that some aspects of international criminal procedure openly disregard existing international human rights norms.¹ A clear example which was identified is the principle that detention is the rule and release the exception, which still seems to be prevalent in international criminal procedure.

III.2. Other commonly shared rules

The common rules and practices identified are by no means limited to these procedural safeguards. A number of other procedural rules are also shared by the different jurisdictions.

(i) Power-conferring rules (sword dimension of international criminal procedure)

Firstly, the international Prosecutor holds the power to initiate investigations. He or she possesses considerable discretion in initiating investigations. The use of the term ‘principle of opportunity’ was rejected where this terminology originates from national criminal procedural law and does not translate to the investigations and prosecutions by the international tribunals under review very well. Therefore, referring to the ‘considerable discretion’ of the international Prosecutor is to be preferred.

Moreover, all tribunals and courts have that certain safeguards as well as some restraints (institutional or judicial in nature) of prosecutorial discretion are provided for in common. Prosecutorial discretion is limited by the principles of equality and non-discrimination. Most courts and tribunals were found to expressly provide that all accused persons (or individuals) shall be equal before the court or tribunal, while the principle of non-discrimination is not expressly mentioned. However, as confirmed by the jurisprudence of the ad hoc tribunals and the SCSL, both principles ultimately derive from human rights law. Furthermore, it was found that at all courts and tribunals under review, discretion is both guaranteed and limited by the principle of prosecutorial independence, which prevents the Prosecutor from (actively) seeking or (passively) receiving instructions from any government or any other source on how to exercise his or her discretion. While the most elaborate forms of accountability, including forms of judicial oversight, are to be found at the ICC, an evolution towards more judicial oversight over prosecutorial discretion is noticeable, also at the ad hoc tribunals.

All of the jurisdictions examined provide the Prosecutor with general powers to collect evidence. The exception are the ECCC, where the powers of the Co-Prosecutors during the preliminary investigation are much more limited. These evidence-gathering powers include the prosecutorial power to question suspects, accused persons, and witnesses. None of the courts and tribunals under review explicitly provides for a corresponding right for the Defence to interview witnesses, which is in line with the general observation that defence investigative
powers are not expressly provided for (see the recommendation infra). In addition, the prosecutorial power to collect evidence includes the power to make use of non-custodial coercive investigative action.

(ii) Structure, organisation and nature of the investigation phase

In general, no judicial control is exerted over the determination by the Prosecutor to sanction the opening of a full investigation. However, an important exception is the situation in which the ICC Prosecutor makes use of his or her proprio motu powers. Furthermore, in cases of a decision by the ICC Prosecutor at the end of the pre-investigation phase not to sanction the opening of a full investigation, the Pre-Trial Chamber may exert control in some cases.

In addition, it appears that at most courts and tribunals, the level of judicial control over the investigation is limited. Obvious exceptions are the ECCC, where the investigation is led by the Co-Investigating Judges as well as the SPSC, where a judicial authorisation was required for the use of coercive measures by the Public Prosecutor. Regarding the other international(ised) criminal courts and tribunals examined, a trend has been noted towards more judicial intervention. As an example, whereas the Pre-trial Chamber (ICC) and the Pre-Trial Judge (STL) mostly intervene at the request of one of the parties, several self-standing powers could be discerned. Among others, the Pre-Trial Chamber and the Pre-Trial Judge may gather evidence proprio motu in cases of a ‘unique investigative opportunity’ or ‘unique opportunities to gather evidence’ respectively. Certain conditions have to be fulfilled. These judicial powers share the same function in so far as they assist the parties with the preparation of their respective cases. Moreover, these powers are in line with the recognition by the ICC’s practice of the primary responsibility of the ICC Pre-Trial Chamber in ensuring the protection of the rights of the suspects during the investigation stage of proceedings. Overall, these limited, but important judicial tools ensure the fairness of the proceedings.

Moreover, it seems that, as a rule, the Prosecutor and the Defence are in charge of the investigation proper. The investigation is the joint responsibility of the two Co-Investigating Judges at the ECCC only. In turn, the Defence is not allowed to undertake investigative activities beyond mere ‘preliminary inquiries’. The Defence can (as can the Co-Prosecutors or the civil parties) request the Co-Investigating Judges to undertake certain investigative acts, further reflecting the civil law style of proceedings at this stage of proceedings. In a similar
vein, at the SPSC, the Defence could request the Public Prosecutor or the Investigating Judge to order or conduct certain investigative acts. However, in practice, the Defence was not prohibited from conducting its own investigations.

A shared rule has also been identified with regard to the temporal limitation of the investigation. At these tribunals where the Prosecutor heads the investigation, he or she is exceptionally allowed to continue its investigations after the start of the prosecution phase proper. Sufficient care should be taken in this scenario that the rights of the defendant are respected.

How investigations before international(ised) criminal courts and tribunals are, as a rule, reactive in nature has also been shown. This sets them apart from national criminal justice systems, which have evolved as a consequence of the fight against organised crime and terrorism. Law enforcement is no longer purely reactive in nature and has been mobilised to serve preventive functions. How, in one reading, the jurisprudence of the ICC may be interpreted as allowing for investigations into situations to become partly proactive in nature has also been illustrated. More precisely, several Pre-Trial Chambers held that a situation can include not only crimes which had already been or were being committed at the time of the referral, but also crimes committed after that moment, insofar as they are sufficiently linked (nexus requirement) to the situation of crisis referred to the Court as on-going at the time of the referral. Thus, while the statutory threshold for the commencement of the investigation proper prevents fully proactive investigations (‘reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed’), this threshold is ‘selective’, in the sense that once it has been established, nothing prevents the Prosecutor from investigating other crimes within the jurisdiction of the Court, as long as these crimes are sufficiently connected to the situation of crisis. This allowance for pro-active investigative efforts would confirm the Courts preventive function, which finds confirmation in the Preamble to the Rome Statute.

The court’s case law lacks uniformity on this point and it should further clarify whether or not this interpretation can be upheld. If so, in the absence of an express legal basis, the broad formulation of the ICC Prosecutor’s investigative powers may be read as allowing for the use of special investigative techniques, such as covert surveillance, which lend themselves to proactive application. However, a number of requirements were identified which should apply
to the proactive application of investigative measures. These include (i) the requirement of a judicial purpose, (ii) the need for precise definition of proactive investigative powers, (iii) the related requirements of proportionality, subsidiarity, and judicial approval where proactive investigative techniques interfere with the right to privacy and, (iv) the requirement of independent and impartial supervision of proactive investigative efforts. In addition, (v) what information can be stored, how long, and under what conditions as well as the use to which this information can be put should be clear. It has been shown that almost all of these requirements are entirely problematic within the procedural framework of the ICC. Equally problematic is the fact that the procedural rights, under Article 55 (2) of the ICC Statute, are reserved to persons against whom ‘there are grounds to believe that [the] person has committed a crime within the jurisdiction of the Court’. Hence, they would not apply to individuals targeted by proactive investigative efforts. It can at present not be recommended that international criminal procedure allow for such proactive investigative efforts for all of these reasons. Moreover, proactive investigative efforts would not serve any purpose at most tribunals and courts under review.

(iii) Obligations incumbent on the parties in international criminal investigations

In addition to the safeguards and other rights outlined above, whether any obligations are incumbent on the parties in the conduct of investigations may be asked. One such obligation could be discerned which is commonly shared by the tribunals and courts under review. It consists of an overarching ethical duty of due diligence which is incumbent on the parties in the conduct of investigations. While this obligation is in most instances not explicitly provided for, it can indirectly be construed.

(iv) Arrest and detention

This study has shown how all but one of the jurisdictions under review allow for the deprivation of liberty in the absence of a judicial authorisation in cases in which some urgency is required. The only exception is the ICC, which always requires a prior judicial authorisation. It was also concluded that the majority of tribunals and courts under review have that they provide for the possibility that indictments or warrants of arrest are issued under seal and not publicly disclosed in common.
Additionally, all tribunals and courts provide for the possibility to apply for provisional release (which is to be distinguished from a right to provisional release). They also make allowance for conditional release. Furthermore, a commonality was found in that they allow for interlocutory appeals against provisional detention/release decisions.

All of the tribunals discussed recognise the risk of interference with the investigation, including victims, witnesses or other persons as a ground legitimising pre-trial detention or, alternatively, require the absence of any risk of this interference as a pre-condition for provisional release. Similarly, all tribunals recognise the risk of flight and the question of whether the accused, if released, will re-appear for trial as a public interest requirement justifying pre-trial detention or require the absence of any risk of flight as a precondition for the ordering of provisional release.

These commonalities notwithstanding, considerable divergences were found with regard to the provisional detention/release scheme, and in particular between the ‘older’ established tribunals and courts (the ad hoc tribunals and the SCSL) and the more recently established ones, hampering the identification of additional shared rules or practices. However, some tendencies could be noted. A clear tendency to remove judicial discretion in provisional release/detention matters was noted with regard to pre-trial detention. While the ad hoc tribunals and the SCSL left the discretion to deny provisional release in cases where all conditions were fulfilled to the Judges, other tribunals and courts reject this idea. This holding better corresponds to international human rights norms and enhances transparency.

IV. RECOMMENDATIONS

A substantial number of recommendations can be made on the basis of this study on how to improve international criminal procedure in order to ensure the fairness of the investigations. The most important recommendations have been outlined below. As a general note, far from calling for an overhaul of the procedural norms regulating the investigation phase, several of the recommendations below encompass small corrections to the predominant adversarial style of investigations and can be easily adopted. Some of these corrections are necessary to reduce the inequalities between the parties in the proceedings, which are most visible in the conduct of investigations and in the collection of evidence. While most recommendations concern the
law of international criminal procedure in general, some are directed to the ICC or other specific jurisdictions covered.

IV.1. The need to strive to ensure the protection of the rights of suspects and of accused person in light of the fragmentation of the investigation phase

The international criminal tribunals face the situation whereby the investigation is fragmented over several jurisdictions. The cooperation by states (and other international actors) is required because of the important limitations in the possibilities of these tribunals to gather evidence and information autonomously and independently on the territory of states or to effectuate the arrest of suspects or accused persons. Consequently, evidence is gathered or arrests are made by states or other international actors pursuant to a request by the tribunal. Where the request is consequently executed according to the domestic laws of the requested state, this leads to fragmentation of the investigation over several jurisdictions. It is suggested that these institutions should strive to avoid any reductive impact of this fragmentation on the protection of the rights of suspects and accused persons. Several steps should be undertaken in that regard. Otherwise, as concluded above, lacunae in the protection of the rights of suspects and accused persons may persist.

Several provisions have been identified in this study which hold the potential of mitigating these reductive effects. These provisions should be interpreted in such manner as to fully realise this potential. A concrete example may illustrate this point. Both Articles 55 (2) and 59 (2) ICC Statute protect the rights of persons in the conduct of investigations. The former provision strengthens the position of suspects by detailing certain procedural rights that the suspect is entitled to, also when questioned by national authorities at the Court’s request. The latter provision strengthens the position of persons arrested by national authorities by detailing certain rights the person arrested at the request of the ICC is entitled to and by explicitly placing some obligations upon the requested state.

However, at least with regard to Article 59 (2) ICC Statute, the potential of this provision in ensuring the protection of the rights of persons arrested has not fully been realised. This provision concerning arrest proceedings in the custodial state is silent on the question whether any supervisory role is incumbent on the Pre-Trial Chamber following the surrender of the person to the Court. While the Court determined that it has the authority to review the arrest
proceedings in the custodial state pursuant to Article 59 (2), it compared its role to the ‘subsidiary’ role played by the ECtHR vis-a-vis national authorities. Such role is at odds with the previous holding, by the ICC Appeals Chamber, that the Pre-Trial Chamber has the primary responsibility of ensuring the protection of the rights of the suspects during the investigation stage of proceedings.

The Court has limited the protection offered by Article 59 (2) ICC Statute in at least three ways. First, (i) from the case law to date, it seems that the Court upholds the view that the rights included in Article 59 (2) primarily refer to the protection offered by national law, rather than to the relevant international human rights norms or the rights provided for under the ICC Statute. Secondly, (ii) while the Court determined that it has the authority to review the arrest proceedings in the custodial state pursuant to Article 59 (2), it held that this role is limited to international procedure. It held that it does not sit as a court of appeal on the decision of the national competent authority. Hence, its role seems limited to the assessment of whether the procedural rights of the person pursuant to Article 59 (2) (a) – (c) were respected, leaving the review of national procedure and substance with the national authorities. Finally, (iii) the Court held that violations occurring prior to the sending of the cooperation request will only be considered once a ‘concerted action’ between the Court and the State Party has been established. The Court is not responsible for the detention in the custodial state which was not at the behest of the tribunal. Article 59 (2) only applies to those proceedings that take place after the transmission of the relevant cooperation request for arrest and surrender by the Registrar.

In order to ensure that the person arrested does not suffer from the fragmentation of the investigation over several jurisdictions, it is suggested that the Court abandons its ‘subsidiary’ interpretation of its supervisory role over arrest proceedings in the custodial state. Consequently, the procedural rights included in Article 59 (2) should not be left to be determined by national law exclusively but should also include international human rights norms and the rights of persons under the ICC Statute. This interpretation would allow the scope of the supervisory role of the Pre-Trial Chamber to be broadened. Lastly, it is recommended that the Pre-Trial Chamber supervise all pre-transfer violations, even those which occurred prior to the sending of the cooperation request for arrest and surrender (see recommendation IV.3 below).
Overall, the major challenge for international criminal tribunals lies in reconciling the protective function these institutions took upon themselves as the ‘ultimate guarantor of individual rights and liberties in the course of the investigation’ with the ‘escapist posture’ they sometimes adopt whereby they seem to hide themselves behind the fragmentation of jurisdictions. This occasionally leads to schizophrenic tensions. For example, on the one hand, the ICC declined to take responsibility for all violations of the rights of the suspect or accused person in relation to the arrest and detention in the custodial state. On the other hand, the Court proved willing in the assessment of the length to the pre-trial detention to look to the pre-transfer detention as long as it is part of the “process of bringing the Appellant to justice for the crimes that form the subject-matter of the proceedings before the Court.” This surpasses the protection under international human rights norms.

IV.2. The need for a requirement of judicial authorisation for the use of non-custodial coercive measures in the collection of evidence

The need to strive to mitigate the reductive effect of the fragmentation of the investigation also favours the adoption of a formal requirement of judicial authorisation for the use, by the Prosecutor, of non-custodial coercive measures, normally ex ante. This requirement follows from international human rights norms. Where adopted, this ensures that no gap exists in the protection of the rights of the suspect or accused person. Indeed, while these coercive measures are normally executed through national authorities, who may already need judicial authorisation pursuant to municipal law, the Prosecutor can in some situations execute these measures directly on the territory of a state or execute them through international agents (e.g. SFOR). In addition, the possibility that this formal requirement of judicial authorisation does not exist under municipal law or that this requirement is disregarded cannot be excluded. It further confirms the role of the Judge as guarantor of individual rights and liberties in the course of the investigation.

IV.3. The need to provide for an effective remedy for all violations of the rights of the suspects or accused persons in the context of a case, including those violations which follow from actions taken by states at the request of the tribunal, or from other external events from which it benefited.
It has been suggested, above, that international(ised) criminal courts and tribunals should take responsibility for all violations that occur in the context of the case. At present, none of the jurisdictions included proved willing to take responsibility for all violations of the person’s rights, even where they cannot be attributed to the tribunal. The ICC has so far refused to take responsibility for violations that occurred prior to the sending of the cooperation request in cases where there was no concerted action. Hence, the Court refuses responsibility for the arrest and detention which was not at the behest of the tribunal. In order to prevent gaps in the protection of the suspect or accused person, it is suggested that the Court should take responsibility for all violations in the context of a case.

With regard to serious violations of the rights of the suspect or the accused person that would render a fair trial impossible, it was indicated above that international(ised) criminal courts and tribunals should stay the proceedings permanently. The case law of the ad hoc tribunals considers it to be irrelevant what entity or entities are responsible for the violations when declining to exercise jurisdiction. In turn, the ICC reserves the remedy of setting jurisdiction aside only to violations committed by ‘his/her accusers’. This formulation excludes acts committed by third parties unrelated to the Court or not at the behest of the Court. This phrase has been interpreted as to always require attribution to a Court organ. Therefore, the Court may only refuse to exercise jurisdiction in cases where there is an involvement by the Prosecution in the violation of the fundamental rights of the accused, either in the period before or in the period following the notification of a request. It seems to follow, from this reasoning, that the phrase ‘his/her accusers’ excludes the national authorities that execute a request for arrest and surrender, in the absence of further involvement of a Court organ.

The former position ought to be preferred where it avoids any gap in the protection of the rights of the suspect or accused person. This interpretation is also to be preferred to the jurisprudence of the ECCC, which holds that in cases where violations cannot be attributed to the Court, the application of the abuse of process doctrine is limited to instances of torture or serious mistreatment.

IV.4. The need for the Statute or the RPE to expressly provide for the applicable procedural safeguards.
It has been indicated, above, how some safeguards may be derived from international human rights norms but are not explicitly mentioned in the procedural texts of the courts and tribunals reviewed (e.g. the right to be free from arbitrary arrest and detention). It is recommended that these rights be incorporated in the procedural framework to avoid any gaps. Likewise, procedural safeguards and rights which are not explicitly provided for in the procedural frameworks of the international(ised) criminal tribunals, but which were confirmed by jurisprudence, should be clearly set out. Moreover, where cooperation is sought from states or other international actors, it may be advisable to include the relevant safeguards in the request. For example, a notification to the authorities of the requested state to ensure the rights of the person concerned, including the right to bring the person before a judge or a judicial officer promptly may be included in an arrest warrant, a request for the provisional arrest, or a provisional arrest and transfer order.

IV.5. Recommendations with regard to the structure and organisation of the investigation phase

§ The need to codify the investigative role of the Defence

With regard to the structure and organisation of the investigation phase in international criminal procedure, certain clarifications on the role of the parties in the investigation would benefit the fairness of the investigation. Firstly, the more adversarial style of investigations conducted at most of the international(ised) criminal tribunals covered notwithstanding, the procedural frameworks of these institutions give too limited an expression to the supposed investigative role of the Defence. The Defence’s investigative powers are only indirectly provided for and derive from the general rights of the accused, including the right of the accused to have adequate time and facilities for the preparation of his or her defence and the principle of equality of arms. It is suggested that the investigative role of the Defence is spelled out explicitly.

§ The need to provide for the possibility that the Defence requests that the Prosecutor undertake certain investigative acts

In order to further alleviate the existing inequalities between the Defence and the Prosecution in conducting investigations, it is recommended that the possibility (which is only explicitly
provided for at the ECCC and the SPSC) for the Defence to request that the Prosecutor undertake certain investigative acts is provided for. Nothing seems to prevent the Defence from addressing these requests to the Prosecutor with regard to the ICC. This may to some extent reduce existing inequalities between the parties in the investigation phase. The adoption of this possibility by other tribunals nevertheless presupposes a Prosecutor who is guided by a principle of prosecutorial objectivity and a reduction of the adversarial ‘two cases’ approach in the investigation phase. Ideally, this possibility should be coupled with a strict time limitation for the Prosecutor to reply to these requests, the requirement of a reasoned decision if this request is turned down, and should be accompanied by the possibility to appeal prosecutorial orders turning this request down.

§ The need to adopt the principle of objectivity

It follows from the previous recommendation that the principle of objectivity, requiring the Prosecutor to investigate incriminating and exonerating evidence equally, should be adopted by all international(ised) criminal tribunals. This can be found at the ICC, the SPSC and the ECCC (Co-Prosecutors during the preliminary investigation, Co-Investigating Judges during the judicial investigation). In particular, and in addition to the recommendations formulated above, it may to some extent offer a solution to the difficulties the Defence encounters in accessing evidence.

IV.6. The need to provide for limitations in the Statute or RPE to the prosecutorial powers in the collection of evidence

Any recommendation to replace the broad evidence-gathering powers of the Prosecutors of international criminal courts and tribunals with a detailed regulation with regard to specific investigative acts, may not be realistic. However, some smaller recommendations may be made in this regard. Divergent approaches exist with regards to the question of whether a minimum threshold of initial suspicion is required for the commencement of the investigation phase and before the arsenal of investigative prosecutorial powers becomes available. While the ad hoc tribunals (‘sufficient basis to proceed’) and the ICC (‘reasonable basis to proceed’) provide for this threshold, the internationalised criminal courts and tribunals do not, with the exception of the threshold required for the opening of the judicial investigation (ECCC). However, the inclusion of this minimum threshold may be particularly called for in
international criminal procedure. First, as set out above, prosecutorial powers in international criminal procedure are broad and the limits thereof unclear. Consequently, the inclusion of such threshold in international criminal procedure puts welcome limitations to the Prosecutor’s broad investigative powers. Moreover, it protects the interests of persons targeted and avoids the spending of scarce resources on investigations which do not stand any chance of resulting in an actual prosecution. Therefore, this minimum threshold is to be recommended on the basis of considerations of fairness and should preferable become part of the law of international criminal procedure. This would imply the existence of a ‘pre-investigative’ phase necessarily by implication.

In light of the broad investigative powers the international Prosecutor possesses, it is also important to know under what circumstances the Prosecutor will exercise his or her discretion to open an investigation. It was found that none of the courts and tribunals included in this study made the prosecutorial guidelines on the exercise of prosecutorial discretion public. It is recommended that the international(ised) criminal tribunals and courts provide for public and ex ante prosecutorial guidelines. This ensures transparency and coherence and serves to protect the principles of equality and non-discrimination, which ultimately derive from human rights law. These would further ensure the fairness of the proceedings by shielding the international Prosecutor from external political pressure. An important obstacle to the adoption of these guidelines is the necessity to first determine and rank the goals of international criminal prosecutions, where these influence any guidelines on the exercise of prosecutorial discretion.

IV.7. The need to conceive of pre-trial release as the rule and pre-trial detention as the exception

In international criminal procedure, unlike what is the case at the ad hoc tribunals and the SCSL, detention should be the exception and release the rule. While the majority of international(ised) courts and tribunals scrutinised proclaim to adhere to this position, the practice proves otherwise. It should be respected by these institutions, nevertheless, because this requirement follows from international human rights law. The burden of proof should be on the Prosecutor (as is the case at the majority of tribunals and courts) in the consideration of requests for provisional release. The opposite rule, which could be found at the ad hoc tribunals and the SCSL, where the burden of proof is put on the accused, violates international
human rights law. Putting the burden upon the Prosecutor is characteristic of a system which considers pre-trial detention to be the exception and release to be the rule. It was noted with concern that even those systems which purport that the burden is on the Prosecutor in practice often shift the burden to the accused person.

IV.8. The need to require legitimate grounds for any deprivation of liberty

Both the STL and the ICC require legitimate grounds for the issuance of an arrest warrant. This set-up differs from the ad hoc tribunals, where detention follows automatically upon arrest. From an international human rights law perspective, the absence of a legitimate ground upon which the arrest is based is not problematic in itself, but the existence of a “genuine requirement of public interest” is required for the further pre-trial detention which, the presumption of innocence notwithstanding, outweighs the person’s right to personal liberty. Consequently, the inclusion of these legitimate grounds necessitating the deprivation of liberty in international criminal procedure is recommended.

IV.9. The need to provide for time limitations with regard to the provisional arrest of suspects, especially in the absence of a judicial authorisation

As indicated previously, the procedures of most courts and tribunals allow for the provisional arrest of suspects in the absence of a judicial authorisation. However, it emanates from prior abuses, that it is necessary in these situations to provide for a deadline for (i) the Prosecutor to apply for his or her transfer (cf. SCSL RPE) and (ii) in cases of failure to transfer the suspect, to provide for an ultimate deadline after which time the suspect shall be released.

The procedures of a substantial number of tribunals and courts (the ad hoc tribunals, the SCSL, and the STL) also envisage the transfer and the provisional detention of suspects at the seat of the tribunal, and set out a number of requirements in considerable detail, offering better protection of the rights of the suspect. Safeguards include (i) the need for judicial authorisation, (ii) a material threshold, (iii) the requirement of a legitimate ground (necessity), (iv) a strict time limitation, (v) the prerequisite of provisional charges and (vi) a summary of evidence on which the Prosecutor relies. However, in general, how this procedural scheme does not prevent that the suspect ends up lingering in detention in the custodial state has been
shown. There is no limitation upon the amount of time the suspect may spend in pre-transfer detention.

This recommendation, of providing strict deadlines, is of particular importance to the STL. It has been noted with much concern how the STL failed to learn from the shortcomings of the ad hoc tribunals and the SCSL where its procedural framework reveals the same gaps in the protection of the rights of the suspect. Hence, it is strongly recommended that the two recommendations above (time limitations for the application for the transfer and an ultimate deadline) also apply in this situation.

**IV.10. The need to periodically review pre-trial detention**

Many of the courts and tribunals (ICC, SPSC, STL) scrutinised make allowance for a *periodic review mechanism* of pre-trial detention (or a review at the occasion of the extension of the pre-trial detention (ECCC)). This review provides the detained person with an effective safeguard against undue prolongation of the detention. It allows any change in the circumstances to be taken into consideration. Where it ensures that release is the rule and detention the exception, its adoption by all international(ised) criminal courts and tribunals is to be recommended.

**IV.11. The need for international(ised) criminal courts and tribunals to proprio motu consider the possibility of a summons to appear as an alternative to the issuance of a warrant of arrest**

Contrary to the more seasoned tribunals, some newer established courts and tribunals provide for an alternative to arrest and provisional detention, namely the possibility of a summons to appear. Where it forms a viable alternative to the deprivation of liberty, it is submitted that it should always be open for the Judge who authorises an arrest warrant to summon the person to appear before the court, if he or she considers that to be more appropriate (cf. STL). In cases where conditions are imposed on the person, these should relate to the justifications for the deprivation or limitation of liberty provided for by the procedural framework of the tribunal concerned. This set-up is in conformity with the principle of subsidiarity under human rights law. Hence, with regard to the ICC, it is suggested that Article 58 (7) ICC Statute be amended to add that a summons to appear may not only be issued upon the request of the Prosecutor, but may also be issued *proprio motu* by the Pre-Trial Chamber.
IV.12. The need to confirm the obligation of states to receive persons provisionally released and for states to provide for the procedures necessary to receive persons provisionally released by the Court and to ensure the appearance of the person at trial and/or to avoid any interference with victims, witnesses or other persons.

Finally, a major obstacle to provisional release lies in the de facto requirement that the host state agrees to allow the accused on its soil and guarantees that the person will appear for trial and will not interfere with witnesses, victims or other persons. In this regard, an obligation to accept detainees who have been provisionally released and to offer necessary guarantees for their appearance at trial follows from the general cooperation obligations of states with the international criminal courts and tribunals. States should have the necessary procedures in place to receive persons provisionally released by the Court and to ensure the appearance of the person at trial and/or to avoid any interference with victims, witnesses or other persons. In that regard, it is recommended that agreements are concluded with states on the acceptance of detainees who have been provisionally released. As far as the ICC is concerned, the ASP should ensure that arrangements are in place to ensure the cooperation of States Parties in relation to provisional release.