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International criminal tribunals and human rights law: Adherence and contextualization

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**PART II THE INTERPRETATION AND APPLICATION OF
HUMAN RIGHTS NORMS BY THE
INTERNATIONAL CRIMINAL TRIBUNALS**

CHAPTER 4 THE RIGHT TO PRIVACY AND INVESTIGATIVE MEASURES

1. Introduction

The right to privacy is a multifaceted right, aimed at protecting a person's private sphere. It covers a broad range of issues, but here, focus is on its application in the context of a criminal investigation. Being subject to a criminal investigation typically interferes with a person's privacy. Authorities may conduct investigative measures such as searching private premises or intercepting private communication. The right to privacy as enshrined in IHRL aims to regulate such interferences. This Chapter investigates whether and how interferences with the right to privacy are regulated in the law and practice of the ICTs, and whether and how the ICTs have relied on sources of IHRL in their case law on this issue. Focus is on coercive measures, which are defined as investigative methods that are applied in criminal investigations against the will of the person and that interfere with individual rights.¹ Two types of coercive measures that interfere with the right to privacy are discussed: search and seizure operations, and, to a lesser extent, the interception of communication, since these are the primary coercive measures that interfere with the right to privacy, and they are the measures that have most often been addressed by the ICTs.²

The unique features of international criminal justice significantly impact on the conduct of investigative measures, arguably even more so than on the conduct of the trial proceedings. The ICTs' almost complete dependence on states has a relatively larger impact on the conduct of investigative measures than on the conduct of the trial; if only for the simple reason that the trials take place on the ICTs' premises and are conducted by ICT officials, whereas the investigations are largely conducted on the territory of states and investigative measures are often executed under the control of state officials. As a result, the ICTs' control

¹ See also Karel De Meester, 'The Investigation Phase in International Criminal Procedure: in Search of Common Rules' (PhD Thesis, University of Amsterdam 2014), 515, who employs a similar definition: 'investigative acts which infringe upon the rights and liberties of the suspect (accused) or third persons.' Note that an interference with the right to privacy should not be equated with a violation of the right to privacy. As will be explained in section 2.1. below, interferences with the right to privacy constitute violations thereof if the requirements for lawful interferences have not been met.

² See also *ibid.*, 564, 588, where the author employs a similar primary focus on search and seizure operations and the interception of communication.

over investigative acts is more limited than over the conduct of the trial.³ The fragmented nature of the investigation makes that the factual capability to protect the rights of persons implicated by it is distributed amongst a number of different actors. The scope of the human rights obligations of each different actor might therefore be difficult to establish.

The added dimension of the cooperation context when it comes to the protection of the right to privacy before the ICTs is reflected in the structure of this Chapter. The discussion of the law and practice of the ICTs regarding the right to privacy is divided into two parts. The first part addresses direct investigative coercive action by the ICTs. Although most evidence-gathering is done by states at the ICTs' or parties' request, there are exceptions. Part three of this Chapter therefore addresses the power of the ICTs to conduct investigative measures independently, and the interpretation and application of the right to privacy in this context. Part four addresses indirect investigative coercive action, executed through cooperation between the ICTs and states. Focus is on the human rights obligations of the ICTs themselves in the context of investigative measures carried out on their behalf. This division has been made because both factual scenarios, of direct and indirect coercive action, raise different questions regarding the human rights obligations of the ICTs.⁴

The cooperation context is not unique to international criminal justice: states also increasingly cooperate with one another in the combating of crime. Accordingly, this Chapter's discussion of the IHRL framework regarding the right to privacy in the context of criminal investigations is divided into two sections. The first addresses IHRL regarding the right to privacy in the context of criminal investigations, generally. The second section addresses the added complications that arise regarding the interpretation and application of the right to privacy in the context of inter-state cooperation in criminal matters.

The law that applies to inter-state cooperation in criminal matters is not a source of human rights norms in and of itself. Instead, the inclusion of a section on the human rights dimension of inter-state cooperation in criminal matters is intended to contribute to a more complete framework for a comparison of IHRL regarding the right to privacy to the law and practice of the ICTs. The question is whether IHRL imposes obligations on states to protect the right to privacy in the context of inter-state cooperation in criminal matters. Although

³ Hiroto Fujiwara and Stephan Parmentier, 'Investigations' in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds), *International Prosecutors* (OUP 2012), 595, who note that 'international prosecutors do not have full control over the actual evidence-gathering process.'

⁴ See also Mark Klamburg, *Evidence in International Criminal Trials - Confronting Legal Gaps and the Reconstruction of Disputed Events* (Martinus Nijhoff 2013), 249, who distinguishes between active and passive cooperation; De Meester (n 1), 515, who also distinguishes between direct enforcement of coercive measures, and coercive measures executed through legal assistance by states.

inter-state cooperation differs from the cooperation between states and the ICTs, the former has greatly impacted on the latter. In addition, despite the important differences between these two forms of cooperation, states have modeled their legal frameworks governing cooperation with the ICTs after existing frameworks governing inter-state cooperation. The protection of the right to privacy in the context of transnational investigations raises issues distinct from those that arise in purely domestic criminal investigations. As will be seen, there are significant obstacles to the effective protection of the right to privacy in inter-state cooperation in criminal matters, which have greatly impacted on the practice of the ICTs in that regard. Therefore, a discussion of the main determinants of such inter-state cooperation and the protection of the right to privacy of persons implicated by transnational criminal investigations will result in a more complete understanding of the interpretation and application of the right to privacy before the ICTs.

2. IHRL Framework

The right to privacy aims to protect a private sphere to which every individual is entitled. This right is enshrined in most major international human rights treaties and instruments. The ICCPR, ACHR and UDHR contain almost identical provisions, which provide that all persons have the right to be protected against arbitrary or unlawful interferences with their privacy, family, home, or correspondence.⁵ These sources vary as to which spheres of privacy they specifically mention: the UDHR and ICCPR refer to ‘privacy, family, and correspondence’, while the ACHR adds ‘the home’ to the equation. The common ground is that arbitrary and unlawful interferences with the privacy of persons are prohibited, and that persons should be protected by law against such interferences. The ECHR also enshrines this right, and provides a more detailed list of requirements that interferences with the right to privacy must meet in order to be permissible under the Convention. It provides that ‘[e]veryone has the right to respect for his private and family life, his home and his correspondence’. Article 8(2) specifies that interferences with the exercise of this right must be ‘in accordance with the law’, ‘necessary in a democratic society’, and must pursue a legitimate aim, which may in-

⁵ Art 17 ICCPR provides: ‘[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.’, and that ‘Everyone has the right to the protection of the law against such interference or attacks.’; Art 11 ACHR provides that ‘[n]o one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honour or reputation.’, and that ‘[e]veryone has the right to the protection of the law against such interference or attacks.’; Art 12 UDHR provides that ‘[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.’

clude ‘the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’⁶ The ACHPR does not contain a provision protecting the right to privacy, but many African constitutions and statutes do.⁷ The HRC has followed the ECtHR in interpreting ‘non-arbitrariness’ as requiring interferences to have a legitimate aim, and to be proportionate to that aim.⁸ Generally, the HRC will assess whether the interference had a legitimate purpose, whether it was ‘predictable in the sense of rule of law’ and whether it was reasonable and proportional to the purpose to be achieved.⁹

2.1. The right to privacy in the context of domestic criminal investigations

This section first discusses the scope of the right to privacy as applicable in the context of a criminal investigation. In doing so, the kinds of interferences with privacy that are common in the context of domestic criminal investigations are discussed. Subsequently, this section addresses the requirements for permissible interferences with the right to privacy: lawfulness, a legitimate aim, and necessity and proportionality.

2.1.1. *Scope of the right to privacy in the context of criminal investigations*

Interferences with the right to privacy in the context of a criminal investigation can primarily be expected to occur in the execution of coercive measures. Particular focus is on search and seizure operations and the interception of communication. All forms of communication fall within the scope of the right to privacy, including through telephone, e-mail, or other forms of technology.¹⁰ Furthermore, both personal and professional communication may fall within its scope.¹¹ For example, the interception of communication from a professional telephone line and from a professional e-mail account have been found to constitute interferences with a

⁶ Art 8 ECHR.

⁷ George Edwards, ‘International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy’ (2001) 26 *Yale J Int'l L* 323, 401-405, who cites a multitude of domestic constitutions and codes of criminal procedure, including many African, Arab and Asian countries, that protect the right to privacy.

⁸ Nowak 2005, 400; HRC, *Garcia v. Colombia* (Comm No 687/1996), 16 May 2001, 10.3; HRC, General Comment 16, Article 17: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (1988) UN Doc HRI/GEN/1/Rev.1, 4.

⁹ Manred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel 2005), 383.

¹⁰ *ibid*, 401; ECtHR, Judgment, *Klass and others v. Germany* (App No 5029/71), 6 September 1978, 41; ECtHR, Judgment, *Malone v. United Kingdom* (App No. 8691/79), 2 August 1984, 64; ECtHR, Judgment, *Huwig v. France* (App No 11105/84), 24 April 1990, 25; ECtHR, Judgment, *Valenzuela Contreras v. Spain* (App No 58/1997/842/1048), 30 July 1998, 42; ECtHR, Decision, *Weber and Saravia v. Germany* (App No 54934/00), 29 June 2006, 76; ECtHR, Judgment, *Niculescu v. Romania* (App No 25333/03), 25 June 2013, 98.

¹¹ ECtHR, Judgment, *Michaud v. France* (App No 12323/11), 6 December 2012, 91.

person's private life and violations of their right to protection of their correspondence.¹² This right protects the confidentiality of 'private communication', whatever its content or form. It essentially protects 'all the exchanges in which individuals may engage for the purposes of communication'.¹³ Even recording a person at the police station may constitute an interference with their private life, which goes to show the broad scope of this right.¹⁴

The protection of the home is part of the right to privacy, and is explicitly mentioned in Article 8 ECHR, Article 11 ACHR and Article 12 UDHR. Therefore, the search of an individual's home in the context of a criminal investigation constitutes an interference with their right to private life. Business premises may also fall within the scope of the protection of the 'home' and a person's 'private life'.¹⁵ The ECtHR has thus developed a broad notion of the term 'private life', which protects essentially all forms of communication, the home, and sometimes business premises. As such, the right to private life covers a broader notion than the home, which is best captured by the notion of 'private space'.¹⁶

The right to privacy is not an absolute right: interferences with it do not necessarily constitute violations. They must, however, comply with certain standards. In order to constitute a permissible limitation of this right under the ECHR specifically, interferences must (1) be lawful, (2) pursue a legitimate aim, and (3) be necessary.¹⁷ It is for the applicant to establish that her/his right has been interfered with, whereupon the burden shifts to the government to establish that the interference complied with the said requirements.¹⁸

¹² ECtHR, Judgment, *Halford v. United Kingdom* (App No 20605/92), 25 June 1997, 44; ECtHR, Judgment, *Kopp v. Switzerland* (App No 13/1997/797/1000), 30 March 1998, 50; ECtHR, Judgment, *Amann v. Switzerland* (App No 27798/95), 16 February 2000, 44; ECtHR, Judgment, *Copland v. United Kingdom* (App No 62617/00), 3 April 2007, 41.

¹³ ECtHR, Judgment, *Michaud v. France* (App No 12323/11), 6 December 2012, 90.

¹⁴ ECtHR, Judgment, *P.G. and J.H. v. United Kingdom* (App No 44787/98), 25 September 2001, 59.

¹⁵ ECtHR, Judgment, *Niemitz v. Germany* (App No 13710/88), 16 December 1992, 29-32; ECtHR, Judgment, *Roemen and Schmit v. Luxembourg* (App No 51772/99), 25 February 2003, 64; ECtHR, Judgment, *Elçi and others v. Turkey* (App Nos 23145/93 and 25091/94), 13 November 2003, 696; ECtHR, Judgment, *Buck v. Germany* (App No 41604/98), 28 April 2005, 31; ECtHR, Judgment, *Sallinen and others v. Finland* (App No 50882/99), 27 September 2005, 70; ECtHR, Judgment, *Bernh Larsen Holding AS and others v. Norway* (App No 24117/08), 14 March 2013, 104; see also, on the ICCPR, Nowak (n 8), 400.

¹⁶ David Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009), 368.

¹⁷ A formula that the ECHR uses for several rights, see Arts 9(2), 10(2), 11(2). This formula can be traced back to Art 29(2) UDHR, which states that limitations of the rights set forth in the Declaration are only permissible if they are 'determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.'

¹⁸ Harris, O'Boyle and Warbrick (n 16), 397.

2.1.2. Lawfulness

For an interference with the right to privacy to be lawful, it must at least have ‘some basis’ in national law.¹⁹ The ECtHR employs a substantive understanding of this requirement, which means that the ‘law’ in question does not necessarily need to have a certain form or status, or even be laid down in statutes.²⁰ Case law or longstanding practices can satisfy this substantive understanding of lawfulness.²¹ Generally, the interference and the law that regulates it must be in accordance with ‘the rule of law’.²² However, in the context of criminal investigations, a concrete legal basis for a specific coercive measure is generally required. The ECtHR has often found violations because it considered there was not a sufficiently specific legal basis for the investigative measure in question.²³ The ECtHR has further developed certain qualitative requirements under the heading of lawfulness: ‘[t]he Court will check whether there is legislation in force that generally permits the interference in question, the law itself, in turn, must fulfill certain requirements, and, finally, the law must have also been correctly applied in the case at hand.’²⁴ Similarly, the HRC’s interpretation of the requirement of lawfulness shows that law authorizing an interference with privacy must not be too general and must provide satisfactory legal safeguards.²⁵

¹⁹ ECtHR, Judgment, *Malone v. United Kingdom* (App No. 8691/79), 2 August 1984, 66; ECtHR, Judgment, *Chappell v. United Kingdom* (App No 10461/83), 30 March 1989, 52; ECtHR, Judgment, *Huvig v. France* (App No 11105/84), 24 April 1990, 26; ECtHR, Judgment, *Valenzuela Contreras v. Spain* (App No 58/1997/842/1048), 30 July 1998, 46; ECtHR, Judgment, *P.G. and J.H. v. United Kingdom* (App No 44787/98), 25 September 2001, 44; ECtHR, Judgment, *Robathin v. Austria* (App No 30457/06), 3 July 2012, 40; ECtHR, Judgment, *Bernh Larsen Holding AS and others v. Norway* (App No 24117/08), 14 March 2013, 123; HRC, General Comment 16, Article 17: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (1988) UN Doc HRI/GEN/1/Rev.1, 3.

²⁰ ECtHR, Judgment, *Huvig v. France* (App No 11105/84), 24 April 1990, 28; ECtHR, Judgment, *Sallinen and others v. Finland* (App No 50882/99), 27 September 2005, 77; ECtHR, Judgment, *Robathin v. Austria* (App No 30457/06), 3 July 2012, 40.

²¹ ECtHR, Judgment, *Sunday Times v. United Kingdom* (App No 13166/87), 26 April 1979, 47; ECtHR, Judgment, *Malone v. United Kingdom* (App No. 8691/79), 2 August 1984, 66; ECtHR, Judgment, *Chappell v. United Kingdom* (App No 10461/83), 30 March 1989, 52.

²² ECtHR, Judgment, *Kopp v. Switzerland* (App No 13/1997/797/1000), 30 March 1998, 63; ECtHR, Judgment, *Valenzuela Contreras v. Spain* (App No 58/1997/842/1048), 30 July 1998, 46; ECtHR, Judgment, *P.G. and J.H. v. United Kingdom* (App No 44787/98), 25 September 2001, 44; ECtHR, Judgment, *Sallinen and others v. Finland* (App No 50882/99), 27 September 2005, 82; ECtHR, Judgment, *Copland v. United Kingdom* (App No 62617/00), 3 April 2007, 46; ECtHR, Judgment, *The Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria* (App No 62540/00), 28 June 2007, 71; ECtHR, Judgment, *Robathin v. Austria* (App No 30457/06), 3 July 2012, 40; ECtHR, Judgment, *Bernh Larsen Holding AS and others v. Norway* (App No 24117/08), 14 March 2013, 123.

²³ ECtHR, Judgment, *Taylor Sabori v. United Kingdom* (App. No. 47114/99), 22 October 2002, 19: There was no specific legal basis for intercepting pager messages, therefore: violation; Similarly ECtHR, Judgment, *Lewis v. United Kingdom* (App No 1303/02), 25 November 2003, 19 ECtHR, Judgment, *Copland v. United Kingdom* (App No 62617/00), 3 April 2007, 48.

²⁴ Stefan Trechsel, *Human Rights in Criminal Proceedings* (OUP 2005), 537.

²⁵ HRC, *Pinkney v. Canada* (Comm No R.7/27), 29 October 1981, 34.

The qualitative requirements that the ECtHR uses to check the lawfulness of interference with privacy are accessibility and foreseeability.²⁶ The former implies that people must have a certain indication of the legal norms that apply to a given case.²⁷ The latter requires a norm to be ‘formulated with sufficient precision to enable the citizen to regulate his conduct’; it does not require absolute certainty, but a person must be able to foresee, at least to a reasonable degree, what consequences any given action would entail.²⁸

The requirement of foreseeability has been further developed in the case law of the Court specifically with respect to the interception of communication and the search of (private) premises. The law authorizing such interferences must incorporate substantive guarantees to prevent arbitrary interferences with the right to privacy.²⁹ This is particularly important with respect to secret measures of surveillance or the interception of communication, ‘because of the lack of public scrutiny and the risk of misuse of power’.³⁰ The exercise of such investigative power must be in line with ‘the rule of law’, which means that the discretion granted to the authorities must be clearly circumscribed. To give individuals adequate protection against arbitrary interferences, the law in question must indicate the scope of the discretion conferred on the competent authorities and the manner in which they may exercise their discretion with sufficient clarity.³¹ This means that the law must prescribe in which circumstances and under which conditions public authorities are empowered to resort to ‘secret and potentially dangerous interference with the right to respect for private life.’³² The ECtHR

²⁶ ECtHR, Judgment, *Huvig v. France* (App No 11105/84), 24 April 1990, 26; ECtHR, Judgment, *Camenzind v. Switzerland* (App No 21353/93), 16 December 1997, 37; ECtHR, Judgment, *Doerga v. Netherlands* (App No 50210/99), 27 April 2004, 45; ECtHR, Judgment, *Sefilyan v. Armenia* (App No 22491/08), 2 October 2012, 121; ECtHR, Judgment, *Bernh Larsen Holding AS and others v. Norway* (App No 24117/08), 14 March 2013, 123.

²⁷ ECtHR, Judgment, *Sunday Times v. United Kingdom* (App No 13166/87), 26 April 1979, 49; ECtHR, Judgment, *Malone v. United Kingdom* (App No. 8691/79), 2 August 1984, 66; ECtHR, Judgment, *Chappell v. United Kingdom* (App No 10461/83), 30 March 1989, 56.

²⁸ ECtHR, Judgment, *Sunday Times v. United Kingdom* (App No 13166/87), 26 April 1979, 49; ECtHR, Judgment, *Malone v. United Kingdom* (App No. 8691/79), 2 August 1984, 66; ECtHR, Judgment, *Chappell v. United Kingdom* (App No 10461/83), 30 March 1989, 56.

²⁹ ECtHR, Judgment, *Valenzuela Contreras v. Spain* (App No 58/1997/842/1048), 30 July 1998, 46.

³⁰ ECtHR, Judgment, *Kopp v. Switzerland* (App No 13/1997/797/1000), 30 March 1998, 64; ECtHR, Judgment, *Amann v. Switzerland* (App No 27798/95), 16 February 2000, 56; ECtHR, Judgment, *Doerga v. Netherlands* (App No 50210/99), 27 April 2004, 45.

³¹ ECtHR, Judgment, *Malone v. United Kingdom* (App No. 8691/79), 2 August 1984, 68; ECtHR, Judgment, *Doerga v. Netherlands* (App No 50210/99), 27 April 2004, 50; ECtHR, Decision, *Weber and Saravia v. Germany* (App No 54934/00), 29 June 2006, 94; ECtHR, Judgment, *Sefilyan v. Armenia* (App No 22491/08), 2 October 2012, 126.

³² ECtHR, Judgment, *Malone v. United Kingdom* (App No. 8691/79), 2 August 1984, 67; ECtHR, Judgment, *Huvig v. France* (App No 11105/84), 24 April 1990, 29; ECtHR, Judgment, *Halford v. United Kingdom* (App No 20605/92), 25 June 1997, 49; ECtHR, Judgment, *Kopp v. Switzerland* (App No 13/1997/797/1000), 30 March 1998, 64; ECtHR, Judgment, *Valenzuela Contreras v. Spain* (App No 58/1997/842/1048), 30 July 1998, 46, 60; ECtHR, Judgment, *Amann v. Switzerland* (App No 27798/95), 16 February 2000, 58; ECtHR, Judgment, *Doerga v. Netherlands* (App No 50210/99), 27 April 2004, 50; ECtHR, Judgment, *The Association for Europe-*

has repeatedly held that the interception of communication is such a serious interference with the private life of individuals that it must be based on a law that is ‘particularly precise’, and that it is essential that there are clear, detailed rules on the subject, ‘especially as the technology available for use is continually becoming more sophisticated.’³³ The Court has also emphasized the need for ‘particularly precise law’ regulating search and seizure operations.³⁴ According to the Court, ‘it is trite that specific statutory or other express legal authority is required for more invasive measures, whether searching private property or taking personal body samples.’³⁵ Similarly, the HRC has held that the legal basis for interferences with the right to privacy must ‘specify, in detail, the precise circumstances in which such interferences may be permitted’.³⁶

With respect to the interception of communication, the ECtHR has developed a set of minimum standards that should be laid down in the law, in order for it to satisfy the requirement of lawfulness. The law should (1) describe the nature of the offences which may give rise to the measure; (2) clearly define the categories of people liable to have their communication monitored; (3) prescribe a limit on the duration of such monitoring; (4) prescribe procedures to be followed for examining, using and storing the data obtained; (5) develop precautions to be taken when communicating the data to other parties; and (6) lay down the circumstances in which data obtained may or must be erased.³⁷ These safeguards should also be formulated with sufficient precision and appear clearly from the law.³⁸ Furthermore, the discretion that the (judicial) authorities may exercise in ordering such measures must be clearly circumscribed to ensure that this power is not ‘unfettered’.³⁹ The law must indicate the scope

an Integration and Human Rights and Ekimdzhev v. Bulgaria (App No 62540/00), 28 June 2007, 75; ECtHR, Judgment, *Sefilyan v. Armenia* (App No 22491/08), 2 October 2012, 123.

³³ ECtHR, Judgment, *Huvig v. France* (App No 11105/84), 24 April 1990, 32; ECtHR, Judgment, *Kopp v. Switzerland* (App No 13/1997/797/1000), 30 March 1998, 72; ECtHR, Judgment, *Valenzuela Contreras v. Spain* (App No 58/1997/842/1048), 30 July 1998, 46; ECtHR, Judgment, *Amann v. Switzerland* (App No 27798/95), 16 February 2000, 56; ECtHR, Decision, *Weber and Saravia v. Germany* (App No 54934/00), 29 June 2006, 93; ECtHR, Judgment, *The Association for European Integration and Human Rights and Ekimdzhev v. Bulgaria* (App No 62540/00), 28 June 2007, 75; ECtHR, Judgment, *Sefilyan v. Armenia* (App No 22491/08), 2 October 2012, 124.

³⁴ ECtHR, Judgment, *Sallinen and others v. Finland* (App No 50882/99), 27 September 2005, 90.

³⁵ ECtHR, Judgment, *P.G. and J.H. v. United Kingdom* (App No 44787/98), 25 September 2001, 62.

³⁶ HRC, General Comment 16, Article 17: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (1988) UN Doc HRI/GEN/1/Rev.1, 8.

³⁷ See eg ECtHR, Judgment, *Huvig v. France* (App No 11105/84), 24 April 1990, 34; ECtHR, Judgment, *Valenzuela Contreras v. Spain* (App No 58/1997/842/1048), 30 July 1998, 46; similarly ECtHR, Decision, *Weber and Saravia v. Germany* (App No 54934/00), 29 June 2006, 95; ECtHR, Judgment, *The Association for European Integration and Human Rights and Ekimdzhev v. Bulgaria* (App No 62540/00), 28 June 2007, 76; ECtHR, Judgment, *Sefilyan v. Armenia* (App No 22491/08), 2 October 2012, 125.

³⁸ ECtHR, Judgment, *Valenzuela Contreras v. Spain* (App No 58/1997/842/1048), 30 July 1998, 57.

³⁹ ECtHR, Judgment, *Amann v. Switzerland* (App No 27798/95), 16 February 2000, 56. See also ECtHR, Judgment, *Valenzuela Contreras v. Spain* (App No 58/1997/842/1048), 30 July 1998, 60: ‘foreseeable means, in the

and manner of exercise of the relevant discretion conferred on the public authorities with reasonable clarity.’⁴⁰

The ICCPR requires that searches of a home be authorized by a specific decision by a state authority that is expressly empowered by law to do so.⁴¹ This does not mean the authority has to be ‘judicial’. The ECtHR also does not strictly require prior judicial authorization for a search order. However, it has often found a violation where such review was absent, and has generally emphasized the importance of independent judicial oversight.⁴² In the absence of a search warrant, the ECtHR will be more inclined towards finding a violation.⁴³ In addition, there are content requirements for search warrants, which must be specific, should clarify what items may be sought, and should not be overly broad.⁴⁴

2.1.3. *Legitimate aim*

The ECHR requires that interferences pursue a legitimate aim. In relevant part, Article 8(2) recognizes the interests of national security and public safety, the prevention of disorder or crime, as well as the protection of the rights of others as legitimate aims to limit a person’s right to private life. This criterion has not proven difficult to satisfy in connection with investigative measures, because the investigation of crime fits neatly within the scope of the interests mentioned in Article 8 (2) ECHR.⁴⁵

2.1.4. *Necessity and proportionality*

The requirement that interferences be ‘necessary in a democratic society’ means that the interference must correspond to a ‘pressing social need’, and that it must be ‘proportionate to

sphere of monitoring telephone communications, that the guarantees stating the extent of the authorities’ discretion and the manner in which it is to be exercised must be set out in detail in domestic law so that it has a binding force which circumscribes the judges’ discretion in the application of such measures’.

⁴⁰ ECtHR, Judgment, *Huvig v. France* (App No 11105/84), 24 April 1990, 35.

⁴¹ Nowak (n 8), 400.

⁴² ECtHR, Judgment, *Kopp v. Switzerland* (App No 13/1997/797/1000), 30 March 1998, 72; ECtHR, Judgment, *Sallinen and others v. Finland* (App No 50882/99), 27 September 2005, 89; ECtHR, Judgment, *Niculescu v. Romania* (App No 25333/03), 25 June 2013, 99, with respect to the interception of communication.

⁴³ ECtHR, Judgment, *Elçi and others v. Turkey* (App Nos 23145/93 and 25091/94), 13 November 2003, 699.

⁴⁴ ECtHR, Judgment, *Elçi and others v. Turkey* (App Nos 23145/93 and 25091/94), 13 November 2003, 697; ECtHR, Judgment, *Sallinen and others v. Finland* (App No 50882/99), 27 September 2005, 89.

⁴⁵ Harris, O’Boyle and Warbrick (n 16), 407; Trechsel (n 24), 540, specifically n 22, where the author mentions several cases where it was shown that this requirement is not difficult to satisfy; Lorena Bachmaier Winter, ‘The Role of the Proportionality Principle in Cross-Border Investigations Involving Fundamental Rights’ in Stefano Ruggeri (ed), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings - A Study in Memory of Vittorio Grevi and Giovanni Tranchina* (Springer 2013), 91.

the legitimate aim pursued'.⁴⁶ This standard implies a test of proportionality, which encompasses questions of the appropriateness of the measure, its necessity in the strict sense, as well as its reasonableness.⁴⁷ The requirement of 'reasonableness' can also be found in the views of the HRC in this regard.⁴⁸ Subsidiarity is another standard that is part of this test, which requires that the same aim could not have been reached through less restrictive alternative means.⁴⁹ That does not mean that the specific measure had to have been 'absolutely indispensable'; it is sufficient that the measure was 'reasonably necessary and convenient'.⁵⁰ Proportionality is not a concept that is easily defined *a priori*. Instead, it must be assessed on a case-by-case basis and the ECtHR has developed a number of parameters that the Court employs to determine whether this requirement is satisfied.

In its assessment of necessity, the ECtHR sometimes grants member states a margin of appreciation.⁵¹ This margin confirms the deferent role of the ECtHR, since it recognizes that state authorities are better placed to assess whether there is a pressing social need. They are more familiar with the circumstances of the case and therefore in a better position to evaluate the necessity of the measure and, in doing so, to find the appropriate balance between the protection of individual rights and the objectives of the public interest.⁵² States have a particularly wide margin of appreciation when it comes to the protection of their national security and the usage of telephone interceptions in doing so.⁵³ The width of the margin is determined by, amongst other things, the nature and seriousness of the interests at stake, and the gravity of the interference.⁵⁴

The state bears the burden of proof for establishing necessity and proportionality and must demonstrate the 'pressing social need' for interfering with the person's right.⁵⁵ The reasons put forth by the state to, for example, execute a search and seizure must be 'relevant and

⁴⁶ ECtHR, Judgment, *Camenzind v. Switzerland* (App No 21353/93), 16 December 1997, 44; ECtHR, Judgment, *Buck v. Germany* (App No 41604/98), 28 April 2005, 44; ECtHR, Judgment, *Keegan v. United Kingdom* (App. No 28867/03), 18 July 2006, 30; ECtHR, Judgment, *Robathin v. Austria* (App No 30457/06), 3 July 2012, 43; ECtHR, Judgment, *Michaud v. France* (App No 12323/11), 6 December 2012, 120.

⁴⁷ Bachmaier Winter (n 45), 89.

⁴⁸ Nowak (n 8), 383; HRC, General Comment 16, Article 17: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (1988) UN Doc HRI/GEN/1/Rev.1, 4; HRC, *Garcia v. Colombia* (Comm No. 687/1996), 16 May 2001, 10.3.

⁴⁹ Bachmaier Winter (n 45), 89; confirmed by the Court: ECtHR, Judgment, *Buck v. Germany* (App No 41604/98), 28 April 2005, 49.

⁵⁰ Bachmaier Winter (n 45), 89.

⁵¹ ECtHR, Judgment, *Buck v. Germany* (App No 41604/98), 28 April 2005, 44; ECtHR, Judgment, *Keegan v. United Kingdom* (App. No 28867/03), 18 July 2006, 31; ECtHR, Judgment, *Bernh Larsen Holding AS and others v. Norway* (App No 24117/08), 14 March 2013, 158.

⁵² Bachmaier Winter (n 45), 92-93.

⁵³ ECtHR, Decision, *Weber and Saravia v. Germany* (App No 54934/00), 29 June 2006, 105.

⁵⁴ ECtHR, Judgment, *Bernh Larsen Holding AS and others v. Norway* (App No 24117/08), 14 March 2013, 158.

⁵⁵ Harris, O'Boyle and Warbrick (n 16), 407.

sufficient'.⁵⁶ Generally, effective safeguards against arbitrariness must be in place to meet the requirements of necessity and proportionality.⁵⁷ Even where the aim pursued is of high importance and the task for the government is very complex, the relevant legislation must still provide 'adequate and effective safeguards against abuse'.⁵⁸ This shows a certain overlap with the criterion of lawfulness, whereby the ECtHR also considers the existence of safeguards as an essential part of its test relating to the quality of the law.⁵⁹

Whether the actual safeguards in place are sufficient depends on the circumstances of the case. In that regard, the Court assesses a number of factors, including the measures' nature, scope, and duration, the grounds required for such measures to be ordered, which authorities are mandated to order, carry out, and supervise such measures, and the remedy that national law provides.⁶⁰ With regard to search and seizure operations specifically, the Court has developed a number of criteria, including, first, the seriousness of the crime in connection with which the search took place; second, the way and circumstances in which the search order was issued, including the amount of evidence available; third, the content and scope of the order, including the nature of the premises that were searched and the safeguards that were in place to limit the impact of the measure as much as reasonably possible; and fourth, the possible repercussions on the reputation of the person affected by the search.⁶¹

The ECtHR has expressed a clear preference for prior judicial authorization as a crucial safeguard to ensure the proportionality and necessity of investigative measures.⁶² Judicial oversight offers the best guarantees for independence, impartiality and a proper procedure.⁶³

⁵⁶ ECtHR, Judgment, *Camenzind v. Switzerland* (App No 21353/93), 16 December 1997, 45; ECtHR, Judgment, *Buck v. Germany* (App No 41604/98), 28 April 2005, 45; ECtHR, Judgment, *Keegan v. United Kingdom* (App No 28867/03), 18 July 2006, 31; ECtHR, Judgment, *Bernh Larsen Holding AS and others v. Norway* (App No 24117/08), 14 March 2013, 158.

⁵⁷ ECtHR, Judgment, *Klass and others v. Germany* (App No 5029/71), 6 September 1978, 50; ECtHR, Judgment, *Robathin v. Austria* (App No 30457/06), 3 July 2012, 43.

⁵⁸ ECtHR, Judgment, *Crémieux v. France* (App No 11471/85), 25 February 1993, 39; ECtHR, Judgment, *Funke v. France* (App No 10828/84), 25 February 1993, 56; ECtHR, Judgment, *Mialhe v. France* (App No 12661/87), 25 February 1993, 37.

⁵⁹ See *supra* section 2.1.2.

⁶⁰ ECtHR, Judgment, *Klass and others v. Germany* (App No 5029/71), 6 September 1978, 50; ECtHR, Decision, *Weber and Saravia v. Germany* (App No 54934/00), 29 June 2006, 106; ECtHR, Judgment, *The Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria* (App No 62540/00), 28 June 2007, 77; ECtHR, Judgment, *Sefilyan v. Armenia* (App No 22491/08), 2 October 2012, 127.

⁶¹ ECtHR, Judgment, *Buck v. Germany* (App No 41604/98), 28 April 2005, 45; see also Bachmaier Winter (n 45), 92: '[a]mong the elements to evaluate the proportionality principle in the criminal investigation, we can mention the seriousness of the crime, the intensity of the suspicions, the perspective of success of the measure, and the prejudice caused to the individual person vis-à-vis the usefulness of the result'.

⁶² Trechsel (n 24), 558; ECtHR, Judgment, *Niemitz v. Germany* (App No 13710/88), 16 December 1992, 37; ECtHR, Judgment, *Crémieux v. France* (App No 11471/85), 25 February 1993, 40; ECtHR, Judgment, *Funke v. France* (App No 10828/84), 25 February 1993, 57; ECtHR, Judgment, *Mialhe v. France* (App No 12661/87), 25 February 1993, 38; ECtHR, Judgment, *Robathin v. Austria* (App No 30457/06), 3 July 2012, 45.

⁶³ ECtHR, Judgment, *Klass and others v. Germany* (App No 5029/71), 6 September 1978, 55.

The Court has often considered independent and judicial oversight during the actual execution of a search operation to constitute an effective guarantee.⁶⁴ Furthermore, the Court has found a violation of Article 8 with regard to the interception of data, because there was no independent judicial review of whether the data obtained through interception were actually destroyed at a later stage, which strengthens the Court's preference for judicial oversight during the authorization, execution, and subsequent handling of the results of coercive measures.⁶⁵ Although judicial authorization is not an absolute requirement, its absence is a strong indication of arbitrariness, and the Court requires that there be a clear legal framework and strict limits on the exercise of the power to order coercive measures by non-judicial officials.⁶⁶ In *Camenzind*, the Court found no violation despite the absence of judicial oversight because the law in question provided a multitude of other safeguards, including the requirement of a written warrant which could be issued by a limited number of public officials.⁶⁷ The proportionality requirement entails that the discretion of the authorizing officials is clearly circumscribed.⁶⁸

When it comes to search warrants, specifically, the Court has consistently considered the specificity of such warrants to be an important safeguard of proportionality of the search itself, which may not be indiscriminate.⁶⁹ For example, the ECtHR has found a violation of Article 8 because the search warrant in question, although judicially ordered, was insufficiently reasoned and failed to justify the breadth of the search.⁷⁰ Relevant criteria to assess proportionality include the seriousness of the offence and the precision with which the warrant is drawn up; particularly important is the identification of the document or other object to be seized.⁷¹

⁶⁴ ECtHR, Judgment, *Roemen and Schmit v. Luxembourg* (App No 51772/99), 25 February 2003, 69; ECtHR, Judgment, *Robathin v. Austria* (App No 30457/06), 3 July 2012, 49.

⁶⁵ ECtHR, Judgment, *The Association for European Integration and Human Rights and Ekimdzhiiev v. Bulgaria* (App No 62540/00), 28 June 2007, 85-91; ECtHR, Judgment, *Lenev v. Bulgaria* (App No 41452/07), 4 December 2012, 146.

⁶⁶ ECtHR, Judgment, *Camenzind v. Switzerland* (App No 21353/93), 16 December 1997, 45; ECtHR, Judgment, *Bernh Larsen Holding AS and others v. Norway* (App No 24117/08), 14 March 2013, 172.

⁶⁷ ECtHR, Judgment, *Camenzind v. Switzerland* (App No 21353/93), 16 December 1997, 46.

⁶⁸ ECtHR, Judgment, *Crémieux v. France* (App No 11471/85), 25 February 1993, 40; ECtHR, Judgment, *Funke v. France* (App No 10828/84), 25 February 1993, 57; ECtHR, Judgment, *Miailhe v. France* (App No 12661/87), 25 February 1993, 38.

⁶⁹ ECtHR, Judgment, *Niemitz v. Germany* (App No 13710/88), 16 December 1992, 37; ECtHR, Judgment, *Miailhe v. France* (App No 12661/87), 25 February 1993, 39; ECtHR, Judgment, *Roemen and Schmit v. Luxembourg* (App No 51772/99), 25 February 2003, 70; ECtHR, Judgment, *Robathin v. Austria* (App No 30457/06), 3 July 2012, 47.

⁷⁰ ECtHR, Judgment, *Robathin v. Austria* (App No 30457/06), 3 July 2012, 52.

⁷¹ Trechsel (n 24), 558.

2.1.5. *Interim conclusion*

IHRL permits interferences with the right to privacy in the course of criminal investigations. However, it prescribes that they must be lawful, and may not be arbitrary. This means that there must be a specific legal basis for the interference in question. This legal basis, in turn, must provide sufficient guarantees to prevent arbitrary resort to the measure. It must specify under which circumstances the measure may be ordered, by whom it may be ordered, and which considerations may factor into the decision whether or not to order it. There is a certain overlap between the requirements of lawfulness, and necessity and proportionality. The interference must be proportionate to its aim, and the provision of effective safeguards against arbitrary resort to the measure is considered a part of the proportionality test as well. The execution of the measure must also be proportionate, which means that the object of a search must be specific, and only reasonable force may be used. IHRL incorporates a clear preference for judicial oversight with regard to the ordering and execution of coercive measures. Although this requirement is not absolute, it is clear that it will be more difficult for states to justify interferences with the right to privacy in the absence of such oversight.

2.2. The right to privacy in the context of inter-state cooperation in criminal matters

The majority of the investigative activities for the purposes of international criminal trials are executed by states on behalf of the ICTs. As a result, the legal framework governing the protection of the right to privacy before the ICTs differs significantly from the framework governing the protection of the rights discussed in the other chapters of this study. Cooperation is of even more primary importance. International cooperation in the investigation of crime is not unique to the context of the ICTs, as states also cooperate with each other given the increasingly transnational dimension of crime. Therefore, this section addresses the protection of human rights in the context of inter-state cooperation in criminal matters. As will be seen, the cooperation between states and the ICTs in the investigative process is heavily modeled on inter-state cooperation in this field. In addition, the investigation of crime in the context of such cooperation raises distinct human rights issues that are foreign to purely domestic investigations. Such transnational investigations are fragmented, given the factual division of labor between different states involved in the investigation and the trial. This necessarily implies a parallel fragmentation of the factual capability, as well as of the responsibility to protect the rights of persons implicated in the investigative process. As a result, the IHRL framework applicable to transnational investigations of crime has a number of distinct features that differ

from those that apply to purely domestic investigations. The purpose of this section is to provide a brief introduction into the field of inter-state cooperation in criminal matters from the perspective of the privacy rights of persons affected by transnational investigations. It is not possible within the scope of the present inquiry to do full justice to the complexity of the issues. At the same time, these issues cannot be ignored, since they are crucial for a proper understanding of the human rights related problems that arise in the cooperation between states and ICTs.

Inter-state cooperation in criminal matters classically involves two states: the requesting state, which wishes a certain investigative measure to be carried out in the territory of another state, and the requested state, which is asked to execute such an investigative measure. Generally, a bi- or multilateral treaty on mutual legal assistance governs the relationship between the requested and requesting state. There is a plethora of different Mutual Legal Assistance Treaties (MLATs) across the globe that govern a web of bilateral inter-state relations in this field, which makes it impracticable to cover the actual content of such agreements in-depth. Instead, the UN Model Treaty on Mutual Legal Assistance in Criminal Matters (UN Model Treaty) will be used as a blueprint throughout this section, as it is a widely used format for states that conclude such treaties.

This section focuses on the human rights obligations of states that request cooperation, since the ICTs will mostly be on the requesting side of cooperation as well. The section is structured according to three moments during which human rights obligations may arise for the authorities that request (other) states to conduct coercive investigative measures on their behalf. The question is whether, and if so, which guarantees are in place to protect the right to privacy at each stage. The first moment is when a request for assistance is formulated and submitted to foreign authorities. As has been seen in the above, when deciding to perform coercive measures domestically, IHRL requires states to provide for formal and material conditions for their execution. The question arises whether requesting authorities, be it of a state or of an ICT, provide for similar guarantees when they request foreign authorities to execute coercive measures on their behalf. The second moment is the actual execution of the investigative measure. This section focuses on the possible human rights obligations of the requesting authorities arising in the course of the execution of the investigative measure by the requested authorities. May requesting authorities request or require foreign authorities to follow certain procedures in their execution of the request, and does IHRL require the requesting authorities to do so? Another relevant question in this context concerns the law applicable to the execution of the request. Does the law of the requested state, the *lex loci*, apply, the law of

the requesting state, the *lex fori*, IHRL, or a combination of these? The third moment is after the execution of the investigative measure, when the evidence thus gathered is being admitted into evidence. Does the right to privacy impose obligations on the requesting authorities to investigate whether the collection of the evidence has taken place in accordance with the right to privacy, and what are the consequences of possible violations of this right? Inevitably, the subsequent section touches upon issues of domestic law and practice. This is necessary to illustrate the ways in which states have implemented their IHRL obligations, and should not be seen as an expansion of this study's theoretical framework to include domestic law and procedure. Instead, the central issue pertains to the obligations of the requesting state under the right to privacy when it formulates a request for assistance, when the request is executed, and when it admits the information obtained into evidence.

2.2.1. Formulating and submitting a request for assistance

When domestic investigating authorities wish to execute a coercive measure, there are normally certain domestic procedural and material conditions for this, as required by IHRL. In the Netherlands, for example, the search of homes is only allowed in the investigation of specific, more serious crimes.⁷² In addition, the Dutch prosecuting authorities must obtain authorization from a judge to conduct the search, and this authorization must be motivated.⁷³ Generally, in order to obtain such authorization, investigating authorities must explain the status of the investigation, including the investigative measures used thus far, the grounds for the suspicion that a crime has been committed, and, importantly, they must justify the need for this coercive measure.⁷⁴ The requirements of proportionality and subsidiarity apply to the ordering and execution of searches: the judge must be able to assess the need for this coercive measure and to provide a motivated decision. Similar requirements govern the use of other coercive measures, such as the interception of communication. These safeguards are required by the right to privacy of persons affected by such measures. As has been seen, coercive measures may interfere with the right to privacy, but the permissibility of such interferences

⁷² Art 97(1) and Art 67(1) Netherlands CCP.

⁷³ Art 97(2) Netherlands CCP.

⁷⁴ UNGA, Model Treaty on Mutual Assistance in Criminal Matters (14 December 1990) UN Doc A/RES/45/117, Art 1(2)(d) on search and seizure operations; UN Office for Drugs and Crimes, 'Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters' (2002) < http://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf > accessed 8 October 2013, 78-79: 'in most states, the power for a judicial authority to authorize a search will normally be exercised on the basis of underlying facts having been established or a standard having been met. In common law countries, the Prosecutor or officer applying for a warrant must establish that the warrant is justified, in that there are reasonable grounds to believe or suspect that relevant evidence will be found through the search.'

is subject to conditions of lawfulness, necessity and proportionality. These conditions translate into guarantees that must prevent arbitrary resort to these intrusive measures.⁷⁵

The question is how these guarantees are or must be provided in the context of cooperation in criminal matters. Should the authorities of the requesting state apply the same procedural safeguards for coercive measures to be executed abroad, as to the domestic execution of such measures? Given the fact that the requesting state is in charge of the overall investigation, it is better placed to assess the legality and necessity of coercive measures. Or should the requested state assess the legality and necessity of the measure, since its authorities will execute the measure, as a result of which the measure must be lawful under the requested state's laws? An answer to these questions will enable a better assessment of the human rights obligations of the ICTs when they request states to conduct coercive measures on their behalf.

IHRL provides little explicit guidance on these issues. However, states cannot circumvent their human rights obligations through international cooperation.⁷⁶ This militates in favor of the analogical application of the safeguards associated with the use of coercive measures to situations of inter-state cooperation in criminal matters. The Dutch Supreme Court, for example, has decided that the same domestic requirements apply to a Prosecutor's request to conduct a home search when s/he requests foreign authorities to conduct the search.⁷⁷ This means that a Dutch Prosecutor must obtain authorization from a national judge before s/he can request foreign authorities to conduct this coercive measure. Similarly, within the EU, the authority issuing a European Investigation Order, ie a request for assistance, must carry out a check of necessity, proportionality and availability of the investigative measure, prior to submitting the request to foreign authorities.⁷⁸ The EU Directive further clearly provides that an Investigation Order may only be issued if the requested investigative measures could have also been ordered in a similar domestic case. As a result, the regular domestic requirements that apply to the authorization of coercive measures executed within the national legal order equally apply when these measures are carried out transnationally.⁷⁹

⁷⁵ See *supra* section 2.1.

⁷⁶ ECtHR, Judgment, *Soering v. United Kingdom* (App No 14038/88), 7 July 1989, 86, 88; the ECtHR has developed a substantial line of case law on states' continued responsibility under the ECHR when they transfer powers to international organizations, see *supra* Chapter 2, section 3.1.

⁷⁷ Supreme Court (Netherlands), (ECLI:NL:HR:1987:AC9986), 29 July 1987, 4.4.1.

⁷⁸ Council Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in Criminal Matters (2014) OJ L 130/1, Article 6.

⁷⁹ Stefano Ruggeri, 'Transnational Inquiries and the Protection of Fundamental Rights in Comparative Law: Models of Gathering Overseas Evidence in Criminal Matters' in Stefano Ruggeri (ed), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings - A Study in Memory of Vittorio Grevi and Giovanni Tranchina* (Springer 2013), 291.

However, these procedures are specific to cooperation in the framework of the EU, where requested states are increasingly expected to almost blindly execute requests for investigative measures. The general international legal framework applicable to inter-state cooperation in criminal matters differs significantly from this. The UN Model Treaty does not impose any obligations on the requesting state related to the domestic safeguards that apply to coercive measures. The primary aim of such MLATs is to enable and facilitate cooperation. The assumption is that the domestic statutes, constitutions, and international human rights norms cover the human rights obligations of both the requested and requesting state. Moreover, the law applicable to the execution of the request, particularly when it comes to the execution of coercive measures, will normally be the law of the requested state, pursuant to the principle of *lex loci regit actum*.⁸⁰ Like with the execution of domestically ordered coercive measures, internationally requested coercive measures will have to go through the regular domestic procedures and channels of authorization in the requested state. Such authorization processes differ per country and MLATs are in principle neutral as to the way in which requests for legal assistance are executed, and thus far, this gap has not been filled by IHRL.

The UN Model Treaty does provide some guidelines regarding the content of a request, which, in relevant part, must include a description of the request and of the assistance sought, a description of the facts alleged and a statement of the relevant applicable law in the requesting state.⁸¹ Obliging the requesting state to provide details concerning the reasons and content of a request may provide *de facto* guarantees for persons implicated by such measures, since their rationale is to enable the authorities in the requested state to obtain proper authorization for the measure to ensure its legality under its domestic law.

2.2.2. Execution of the request

Generally, the law of the state that executes the request will govern the execution of investigative measures. However, requested states increasingly take the laws and procedural requirements of the requesting state into account.⁸² The UN Model Treaty's provision on applicable law provides that the execution of the measure will be governed by the law of the requested state, but also that the requesting state should carry out the request in the manner

⁸⁰ See eg Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (Intersentia 2002), 204.

⁸¹ Art 5(1)(b) and (c) UN Model Treaty.

⁸² André Klip, *European Criminal Law: An Integrative Approach* (2nd edn, Intersentia 2012), 349; Annalisa Ciampi, 'Other Forms of Cooperation' in Antonio Cassese, Paula Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002), 1725.

specified by the requesting state, as long as this is not prohibited under its domestic law.⁸³ The requesting state may thus ask for the measure to be executed in a certain procedural manner. In addition, Article 5(1)(e) of the UN Model Treaty provides that the request should contain the reasons for, and details of, any particular procedure or requirement that the requesting state wishes to be followed. The possibility of requesting procedures to be followed exists in order to help ensure the admissibility of the evidence in the subsequent trial in the requesting state. As a result, the role of the requesting state, in possibly including certain procedural and human rights related requirements in its request, might help protect the rights of persons affected by coercive measures executed in the course of transnational investigations.

The UN Model Treaty recognizes that the requested state may comply with the procedural requests of the requesting state, as long as these are not contrary to its domestic law. Theoretically, such procedures could include the enforcement of guarantees to protect the privacy rights of suspects. However, states' willingness to take the requesting state's procedural wishes into account is largely limited to measures that are not of a coercive nature.⁸⁴ The *lex loci* primarily governs the execution of coercive measures that might interfere with human rights, including the right to privacy, precisely because states must respect their own international and domestic human rights obligations. As a result, the idea that states might request other states to abide by additional procedural guarantees in the execution of coercive measures remains largely theoretical since this possibility is rarely used in practice.⁸⁵ However, it has the potential to increase and strengthen human rights protection in inter-state cooperation in criminal matters.

Another possible avenue to strengthen the protection of human rights in this field involves requested states, which may, under certain conditions, refuse cooperation when it might violate human rights. MLATs generally recognize several grounds for states to refuse cooperation requests. The UN Model Treaty includes refusal on the grounds that the request 'requires the State to carry out compulsory measures that would be inconsistent with its law and practice had the offence been the subject of investigation or prosecution under its own

⁸³ Art 6 UN Model Treaty; interestingly, the UN Model Treaty includes no reference to human rights law in its operative provisions. See also Ruggeri (n 79), 540.

⁸⁴ Ciampi, 'Other Forms of Cooperation' (n 82), 1723: where she notes the trend in inter-state cooperation in criminal matters where requesting states are more involved with the actual evidence-taking to ensure admissibility, and 1726, where she notes that this trend does not apply to coercive measures, the execution of which are still primarily governed by the *lex loci*. See also Sluiter, *International Criminal Adjudication and the Collection of Evidence* (n 80), 206.

⁸⁵ Klip (n 82), 349, who also only refers to procedures such as the interrogation in the presence of counsel and the right to cross-examination as human rights-related procedures that may fall within the scope of requested procedures by the requesting state.

jurisdiction'.⁸⁶ This enables requested states to refuse to cooperate with requests that are not compatible with its human rights obligations, be they of a domestic or international nature.⁸⁷ In addition, the UN Model Treaty refers to reasons of public order (*'ordre public'*) as a ground for refusal, which may include human rights related reasons. The requested state's possible refusal to cooperate to prevent human rights violations might operate as an incentive for the requesting state to ensure conformity of their requests with IHRL.

The protection of privacy rights in inter-state cooperation in criminal matters largely depends on the *lex loci*, given its primary applicability in the context of coercive measures. However, there is a significant risk that the requested state will be unable to provide the same human rights guarantees in the context of transnational investigations, as it normally does in its domestic investigations. The authorities of the requested state may have only limited information regarding the facts supporting the request for a coercive measure, which will complicate their assessment of the legality and necessity of the measure in question.⁸⁸ Although the requesting state should provide sufficient information to the requested state to enable it to conduct the measure in question, the requesting state is in a better position to properly assess the legality, necessity and proportionality of coercive measures, because it has much more information at its disposal regarding the investigative measures taken and the evidence gathered thus far.⁸⁹

Second, the requested state may have a general obligation to execute the coercive measure pursuant to an MLAT. The fact that coercive measures are executed pursuant to cooperation requests adds a new dimension to the assessment of the measure's necessity, or at least an extra factor to take into consideration for the requested state's authorities. Although MLATs do recognize human rights concerns as grounds for refusal, such refusal is discretionary.⁹⁰ State authorities may have a myriad of reasons not to refuse to cooperate, given the reciprocal nature of relations between states. Inter-state cooperation in criminal matters is built on a degree of mutual trust between cooperating parties. As a result, a rule of non-inquiry has developed according to which requested states, to a certain extent, trust the re-

⁸⁶ Art 4(1)(e) UN Model Treaty.

⁸⁷ Ruggeri (n 79), 549.

⁸⁸ Alphons Orie, 'De Verdachte Tussen Wal en Schip of de Systeem-Breuk in de Kleine Rechtshulp' in E André de la Porte and W Bremmer (eds), *Bij Deze Stand Van Zaken - Bundel Opstellen Aangeboden Aan A L Melai*, (Gouda Quint 1983), 355, who also notes that the limited availability of remedies in the requested state may serve to discourage the requested state's authorities from conducting a full check, since they will not be able to provide remedies in any case.

⁸⁹ Aukje van Hoek and Michiel Luchtman, 'Transnational Cooperation in Criminal Matters and the Safeguarding of Human Rights' (2005) 1 Utrecht L Rev 1, 15.

⁹⁰ Klip (n 82), 343; Harmen van der Wilt, 'Bewijs En Kleine Rechtshulp: Rode Draad 'Bewijs En Bewijsrecht'' (1999) 48 *Ars Aequi* 52, 526.

requesting state's assessment of the necessity of the measure and its legality.⁹¹ Further inquiries could be seen as demonstrating a degree of distrust towards the requesting authority, which might harm the reciprocal relationship between the two states in question.⁹²

Grounds for refusal are relied upon less and less in inter-state cooperation in criminal matters, since the need for state cooperation in the combating of crime are thought to outweigh concerns regarding the protection of individual rights. In the EU, the high degree of mutual trust amongst member states is based on the assumption that the legal protection across all EU member states is more or less equivalent, as a result of which states almost automatically execute requests for cooperation, and will refrain from providing an additional legal check for decisions that have been made in other member states.⁹³ This recognition manifests a high degree of mutual trust, which is essentially based on the assumption that all EU member states comply with human rights law.⁹⁴ The propriety of this assumption is questionable, even though all EU member states are party to the ECHR.⁹⁵ Similarly, in the context of expulsion proceedings, the ECtHR has held that where there is evidence of practices that are contrary to the convention principles in the receiving state, member states cannot simply rely on the presence of domestic laws and the ratification of international conventions that seek to guarantee respect for human rights, as proof of adequate protection against the risk of ill-treatment, even when the receiving state is party to the ECHR.⁹⁶

The regulation of the right to privacy is not uniform across all states. The right to privacy sets certain parameters and requires states to regulate interferences with this right and to provide guarantees against arbitrary interferences. Each state may do this in a different way and each may be acceptable under IHRL. For example, it has been noted that 'in terrorist investigations in France the *juge d'instruction* shares information with and generates evidence from security service in a way that would be unacceptable in England and Wales'.⁹⁷ The ECtHR grants states a margin of discretion in deciding how to regulate these matters domestical-

⁹¹ Van Hoek and Luchtman (n 89), 15.

⁹² *ibid*, 15. See also Van der Wilt (n 90), 530, who notes the application of a presumption of legality.

⁹³ Klip (n 82), 362, and 371, where he notes that, in principle, EU law does not allow for double checks. See also, 310, where he notes that mutual legal assistance in the EU relies heavily on mutual recognition: 'member states agree that they regard certain legal figures as equivalent in order to avoid creating obstacles to cooperation'.

⁹⁴ Jacqueline Hodgson, 'Safeguarding Suspects' Rights in Europe: A Comparative Perspective' (2011) 14 *New Crim L Rev* 611, 618.

⁹⁵ *ibid*, 631: 'the UK's assurance that ECHR Article 8 will provide sufficient protection against "fishing expeditions" is unconvincing, not least because [member states] such as the UK have failed demonstrably to respect the privacy of the individual under Article 8.'

⁹⁶ ECtHR, Judgment, *Saadi v. Italy* (App No 37201/06), 28 February 2008, 147; ECtHR, Judgment, *M.S.S. v. Belgium and Greece* (App No 30696/09), 21 January 2011, 353.

⁹⁷ Hodgson (n 94), 632.

ly, which allows for large disparities between legal systems. On a global scale, such disparities will be even larger than within ECHR states parties. When different legal systems are combined through transnational investigations, these disparities may cause gaps in the protection of human rights, because the guarantees that are normally offered by each system separately are not applicable in the context of inter-state cooperation.⁹⁸

2.2.3. *Evaluating evidence obtained*

The final moment where obligations related to the right to privacy in the context of an international investigation might arise is when evidence is adduced at trial that was collected by foreign authorities in a manner that may have violated the right to privacy. As has just been pointed out, procedural rights have a high risk of losing their effectiveness when legal systems are combined in the context of international cooperation, and exclusion of evidence obtained through human rights violations might constitute an appropriate remedy. The requesting state could test the legality of the manner in which the evidence was obtained by the requested state. However, this raises several problems, which largely follow from the fact that the execution of such transnational coercive measures is carried out by the requested state under its own domestic law.

It is difficult for the judiciary of the requesting state to adjudicate upon the manner in which the evidence was collected by the requested state. They might have too little information concerning the applicable law in the state that executed the coercive measure, or about the exact manner in which the measure was executed.⁹⁹ As a result, they may not be able to adjudicate upon the manner in which the evidence was collected. In addition, the principle of sovereign equality makes states unwilling to judge the domestic conduct of other states.¹⁰⁰ Furthermore, assessing another state's domestic conduct through the lens of the requesting state's own human rights obligations is sometimes considered tantamount to extra-territorial application of the requesting State's law.¹⁰¹ As a result, it is unclear what legal standard the requesting state should apply in this regard. Moreover, since inter-state cooperation in criminal matters rests on a web of reciprocal inter-state relations, states will be hesitant to judge other states' execution of coercive measures, because it might have a negative

⁹⁸ Van Hoek and Luchtman (n 89), 14; see generally: Orie (n 88) and section 2.2.3. below.

⁹⁹ Van der Wilt (n 90), 525.

¹⁰⁰ *ibid.*

¹⁰¹ Robert Currie, 'Human Rights and International Mutual Legal Assistance: Resolving the Tension' (2000) 11 *Crim L Forum* 143, 168.

impact on their mutual relationship.¹⁰² In the field of such inter-state cooperation, there is a longstanding custom of non-inquiry by judicial authorities regarding the legitimacy of the acts of foreign authorities.¹⁰³ The result is the adoption in judicial practice of a presumption of legality of those acts.¹⁰⁴ The courts of states that are active in providing or requesting legal assistance will generally not inquire into the propriety of the taking of certain evidence, including searches and seizures, that were executed by foreign authorities.¹⁰⁵

Although requesting states do not categorically refuse to assess the manner in which evidence was obtained, they do generally apply a different, higher standard for the exclusion of such evidence than for evidence that was obtained domestically.¹⁰⁶ Domestic courts are generally reluctant to interfere with the process of inter-state cooperation in criminal matters because it rests on vital interests of international comity and therefore falls within the preserve of the executive.¹⁰⁷ Exclusion of evidence is usually only an option in the interests of ‘fairness’ or ‘fundamental principles of justice’, where the conduct through which the evidence was obtained ‘shocks the conscience of the court’, or where admission would ‘bring the administration of justice into disrepute’.¹⁰⁸ These are vague standards, warranting the conclusion that IHRL governing the use of evidence obtained by foreign authorities remains a largely grey area.¹⁰⁹ State practice does appear to posit an international exclusionary rule, but only in the most heinous or shocking of cases.¹¹⁰ However, ‘courts have proven difficult to shock, and have declined to exclude evidence resulting from serious invasions of privacy and personal liberty’.¹¹¹

At the same time, the development of IHRL has not kept up with the developments in the field of inter-state cooperation in criminal matters. For example, the ECtHR has been argued to act as an outright supporter of such cooperation at the expense of the effective protec-

¹⁰² *ibid.*

¹⁰³ *ibid.*, 173: ‘the prime justification applied by courts is an unwillingness to adjudicate either the laws of other states or the actions taken by their law enforcement authorities, due to sovereignty concerns, the interests of comity, and perhaps most centrally, lack of jurisdiction.’ See also Van Hoek and Luchtman 2005 (journal), 2

¹⁰⁴ Van der Wilt (n 90), 530.

¹⁰⁵ Currie (n 101), 173; Ruggeri (n 79), 547, who notes that several countries, such as Spain, use a ‘dangerous presumption of legitimacy of the enquiries carried out abroad, thus imposing the burden of proof on the party affected by the foreign evidence’.

¹⁰⁶ Currie (n 101), 178; Ruggeri (n 79), 537: ‘[w]orldwide, we are witnessing a clear tendency to lower the usual guarantee standards in conducting investigations and admitting evidence taken abroad.’

¹⁰⁷ Currie (n 101), 178.

¹⁰⁸ *ibid.*, 177; Ruggeri (n 79), 548.

¹⁰⁹ Currie (n 101), 177.

¹¹⁰ *ibid.* See also ECnHR, Decision, *Chinoy v. United Kingdom* (App No 15199/89), 4 September 1991, 3, where the Commission quotes the British magistrate’s decision, who considered that the illegally obtained evidence would only have to be excluded if its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it’.

¹¹¹ Currie (n 101), 178.

tion of Convention rights. It seems that the public interest in mutual legal assistance takes precedence over an effective application of human rights.¹¹² For example, in *Chinoy v. UK*, authorities from the United States had intercepted telephone conversations from the suspect's home in France, which were subsequently adduced in extradition proceedings in the UK. There appeared to have been no legal basis whatsoever for the telephone intercepts, and yet the ECnHR found the plaintiff's claims to be manifestly ill-founded.¹¹³ The Commission relied on the fact that the UK was not responsible for the actual collection of the evidence, as a result of which its responsibility under the Convention could only arise for its use of the evidence at trial.¹¹⁴ However, The Commission accorded considerable weight to the fact that the extradition proceedings in the UK formed part of the international campaign against drug trade, and considered that although there were doubts regarding the legality of the way in which it had been gathered, the evidence had been relevant, and that therefore, no violation of the right to privacy could be found on the part of the UK authorities.¹¹⁵ On the one hand, this decision seems to allow for a silver platter approach, where the trial state can simply use illegally obtained evidence.¹¹⁶ At the same time, the Commission's emphasis on the lack of involvement from the UK might imply that had the UK been the author of a request for legal assistance, pursuant to which evidence had been illegally obtained, it might have borne some responsibility. Similarly, Dutch courts will set aside the rule of non-inquiry in cases where Dutch officials were somehow involved in the execution of the investigative measure.¹¹⁷

In *Echeverri Rodriguez v. the Netherlands*, the suspect alleged that parts of the evidence used against him had been illegally obtained. The Dutch courts, however, had relied on the rule of non-inquiry and refused to assess the collection of the evidence.¹¹⁸ The ECtHR accepted the Dutch courts' line of reasoning, recalling its long-standing approach to the admission of evidence, considering that this was 'primarily a matter for regulation by national law', while the ECtHR will only 'ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair'.¹¹⁹ The investigative methods that were at stake

¹¹² Richard Vogler, 'Transnational Inquiries and the Protection of Human Rights in the Case-Law of the European Court of Human Rights' in Stefano Ruggeri (ed), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings - A Study in Memory of Vittorio Grevi and Giovanni Tranchina* (Springer 2013), 33.

¹¹³ ECnHR, Decision, *Chinoy v. United Kingdom* (App No 15199/89), 4 September 1991, 7.

¹¹⁴ *ibid*, 6.

¹¹⁵ *ibid*, 7.

¹¹⁶ On the danger of a silver-platter approach in inter-state cooperation in criminal matters, see eg *Orie* (n 88), 361.

¹¹⁷ *Van der Wilt* (n 90), 528.

¹¹⁸ ECtHR, Decision, *Echeverri Rodriguez v. the Netherlands* (App No 43286/98), 3.

¹¹⁹ *ibid*, 8.

here did not relate to the right to privacy alone and the claimant did not allege any violations of Article 8 specifically. As a result, possible violations of the right to privacy were not examined. The Court did recognize that although the Convention allows for the use of evidence obtained by foreign investigating authorities, the subsequent use of such evidence at trial could raise issues under the right to a fair trial if there are reasons to assume that defence rights have been disrespected.¹²⁰ The defendant, however, bears the burden of proof.¹²¹

Another case dealt with a search conducted by Austrian authorities pursuant to a request from Germany.¹²² According to the ECnHR, the search was ‘in accordance with the law’, because it was based on Austrian law. Interestingly, despite the fact that the Austrian courts had not performed the usual test of necessity, appropriateness and proportionality, and had relied on Germany’s assessment thereof, the search was not illegal because there was no indication that the search was objectively unjustified or disproportionate.¹²³

This warrants the conclusion that under the ECHR, a principle of ‘qualified non-inquiry’ applies to carrying out coercive measures on behalf of other states.¹²⁴ The use of evidence obtained abroad may raise issues under the right to a fair trial if the manner of collection was in violation of essential defence rights.¹²⁵ It is not obvious whether such rights may also include the privacy rights of persons implicated by the coercive measures, or are limited to defence rights. Presumably, the use of evidence obtained in violation of defence rights may render the trial as a whole unfair under the ECHR in cases of flagrant violations, as also supported by an array of domestic case law discussed above.

There are significant gaps in the protection of privacy rights in the context of transnational criminal investigations.¹²⁶ In contrast to international extradition practice, international practice regarding transnational investigations has exhibited less concern for the protection of individual rights.¹²⁷ This is broadly recognized by, for example, the International Association of Penal Law (AIDP), which has repeatedly focused on these problems.¹²⁸ These shortcom-

¹²⁰ *ibid.*

¹²¹ *ibid.*

¹²² ECnHR, Decision, *S. v. Austria* (App No 12592/86), 6 March 1989, 1

¹²³ *ibid.*, 4, 1

¹²⁴ *Vogler* (n 112), 34.

¹²⁵ *ibid.*, 33.

¹²⁶ *Klip* (n 82), 376, who concludes that ECHR protection of suspects and accused has failed to keep up with the move towards shared responsibility; Van Hoek and Luchtmann 2005 (journal), 16-17, who are similarly critical of ECtHR case law in this area.

¹²⁷ *Currie* (n 101), 169.

¹²⁸ See eg International Association for Penal Law, ‘the Regionalization of International Criminal Law and the Protection of Human Rights in International Cooperative Procedures in Criminal Matters’ in 66 *Int’l Rev Penal L* (1994) XVth International Congress of Penal Law, 69, where the Annual Congress of the AIDP recommended that judicial control should be exercised over all forms of formal and informal cooperation in criminal matters,

ings can be explained by the occurrence of gaps in the protection of human rights in the context of transnational criminal investigations.¹²⁹ These consequences of the fragmentation of criminal investigations have been aptly described by Alfons Orié. On the border between legal systems, the suspect may lose a significant amount of guarantees that each system would accord her/him separately.¹³⁰ IHRL leaves states discretion in the manner in which they protect the right to privacy in the context of a criminal investigation. Some countries have created strong *ex ante* guarantees, where every limitation of the right to privacy must be judicially authorized and is subject to a strict test of necessity, legality and proportionality, whereas other systems provide for strong *ex post facto* guarantees, and offer strict rules on the exclusion of illegally obtained evidence instead.¹³¹ When combining two different systems, this could lead to the weakening of human rights protection.¹³² As Hodgson notes, ‘this mix and match approach of mutual recognition lacks criminal procedural integrity: taking evidence from a criminal process characterized by judicial supervision, and transplanting it for use in a two-party adversarial criminal procedure, for example, can create an asymmetry in the protection available to suspects and accused persons, making it difficult to determine whether, overall, there has been a fair (pre)trial.’¹³³ In such scenarios, the questions of whether the procedural law of the executing state has been respected and what consequences procedural violations should have are not answered in the usual manner within the same system, which has led to diminished protection in practice.¹³⁴

The fragmentation of the responsibility to protect human rights in inter-state cooperation in criminal matters makes it hard for individuals to get a remedy for possible violations of their rights. For example, if a requested state executes a search that is subsequently alleged to have been unlawful, it is difficult for the domestic authorities of that state to effectively assess the unlawfulness, as it cannot—or will not—adjudicate upon the application of foreign law pursuant to which the search was ordered, and because it has too little information to

and that the same rules governing the exclusion of evidence should apply to evidence obtained through cooperation, as through evidence obtained through the regular domestic channels; similarly International Association for Penal Law, ‘The Criminal Justice Systems Facing the Challenge of Organised Crime’ in 70 Int’l Rev Penal L (1999) XVIth International Congress of Penal Law, 909, where the 1999 Congress of the IADP recommended that the principles of legality, proportionality and subsidiarity should apply to police and judicial cooperation in criminal matters, and that when coercive measures are used, there should be judicial authorization for this.

¹²⁹ Vogler (n 112), 28; Orié (n 88); Van Hoek and Luchtman (n 89), 15.

¹³⁰ Orié (n 88), 353, in Dutch, he termed this the danger of a ‘systeembreuk’, a ‘breach’ between (legal) systems.

¹³¹ Van Hoek and Luchtman (n 89), 14.

¹³² Hodgson (n 94), 619: ‘safeguards for the accused vary across jurisdictions, according to the roles and responsibilities of other legal actors at various points in the process – some are stronger during the investigation, others at the trial hearing. A defendant in a cross-jurisdiction case may have the best, or the worst, of both worlds.’

¹³³ *ibid.*

¹³⁴ Orié (n 88), 355.

determine the necessity and proportionality of the search.¹³⁵ What is more, the person standing trial in the requesting state might not be able to apply for remedies in the requested state. On top of that, the requested state will only have responsibilities under the right to privacy, not for the trial overall, the responsibility for which is limited to the requesting state.¹³⁶ At the same time, if the rights of third persons that are nationals of the requested state, other than the accused at trial in the requesting state, are violated, they may not be able to get a proper remedy in the requesting state, because they have no link with the trial. Finally, even if the person whose rights were violated can complain in the requesting state, it will be hard for the judicial authorities to assess whether the search in question has been conducted legally, because it might be unfamiliar with the legal system of the requested state, and because it only has limited information regarding the actual execution of the measure. Even if this remedy is offered in theory, its practical application might be limited. Finally, in this scheme, the sole possible remedy for procedural violations is the exclusion of the evidence obtained through the measure. As has been seen, states are hesitant to exclude evidence obtained abroad, and use high thresholds for exclusion. In addition, such a scheme limits the protection of this right to *ex post facto* validation. The purpose of IHRL is to protect individual liberties and to prevent arbitrary intrusions upon them, which demonstrates a need for *ex ante* protection.¹³⁷

2.2.4. *Interim Conclusion*

There are serious concerns with the protection of human rights in the field of inter-state cooperation in criminal matters. The move to shared responsibility for criminal proceedings has not met with corresponding protection under IHRL.¹³⁸ Legal figures such as the rule of non-inquiry, which can be applied both by requested states upon receiving a request for legal assistance, as well as by requesting state when they are called to assess the legality of the manner in which the evidence has been collected, stand in the way of effective human rights protection. The protection of human rights norms diminishes in the context of inter-state cooperation in criminal matters and an effective framework for the protection of—privacy—rights in this field has yet to develop. It appears as though the interests pursued by such inter-state cooperation often prevail over the effective protection of IHRL generally, and the right to

¹³⁵ Van Hoek and Luchtman (n 89), p.25.

¹³⁶ *ibid*, 26.

¹³⁷ Currie (n 101), 170.

¹³⁸ Klip (n 82), 423.

privacy specifically.¹³⁹ As a result, the IHRL framework applicable to the right to privacy in the field of transnational investigations, which should serve as a framework with which to compare the ICTs' law and practice, is itself flawed from a human rights perspective. As will be seen, the obstacles to the enjoyment of the right to privacy in the context of inter-state cooperation in criminal matters have similarly come up, and are exacerbated before the ICTs. It is therefore important to be aware of them when addressing the interpretation and application of the right to privacy before the ICTs.

3. Privacy and Direct Coercive Action by the ICTs

The two sections below address the independent coercive power of the ICTs. Since the Prosecutor is primarily responsible for the investigative process, focus is on her/his power to conduct coercive measures independently from states. Each section first discusses the general applicability of the right to privacy. Second, the possible legal basis for, and regulation of the power of the Prosecutor to conduct coercive measures is assessed.

3.1. The ad hoc Tribunals

The only references to privacy in the legal instruments of the ad hoc Tribunals relate to victims and witnesses.¹⁴⁰ At the same time, the ad hoc Tribunals have confirmed the applicability of the right to privacy.¹⁴¹ However, the decisions to that effect are limited in number, often relate to the right to medical privacy, and fail to identify the basis on which this right is applied, its existence is simply assumed.¹⁴² Some decisions do refer to international and regional human rights treaties, ostensibly to support the applicability of this right.¹⁴³ However,

¹³⁹ Giulio Illuminati, 'Transnational Inquiries in Criminal Matters and Respect for Fair Trial Guarantees' in Stefano Ruggeri (ed), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings - A Study in Memory of Vittorio Grevi and Giovanni Tranchina* (Springer 2013), 17, who notes that in the field of inter-state cooperation in criminal matters, there is an almost exclusive focus on efficient law enforcement; while it remains extremely difficult to reach agreement on the formal recognition of a common standard of procedural safeguards. See also Currie (n 112), 170: 'the pendulum is swung heavily towards the interests of the State in the investigation of crime.'

¹⁴⁰ Rule 75 (A) of both Tribunals' RPE refer to the possibility of taking measures to protect the privacy of victims and witnesses.

¹⁴¹ See also Amal Alamuddin, 'Collection of Evidence' in Karim Khan, Caroline Buisman and Christopher Gosnell (eds), *Principles of Evidence in International Criminal Justice* (OUP 2010), 236.

¹⁴² ICTY, Order to the Registry of the Tribunal to Provide Documents, *Prosecutor v. Stakić* (IT-97-24-T), 5 July 2002, 4; ICTY, Decision on Urgent Defence Request for Further Submissions of Psychiatric Medical Expert and Decision on Defence Motion to Redact Medical Reports, *Prosecutor v. Stanišić and Simatović* (IT-03-69-T), 6 August 2008, 18.

¹⁴³ ICTY, Decision on the Defence 'Objection to Intercept Evidence', *Prosecutor v. Brđanin* (IT-99-36-T), 3 October 2003, 29; ICTY, Decision on Request for Reversal of Decision to Monitor Telephone Calls, *Prosecutor v. Karadžić* (IT-95-5/18-T), 21 April 2011, 29.

the ICTs have not been consistent regarding what sources of the right to privacy bind them, as a result of which it is not clear which definition of privacy applies to them and what scope of protection is granted. For example, the ICTY has dismissed defence arguments regarding the illegality of interception of telecommunication based on ECtHR case law because this was considered not binding upon the Tribunal but merely ‘persuasive’.¹⁴⁴ The right to privacy in the context of criminal investigations requires states to regulate the exercise of coercive powers of the investigative authorities. Mere references to the right to privacy would therefore not constitute sufficient protection from the perspective of IHRL. As noted, IHRL prohibits arbitrary and unlawful interferences with this right, and the law and practice of the ECtHR specifies what sorts of interferences are permissible and under what conditions. An assessment of the interpretation and application of the right to privacy before the ICTs should therefore examine the legal basis for, and regulation of the ICTs’ coercive powers.

The Statutes of the ad hoc Tribunals do not explicitly grant the Prosecutor the power to execute coercive measures. However, this possibility is not excluded.¹⁴⁵ Articles 18(2) and 17(2) of the ICTY and ICTR Statute, respectively, provide that the Prosecutor has the power to collect evidence and conduct on-site investigations. However, they do not specify the types of investigative measures that the Prosecutor may engage in; nor do the Tribunals’ RPEs provide further clarity. Rule 39 of both Tribunals’ RPEs is entitled ‘conduct of investigations’, but it merely repeats that the Prosecutor may collect evidence and conduct on-site investigations. The Tribunals’ legal instruments thus fail to clarify whether the Prosecutor is empowered to execute coercive measures independently on the territory of states.

According to the ICTY Appeals Chamber, the Prosecutor has this power, but only with respect to states and entities belonging to the former Yugoslavia.¹⁴⁶ There is no convincing legal rationale for this distinction between former Yugoslav and other states, although it

ICTR, Decision on Motion for Disclosure of Medical Information and for Extension of Time, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 28 August 2009, 11.

¹⁴⁴ ICTY, Decision on Request for Reversal of Decision to Monitor Telephone Calls, *Prosecutor v. Karadžić* (IT-95-5/18-T), 21 April 2011, 24.

¹⁴⁵ De Meester and others, ‘Investigation, Coercive Measures, Arrest, and Surrender’ in Göran Sluiter and others (eds), *International Criminal Procedure - Principles and Rules* (OUP 2013), 279.

¹⁴⁶ *ibid.*, 279; Klamberg (n 4), 251. See also Bert Swart and Göran Sluiter, ‘The International Criminal Court and International Criminal Co-Operation’ in Herman von Hebel, Johan Lammers and Jolien Schukking (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (TMC Asser Press 1998), 114; Richard May and Marieke Wierda, *International Criminal Evidence* (Transnational Publishers 2002), 62; Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd edn, CUP 2010), 447; as also confirmed by the ad hoc Tribunals’ case law: 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* (IT-95-14-AR108 bis), 29 October 1997, 53; ICTY, Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, *Prosecutor v. Gotovina et al* (IT-06-90-T), 12 March 2010, 30.

is understandable from a practical point of view.¹⁴⁷ The crimes within the Tribunal's jurisdiction took place on the territory of former Yugoslavian states, and their authorities may have been implicated in the commission of these crimes.¹⁴⁸ Requiring the Prosecutor to involve the authorities of the states and entities of the former Yugoslavia in the preparation and execution of investigative measures might therefore hamper the effectiveness of the investigation. The legal basis for this power of the Prosecutor is UN member states' obligation to cooperate with the Tribunal in such a manner as to enable it to effectively carry out its functions.¹⁴⁹ For former Yugoslav states, allowing the Tribunal to operate effectively thus means allowing the Prosecutor (and the defence) to carry out investigative activities on their territory without impediments.¹⁵⁰ These independent investigations may include coercive measures: the Appeals Chamber specifically mentioned search and seizure operations.¹⁵¹

As a matter of law, the Prosecutors of the ad hoc Tribunals may thus independently execute coercive measures on the territories of states, assuming that the Appeals Chamber's decision would apply to the ICTR as well. However, the practical and political ability of the Office of the Prosecutor (OTP) to do so is limited.¹⁵² After all, its staff does not consist of police officers and is based at a significant distance from the location it might wish to investigate. As a result, Tribunal investigators have not often acted without the support of state authorities on the ground. Where the ICTY OTP has acted without state support, it has generally sought the assistance of UN and NATO forces that were present on the territory of the former Yugoslavia to assist in the execution of coercive measures.¹⁵³ At the ICTR, there appear to have been no examples of investigative measures executed independently by the OTP.

The Tribunals' case law on independent search and seizure operations is quite limited, either because such operations have been rare or because the information about them has remained confidential. For example, the Chamber once ordered the Prosecutor to disclose a number of 'search warrants' to the defence.¹⁵⁴ However, it is unclear what the nature of these warrants were, what premises were searched, and to whom they were directed, since the warrants were disclosed to the defence only, not to the public. Generally, it is assumed that there

¹⁴⁷ Alamuddin (n 141), 257.

¹⁴⁸ 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* (IT-95-14-AR108 bis), 29 October 1997, 53.

¹⁴⁹ *ibid.*, where the Appeals Chamber also cited the vertical cooperation relationship between states and the Tribunal.

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.*, 55.

¹⁵² Alamuddin (n 141), 242.

¹⁵³ *ibid.*, 245, 255.

¹⁵⁴ ICTY, Decision on Defence Motion for Access to Certain Search Warrants, *Prosecutor v. Krajišnik and Plavšić* (IT-00-39-PT & 40-PT), 26 April 2002, 3.

is a small number of examples of search and seizure operations executed by OTP investigators without the support of domestic authorities.¹⁵⁵

The ICTY has held that the execution of search and seizure operations falls within the scope of Rule 2 of its RPE, which defines investigation as ‘all activities undertaken by the Prosecutor under the Statute and the Rules for the collection of information and evidence’.¹⁵⁶ Article 18(2) of the Statute and Rule 39(i) constitute the legal basis for the power of the Prosecutor to conduct investigations. The former provision clarifies that the Tribunal *may* seek the assistance of states, which does not mean it is under an obligation to do so, while states do have an obligation to cooperate with the Tribunal.¹⁵⁷ From this, the prosecutorial power to execute coercive measures independently can be inferred. Three search warrants issued by the ICTY in *Karadžić* confirm that the legal basis for the Prosecutor’s power to conduct search and seizure operations can be inferred from Articles 15 and 18 of the Statute, and Rules 39(i), 39(ii), 53(C) and 54.¹⁵⁸ At the same time, an ICTY Chamber once suggested that the power to conduct search and seizure operations could be implied in the power to arrest suspects.¹⁵⁹ The general consensus seems to be that the Prosecutor’s power to conduct on-site investigations, including coercive measures such as search and seizure operations, is based on Article 18(2) of the ICTY Statute and Rule 39(i).¹⁶⁰ Before the ICTR, there is a substantial amount of case law regarding search and seizure operations that were carried out by OTP officials in cooperation with national authorities. In those cases, the role and responsibility of the OTP in those operations was a bone of contention before the Chambers, and this case law

¹⁵⁵ See also ICTY, Manual on Developed Practices (2009) <http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf> accessed 13 March 2014, 12: search and seizure operations were carried out by tribunal investigators; Sluiter 1998, 107: ‘investigation teams of the tribunal have ventured into or through areas under Bosnian Serb control to conduct investigations, gathering evidence and interviewing witnesses’; Cryer and others (n 146), 448.

¹⁵⁶ ICTY, Decision Stating Reasons for Trial Chamber’s Ruling of 1 June 1999 Rejecting Defence Motion to Suppress Evidence, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), 25 June 1999, 5.

¹⁵⁷ *ibid*; ICTY, Decision on Accused Naletilić’s Reasons why Documents Seized per Search Warrant Are Inadmissible, *Prosecutor v. Naletilić and Martinović* (IT-98-34-T), 14 November 2001, 3; see also Art 29 ICTY Statute and Art 28 ICTR Statute, enshrining states’ obligation to cooperate with the Tribunals.

¹⁵⁸ ICTY, Mandat Faisant Suite à la Requête aux fins d’une Ordonnance et d’un Mandat Autorisant la Perquisition du Quartier Général de la Brigade de Bratunac, Armée de la Republika Srpska, Republika Srpska, Bosnie-Herzégovine, et la Saisie d’Éléments de Preuve Pertinents Trouvés sur Place, *Prosecutor v. Karadžić and Mladić* (IT-95-18-I), 24 February 1998, 2; ICTY, Mandat Faisant Suite à la Requête aux fins d’une Ordonnance et d’un Mandat Autorisant la Perquisition du Quartier Général de la Brigade de Zvornik, Armée de la Republika Srpska, Republika Srpska, Bosnie-Herzégovine, et la Saisie d’Éléments de Preuve Pertinents Trouvés sur Place, *Prosecutor v. Karadžić and Mladić* (IT-95-18-I), 24 February 1998, 2; made public pursuant to: ICTY, Decision on the Accused’s Request for Copies of Search Warrants, *Prosecutor v. Karadžić* (IT-95-5/18-T), 29 August 2008; ICTY, Search Warrant for the Public Security Centre (CJB) Srpsko Sarajevo, *Prosecutor v. Karadžić* (IT-95-5/18-T), 11 September 2003, 2.

¹⁵⁹ ICTY, Decision on Defence Request to Exclude Evidence as Inadmissible, *Prosecutor v. Stakić* (IT-97-24-T), 31 July 2002, 2.

¹⁶⁰ De Meester and others (n 145), 287.

will be discussed later in this chapter.¹⁶¹ As will be seen, the ICTR has generally followed the case law of the ICTY in considering Article 17(2) of the ICTR Statute and Rule 39(i) the legal basis for the operations, sometimes in conjunction with Rule 40.

The case law concerning the limited instances of coercive measures executed by ICTY officials shows that the Tribunal applies few requirements in assessing the legality of such measures. For example, in *Kordić and Čerkez*, the OTP had searched a defence office in Bosnia and Herzegovina, pursuant to a judicial search warrant issued by the Tribunal.¹⁶² The warrant itself has not been made public, so it is impossible to assess whether the judge applied any substantive standards or safeguards prior to issuing the warrant. The defence alleged that the search warrant was insufficiently precise and constituted a fishing expedition, citing, amongst other things, the right to privacy.¹⁶³ However, neither the Trial Chamber, nor the Appeals Chamber addressed any of the arguments of the defence regarding the standards applicable to such warrants.¹⁶⁴ The same warrant seems to have been in dispute in a subsequent case, where the Trial and Appeals Chamber again concluded that the search and seizure was lawful, because the defence had failed to provide any evidence to the contrary.¹⁶⁵ The Chamber found that the defence had not shown that excessive force had been used, and that the warrant was ‘sufficiently precise’.¹⁶⁶ This suggests that, to be legal, search warrants must be precise, and their execution may only involve proportionate force. However, in another case, a Chamber considered a search and seizure, executed by members of the OTP, to have been lawful, despite the absence of a judicial warrant, because ‘no identifiable rule of public international law [exists] according to which it is mandatory to request a judge’s warrant before conducting a search and seizure.’¹⁶⁷ The Chamber emphasized the high threshold for exclusion of evidence, which apparently militated against considering the legality of the

¹⁶¹ See *infra* section 4.1.

¹⁶² ICTY, Decision Stating Reasons for Trial Chamber’s Ruling of 1 June 1999 Rejecting Defence Motion to Suppress Evidence, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), 25 June 1999, 4, where the Trial Chamber considered that ‘the dispute concerns a search executed at the Defence Office of Vitez municipality on 23 September 1998 pursuant to a *search warrant issued by a Judge* of the International Tribunal on 18 September 1998, by persons representing the Prosecution accompanied by SFOR.’

¹⁶³ ICTY, Decision Stating Reasons for Trial Chamber’s Ruling of 1 June 1999 Rejecting Defence Motion to Suppress Evidence, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), 25 June 1999, 3.

¹⁶⁴ ICTY, Decision Stating Reasons for Trial Chamber’s Ruling of 1 June 1999 Rejecting Defence Motion to Suppress Evidence, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), 25 June 1999; ICTY, Decision on Application for Leave to Appeal, *Kordić and Čerkez* (IT-95-14/2-AR73.4), 23 August 1999, 3.

¹⁶⁵ ICTY, Decision on Accused Naletilić’s Reasons why Documents Seized per Search Warrant Are Inadmissible, *Prosecutor v. Naletilić and Martinović* (IT-98-34-T), 14 November 2001, 3; ICTY, Appeals Judgement, *Prosecutor v. Naletilić and Martinović* (IT-98-34-A), 3 May 2006, 241.

¹⁶⁶ ICTY, Decision on Accused Naletilić’s Reasons why Documents Seized per Search Warrant Are Inadmissible, *Prosecutor v. Naletilić and Martinović* (IT-98-34-T), 14 November 2001, 3.

¹⁶⁷ ICTY, Decision on Defence Request to Exclude Evidence as Inadmissible, *Prosecutor v. Stakić* (IT-97-24-T), 31 July 2002, 2.

search and seizure too extensively, since even if it had been unlawful, this would not lead to exclusion in any case.¹⁶⁸ The Appeals Chamber subsequently confirmed the lawfulness of this search and seizure, and thereby implicitly confirmed that no judicial warrant was necessary.¹⁶⁹ The Appeals Chamber also adopted the Chamber's line of reasoning regarding the high threshold for exclusion.¹⁷⁰

Few examples of actual search warrants can be found in the case law of the ICTY. In *Karadžić*, a warrant authorized the search of a public security center in Sarajevo, including the use of force in its execution.¹⁷¹ The warrant does not justify the motivation for the measure, nor does it specify the kind of documents that are to be searched for and seized, which militates against the application of a requirement of precision for search warrants, nor does the warrant mention that only reasonable or proportionate force is justified. The same goes for two other search warrants, issued by Judge Jorda in 1998, of which the confidentiality was lifted in 2008.¹⁷² The warrants authorize direct searches by personnel of the OTP and identify the types of documents that they are authorized to search for and seize.¹⁷³ On the other hand, the warrants identify many categories of documents, and these categories, in turn, are very broad. The warrants order the OTP to make an inventory of the items seized.¹⁷⁴ However, these warrants authorized the search of military quarters, premises that may fall

¹⁶⁸ ICTY, Decision on Defence Request to Exclude Evidence as Inadmissible, *Prosecutor v. Stakić* (IT-97-24-T), 31 July 2002, 3; for a similar approach, where the Appeals Chamber declined to truly assess the legality of a search and seizure operation because of the high threshold for exclusion, see eg ICTY, Appeals Judgement, *Prosecutor v. Naletilić and Martinović* (IT-98-34-A), 3 May 2006, 238 ; ICTY, Decision on Accused Naletilić's Reasons why Documents Seized per Search Warrant Are Inadmissible, *Prosecutor v. Naletilić and Martinović* (IT-98-34-T), 14 November 2001.

¹⁶⁹ ICTY, Decision, *Prosecutor v. Stakić* (IT-97-24-AR73.5), 10 October 2002, 2.

¹⁷⁰ *ibid.*

¹⁷¹ ICTY, Search Warrant for the Public Security Centre (CJB) Srpsko Sarajevo, *Prosecutor v. Karadžić* (IT-95-5/18-T), 11 September 2003.

¹⁷² ICTY, Decision on the Accused's Request for Copies of Search Warrants, *Prosecutor v. Karadžić* (IT-95-5/18-T), 29 August 2008.

¹⁷³ ICTY, Mandat Faisant Suite à la Requête aux fins d'une Ordonnance et d'un Mandat Autorisant la Perquisition du Quartier Général de la Brigade de Zvornik, Armée de la Republika Srpska, Republika Srpska, Bosnie-Herzégovine, et la Saisie d'Éléments de Preuve Pertinents Trouvés sur Place, *Prosecutor v. Karadžić and Mladić* (IT-95-18-I), 24 February 1998, 3; ICTY, Mandat Faisant Suite à la Requête aux fins d'une Ordonnance et d'un Mandat Autorisant la Perquisition du Quartier Général de la Brigade de Bratunac, Armée de la Republika Srpska, Republika Srpska, Bosnie-Herzégovine, et la Saisie d'Éléments de Preuve Pertinents Trouvés sur Place, *Prosecutor v. Karadžić and Mladić* (IT-95-18-I), 24 February 1998, 3.

¹⁷⁴ ICTY, Mandat Faisant Suite à la Requête aux fins d'une Ordonnance et d'un Mandat Autorisant la Perquisition du Quartier Général de la Brigade de Zvornik, Armée de la Republika Srpska, Republika Srpska, Bosnie-Herzégovine, et la Saisie d'Éléments de Preuve Pertinents Trouvés sur Place, *Prosecutor v. Karadžić and Mladić* (IT-95-18-I), 24 February 1998, 4; ICTY, Mandat Faisant Suite à la Requête aux fins d'une Ordonnance et d'un Mandat Autorisant la Perquisition du Quartier Général de la Brigade de Bratunac, Armée de la Republika Srpska, Republika Srpska, Bosnie-Herzégovine, et la Saisie d'Éléments de Preuve Pertinents Trouvés sur Place, *Prosecutor v. Karadžić and Mladić* (IT-95-18-I), 24 February 1998, 4.

beyond the scope of the protection of the right to privacy.¹⁷⁵ Still the issuance of these warrants suggests that a practice existed of issuing warrants for search and seizure operations. However, these warrants are directed towards the national authorities and order them not to interfere with the searches. Rather than ensuring the legality of the coercive measure, these warrants are also intended to ensure its unhindered execution.¹⁷⁶

Hence, the limited practice that exists in respect of the independent execution of coercive measures by the Prosecutor has sometimes involved the issuance of judicial warrants prior to the execution of such measures, even though no such requirement is contained in the Tribunals' legal instruments.¹⁷⁷ Some authors have argued that a judicial warrant is required, whereas others have argued against the existence of such a requirement.¹⁷⁸ The ICTY Appeals Chamber, itself, however, has held that a warrant is not a requirement for the lawfulness of a search and seizure operation.¹⁷⁹

Furthermore, a few decisions suggest the application of certain requirements for search and seizure operations, including a requirement of precision of judicial warrants, of proportionality of the use of force in their execution, and of an inventory to be made up subsequent to the measure. However, this practice is too inconsistent to support the conclusion that real and effective guarantees exist at the level of the ad hoc Tribunals that regulate the exercise of their coercive power.¹⁸⁰ As a result, the Prosecutor's exercise of coercive power that may interfere with persons' right to privacy appears almost unregulated. There is no specific legal basis for coercive measures in the legal instruments of the Tribunals and the exercise of this power is not subject to substantive limitations or review. The limited practice of the ad hoc Tribunals does suggest that the Prosecutor has had little resort to this power, as a result of which the actual possible instances of interferences with privacy rights may have

¹⁷⁵ ICTY, Mandat Faisant Suite à la Requête aux fins d'une Ordonnance et d'un Mandat Autorisant la Perquisition du Quartier Général de la Brigade de Zvornik, Armée de la Republika Srpska, Republika Srpska, Bosnie-Herzégovine, et la Saisie d'Éléments de Preuve Pertinents Trouvés sur Place, *Prosecutor v. Karadžić and Mladić* (IT-95-18-I), 24 February 1998; ICTY, Mandat Faisant Suite à la Requête aux fins d'une Ordonnance et d'un Mandat Autorisant la Perquisition du Quartier Général de la Brigade de Bratunac, Armée de la Republika Srpska, Republika Srpska, Bosnie-Herzégovine, et la Saisie d'Éléments de Preuve Pertinents Trouvés sur Place, *Prosecutor v. Karadžić and Mladić* (IT-95-18-I), 24 February 1998..

¹⁷⁶ Similarly De Meester (n 1), 520, who concludes that, generally, the Prosecutor requests judicial authorization for coercive measures where voluntary cooperation from the state is not possible.

¹⁷⁷ De Meester and others (n 145), 284.

¹⁷⁸ For authors who argue in favour of a requirement of a judicial warrant, see eg Alexander Zahar and Göran Sluiter, *International Criminal Law: a Critical Introduction* (OUP 2008), 367; Christop Safferling and others, *International Criminal Procedure* (OUP 2012), 278. However, several other authors come to a different conclusion, see eg May and Wierda (n 146), 61-62; Cryer and others (n 146), 526; Klamberg (n 4), 252; De Meester and others (n 145), 284.

¹⁷⁹ ICTY, Decision, *Prosecutor v. Stakić* (IT-97-24-AR73.5), 10 October 2002, 2.

¹⁸⁰ Alamuddin (n 141), 286.

been limited. Nevertheless, this under-regulation is coupled with an unwillingness on the part of the Tribunals to assess alleged violations of the right to privacy. This will be further expanded upon subsequent to the discussion of the regulation of coercive measures that are executed in the context of state cooperation with the ICTs.

3.2. The International Criminal Court

Like those of the ad hoc Tribunals, the ICC's legal instruments only references to privacy related to victims and witnesses.¹⁸¹ However, the ICC has also confirmed the general applicability of the right to privacy in its legal framework.¹⁸² The Court has referred to Article 21(3) as the legal basis for the application of this right.¹⁸³ Other decisions only referred to sources of international law, notably the ICCPR, ACHR and ECHR, to justify the right's applicability without mentioning the legal basis in the Statute for doing so.¹⁸⁴ Other decisions, however, simply refer to this right without explaining the source for its applicability, or going into its scope of application before the ICC at all.¹⁸⁵ As has been stated with regard to the ad hoc Tribunals, above, the more pressing question is whether and how the ICC Statute regulates interferences with the right to privacy. This section therefore investigates whether the ICC has the power to execute coercive measures independently, and whether and how such interferences with the right to privacy are regulated.

The Statute and the RPE of the ICC do not authorize the Court to execute coercive measures independently on the territory of states. Given the exhaustiveness of the Statute, it seems unlikely that the ICC will follow the ad hoc Tribunals in considering such a power to be inherent or implied;¹⁸⁶ and the Court has not done so to date. In principle, the ICC will

¹⁸¹ See eg Arts 57(3)(c) and 68(1) ICC Statute.

¹⁸² See eg Alamuddin (n 141), 236.

¹⁸³ ICC, Decision on the Prosecutor's Request Relating to Three Forensic Reports, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-988-tENG), 25 March 2009, 5; ICC, Public Redacted Version of the Decision on the Prosecutor's Application for Protective Measures and the Redaction of Information Contained in Rule 77 Material (Witnesses 132, 249 and 287) (ICC-01/04-01/07-1194) of 2 July 2009, *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-1281-tENG), 8 July 2009, 14.

¹⁸⁴ ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), 29 January 2007, 74; ICC, Decision on the Admission of Material from the 'Bar Table', *Prosecutor v. Lubanga* (ICC-01/04-01/06-1981), 24 June 2009, 21; ICC, Redacted Decision on the Prosecution's Applications for Redactions, *Prosecutor v. Bemba* (ICC-01/05-01/08-815-Red2), 20 July 2010, 21.

¹⁸⁵ ICC, Decision on Re-classification and Unsealing of Certain Documents and Decisions, *Prosecutor v. Bemba* (ICC-01/05-01/08-528), 18 September 2009, 15; ICC, Redacted version of "Decision on the Request of the Office of Public Counsel for Victims for Additional Redactions submitted on 30 September 2009", *Prosecutor v. Bemba* (ICC-01/05-01/08-616-Red), 2 February 2010, 2-3; ICC, Redacted version of "Decision on the Observations of the Victims and Witnesses Unit on the Re-Classification of ICC-01/05-01/08-72-Conf with two confidential Annexes and ICC-01/05-01/08-95-Conf", *Prosecutor v. Bemba* (ICC-01/05-01/08-676-Red), 3 March 2010, 2-3.

¹⁸⁶ Swart and Sluiter (n 146), 102.

therefore never be exclusively responsible for the protection of the rights of individuals implicated in their investigative activities. Instead, it will generally have to depend on states for the execution of coercive measures in its investigations.¹⁸⁷

There are two exceptions. First, Article 54 grants the Prosecutor the power to conduct on-site investigations on the territory of a state, either in accordance with part 9 of the Statute, which governs the cooperation between states and the ICC, or ‘as authorized by the Pre-Trial Chamber under Article 57 paragraph 3 (d)’. The latter provision allows the Pre-Trial Chamber to authorize the Prosecutor to take specific investigative steps on the territory of a state, without having secured that state’s cooperation, but only when the state in question ‘is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system’.

Arguably, the investigative measures covered by this provision should include those of a coercive nature, such as search and seizure operations, or the interception of communication. Concluding otherwise would render the execution of such coercive measures impossible, since the state in question is unable to execute them.¹⁸⁸ On the other hand, a draft provision that explicitly enabled the Prosecutor to execute coercive measures independently in such a failed-state scenario was removed from the Statute.¹⁸⁹ However, the effectiveness of the Court would be severely curtailed if the ‘investigative steps’ referred to in Article 57(3)(d) would not include coercive measures. Therefore, the effective functioning of the Court would require that the Prosecutor also be able to execute coercive measures if there is no (effective) state to do so on her/his behalf.¹⁹⁰

Rule 115 elaborates the relevant procedures to be followed by the Prosecutor to obtain authorization to conduct investigative measures independently, and provides that s/he must specify the kind of investigative activity s/he intends to employ. The Rule also provides that the Pre-Trial Chamber’s decision must be issued in the form of an order and state the reasons based on the criteria set forth in Article 57(3)(d) of the Statute. Finally, the Pre-Trial Cham-

¹⁸⁷ Kai Ambos, ‘The International Criminal Court and the Traditional Principles of International Cooperation in Criminal Matters’ (1998) 9 Finnish Y B Int’l L 413, 425; Bert Swart, ‘General Problems’ in Antonio Cassese, Paula Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court - a Commentary* (OUP 2002), 1589, where he notes that the ICC Prosecutor depends entirely on states, and 1598, where he notes that the ICC’s authority to act independently is ‘a far cry’ from the system established by the ad hoc Tribunals; Alamuddin (n 141), 246; De Meester and others (n 145), 292.

¹⁸⁸ De Meester and others (n 145), 292; Alamuddin (n 141), 247; Fabricio Guariglia, Kenneth Harris, and Gudrun Hochmayr, ‘Article 57, Functions and Powers of the Pre-Trial Chamber’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd edn, Beck 2008), 1129.

¹⁸⁹ Sluiter, *International Criminal Adjudication and the Collection of Evidence* (n 80), 311.

¹⁹⁰ *ibid.*

ber may order that certain specific procedures be followed by the Prosecutor in carrying out ‘such collection of evidence.’¹⁹¹ To date, no such applications have been made by the Prosecutor and the Court thus has not yet relied on it.¹⁹² As a result, it is difficult to assess whether and how the Pre-Trial Chamber will ensure the protection of the (privacy) rights of individuals affected by these investigative measures. The Statute and RPE provide limited guidance in that regard. The Pre-Trial Chamber *may* specify certain procedures, but it is not explicitly obliged to do so. Although the Prosecutor has a general duty to ‘respect the rights of persons arising under this Statute’, and Article 21(3) provides for the hierarchical superiority of internationally recognized human rights, it may be questioned whether such indirect guarantees suffice to effectively ensure the protection of the privacy rights of persons affected by the investigations. Such broad standards do not seem consistent with the requirements for lawful interferences with the right to privacy developed in IHRL.

One condition for the exercise of this power to execute coercive measures independently is judicial authorization. Given the requirements laid down in Rule 115(1), it is also clear that the Prosecutor must specify the type of measure s/he wishes to execute. Arguably, the requirement of proportionality also applies, because, as will be seen below, the ICC has held that this principle applies to search operations carried out by national authorities, in the presence of the Prosecutor.¹⁹³ It therefore seems logical that a similar requirement would apply to coercive measures executed by the Prosecutor independently. However, this so-called failed state exception has a very limited scope of application, and is only likely to be found in cases involving a complete collapse of the state’s institutions.¹⁹⁴

The second exception to the rule that state consent and cooperation are required for the exercise of investigative measures by the ICC is provided for in Article 99(4). However, this provision explicitly excludes compulsory measures from its scope. This exception was included in order to allow states to protect its interests or those of its citizens.¹⁹⁵ Other than in the failed-state scenario, the ICC Prosecutor thus has no authority to execute coercive measures independently from states on their territory.

¹⁹¹ Rule 115(1), (3) ICTY RPE.

¹⁹² Similarly Alamuddin (n 141), 247.

¹⁹³ ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), 29 January 2007, 79; for an in-depth discussion of this Decision, see Section 4.2.3. on the human rights obligations of the ICC in the joint execution of coercive measures, below.

¹⁹⁴ Alamuddin (n 141), 247.

¹⁹⁵ Claus Kress and Kimberly Prost, ‘Article 99, Execution of Requests Under Article 93 and 96’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd edn, Beck 2008), 1622.

Unlike the legal instruments of the ad hoc Tribunals, the Statute and the RPE of the ICC do explicitly provide the Prosecutor with the power to execute coercive measures independently, but this only applies to ‘failed states’. Since this situation has not yet occurred before the ICC, it is difficult to predict the issues that will arise in practice. However, from the perspective of the right to privacy, it is a definite improvement from the ad hoc Tribunals that the ICC’s Statute and RPE provide a specific legal basis for this power, and provide some – albeit limited – regulation regarding the way it is to be executed. Notably, the requirement of judicial authorization may offer some guarantees. However, neither the Statute nor the RPE specify any formal or material conditions for the issuing of such judicial authorization in the case of coercive measures. Although the ICC’s approach can be seen as an improvement from that of the ad hoc Tribunals, it can still be criticized from the perspective of IHRL for its lack of specific safeguards.

4. Privacy and Coercive Measures Executed in Cooperation with States

The bulk of the investigative activities of the ICTs are carried out by states. The protection of the right to privacy in this context is therefore of primary importance. As stated above, there are significant obstacles to the effective protection of the right to privacy in the context of inter-state cooperation in criminal matters.¹⁹⁶ The specific nature of the cooperation between states and the ICTs exacerbate these problems, and the execution of coercive measures in this context raises additional problems of its own.

Before commencing the analysis, it is important to note that the legal framework governing cooperation amongst states differs from the frameworks that apply to cooperation of states with the ad hoc Tribunals and with the ICC. On a general level, traditional inter-state cooperation is characterized by sovereign equality, consent, and reciprocity. States are free to choose whether or not to enter into agreements with other states to provide mutual legal assistance, and when they do, they decide on the content and scope of the obligations laid down in such agreements. This results in reciprocal relations that entail an obligation to provide legal assistance whenever another state so requests, but at the same time there are grounds for refusal as well as certain guidelines for the content of a request.¹⁹⁷

¹⁹⁶ See *supra* section 2.2.

¹⁹⁷ See *supra* section 2.2.

The Statutes of the ICTY and the ICTR lay down an absolute obligation incumbent upon states to cooperate fully with the Tribunals.¹⁹⁸ This obligation is also enshrined in the UNSC Resolutions establishing the tribunals.¹⁹⁹ As a result, the obligation to cooperate binds all UN member states, since the resolutions were adopted pursuant to the UNSC's mandate under Chapter VII of the UNC. In addition, UNC obligations override other international obligations pursuant to Article 103 as a result of which the obligation to cooperate is hierarchically superior to other obligations. This obligation to cooperate includes the obligation to take certain actions vis-à-vis individuals present in states' territory.²⁰⁰ Finally, unlike in the context of inter-state cooperation, where there are normally a number of grounds for refusal, the ad hoc Tribunals only recognize national security concerns; and even then, the Tribunals' Chambers decide whether or not these concerns are legitimate and may indeed constitute a ground for refusal.²⁰¹ States thus have an absolute and almost unconditional obligation to cooperate with the ad hoc tribunals.²⁰² Cooperation between states and the ad hoc Tribunals has therefore been argued to be of a vertical nature, whereas cooperation amongst states is horizontal.²⁰³ As a result, it is more appropriate to speak of state assistance to the Tribunals, instead of state cooperation with them.²⁰⁴ This vertical relationship has a profound impact on the way in which states handle cooperation requests and, as a consequence, on the protection of human rights in the execution of such requests. While states may refuse to execute a regular request for legal assistance if it does not live up to their domestic standards, this is not the case when it comes to the ad hoc Tribunals. From an international law perspective, states are precluded from reviewing, let alone rejecting requests and orders from the ad hoc Tribunals.²⁰⁵

¹⁹⁸ Art 18(2) ICTY Statute; Art 17(2) ICTR Statute.

¹⁹⁹ UNSC Res 827 (25 May 1993) UN Doc S/Res/827, 5; UNSC Res 955 (8 November 1994) UN Doc S/Res/955, 2.

²⁰⁰ 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* (IT-95-14-AR108 bis), 29 October 1997, 27.

²⁰¹ Rules 54bis (F) and (G) ICTY RPE. See also Sluiter, *International Criminal Adjudication and the Collection of Evidence* (n 80), 145ff.

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* (IT-95-14-AR108 bis), 29 October 1997, 26.

²⁰² Dagmar Stroh, 'State Cooperation with the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2001) 5 Max Planck Y B UN L 249, 266.

²⁰³ May and Wierda (n 146), 54.

²⁰⁴ Stroh (n 202), 266.

²⁰⁵ *ibid*, 269.

The cooperation regime of the ICC is different from that of the ad hoc Tribunals. It was subject to heavy debates, because of its direct impact on states parties.²⁰⁶ The result of the negotiations is a cooperation regime that is less vertical in nature. States' obligation to cooperate is less absolute and domestic law has been given a (more) prominent place. In that sense, the cooperation with the ICC is more akin to classic inter-state cooperation in criminal matters, but there are also significant differences. There are fewer grounds for refusal of a request for assistance, there is no reciprocity, and the ICC itself has the authority to settle disputes arising in the context of cooperation.²⁰⁷ Overall, the ICC Statute creates a cooperation regime that incorporates both vertical and horizontal aspects.²⁰⁸ Article 86 obliges states parties to cooperate with the Court. This obligation is less absolute than the obligation to cooperate with the ad hoc Tribunals, because it relates only to forms of cooperation specifically provided for by the Statute.²⁰⁹ Furthermore, the Rome Statute recognizes more grounds for refusal of assistance than national security alone. These grounds for refusal may enable states to ensure the rights of persons implicated by the investigative activities on behalf of the ICC.²¹⁰

Despite these different legal frameworks, states have by and large employed existing schemes for inter-state cooperation to process requests for assistance from the ICTs. The impact of classic inter-state cooperation in criminal matters on the cooperation between states and ICTs should therefore not be underestimated. Even more so given the fact that the cooperation framework at the ICC is more akin to classic inter-state cooperation. The following discussion address whether, and if so, what obligations the ICTs may have under the right to privacy when they (1) submit a request for legal assistance, (2) when the request is executed, and (3) when they admit the results of the measures into evidence.

4.1. The ad hoc Tribunals

4.1.1. *Formulating and submitting a request for assistance*

The Statutes of the Tribunals provide little guidance as to the legal basis for the formulation of requests for assistance to be submitted to states. They simply provide that the Prosecutor

²⁰⁶ Claus Kress, Kimberly Prost and Peter Wilkitzki 'Part 9, International Cooperation and Judicial Assistance' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Beck 2008), 1507.

²⁰⁷ Art 87(7) ICC Statute; Kress, Prost and Wilkitzki (n 206), 1508; see also Sluiter, *International Criminal Adjudication and the Collection of Evidence* (n 80), 86.

²⁰⁸ Swart and Sluiter (n 146), 99; Swart (n 187), 1594; Kress, Prost and Wilkitzki (n 206), 1508.

²⁰⁹ Swart (n 187), 1594.

²¹⁰ See *infra* section 5.2.2.

has the power to ‘collect evidence and to conduct on-site investigations’, and that s/he may, as appropriate, seek state cooperation in doing so.²¹¹ The Tribunals’ RPEs reiterate this power without adding further specification as to which kind of measures s/he is entitled to request.²¹² The RPEs further provide that the Prosecutor may seek cooperation from states and international bodies and that s/he may ‘request such orders as may be necessary from a Trial Chamber or a Judge’.²¹³ In cases of urgency, s/he may request states to seize physical evidence during the arrest of a suspect.²¹⁴ Finally, the RPEs provide that the Prosecutor shall be responsible for the ‘storage, retention, and security of information and physical material obtained in the course of [his] investigations’,²¹⁵ to which the ICTR RPE add that s/he must ‘draw up an inventory of all materials seized from the accused’, and that s/he must return, without delay, all materials that are of no evidentiary value.²¹⁶

It appears as though Rule 40 specifically regulates the seizure of materials the OTP believes to present evidentiary value, and limits this to cases of ‘urgency’. However, ‘urgency’ is nowhere defined, and the Tribunals’ case law shows that there has not been a strict interpretation of these provisions. Quite the contrary, although several ICTR decisions addressed Rule 40(A)(ii), none of these discuss the implications of this term, as a result of which it should not be interpreted as a substantive or procedural limit to the Prosecutor’s power to seize evidence. In addition, the case law of the Tribunal shows that the Prosecutor also has a general power to request states to conduct coercive measures on her/his behalf, and that this power is based on Article 17(2) and 18(2) of the ICTR and ICTY Statute, respectively, and on Rule 39 of both Tribunals’ RPE.²¹⁷ The power to request search and seizure opera-

²¹¹ Art 18(2) ICTY Statute; Art 17(2) ICTR Statute.

²¹² Rule 39(i) ICTY RPE; Rule 39(i) ICTR RPE.

²¹³ Rule 39(iii), (iv) ICTY RPE; Rule 39(iii), (iv) ICTR RPE.

²¹⁴ Rule 40(ii) ICTY RPE; Rule 40(A)(ii) ICTR RPE.

²¹⁵ Rule 41 ICTY RPE; Rule 41(A) ICTR RPE.

²¹⁶ Rule 41(B) ICTR RPE.

²¹⁷ ICTR, Decision on Defence Motion for Restitution of Personal Effects, *Prosecutor v. Ruggiu* (ICTR-97-32-I), 7 July 1998, 5; ICTR, Decision on the Defence Motion for Annulment of Proceedings, Release and Return of Personal Items and Documents, *Prosecutor v. Ntabakuze* (ICTR-97-34-T), 25 September 1998, 7; ICTR, Decision on Defence Motion for Restitution of Items and Documents Seized, *Prosecutor v. Kabiligi* (ICTR-97-34-I), 5 October 1998, 3; 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*, (ICTR-98-44-I), 10 December 1999, 4.9; ICTR, Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Materials, *Prosecutor v. Ngirumpatse* (ICTR-97-44-I), 10 December 1999, 73; 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. Nzizorera* (ICTR-98-44-T), 7 September 2000, 31; ICTR, Decision on Prosecutor’s Motion Pursuant to Trial Chamber’s Directives of 7 December 2005 for the Verification of the Authenticity of Evidence Obtained out of Court Pursuant to Rules 89 (C) & (D), *Prosecutor v. Muvunyi* (ICTR-2000-55A-T), 26 April 2006, 25; the decisions varied slightly as to whether they mentioned either Rule 39 or Rule 40, or both; As to the ICTY,

tions to be carried out is thus not limited to cases of urgency, as Rule 40 might suggest. Indeed, Rule 40 has not been the sole legal basis employed for search and seizure operations. Instead the Tribunals have also often relied on their general power to request cooperation and states' obligation to comply. As such, the Tribunals' legal frameworks grant the Prosecutor a broad power to collect evidence and conduct on-site investigations, and to seek the assistance of states in doing so. The Prosecutor may turn to states directly, without having to go through the judicial authorities at the Tribunals.²¹⁸

The Tribunals' legal frameworks do not regulate the formulation or submission of requests for legal assistance. There is no requirement of judicial authorization enshrined in the Tribunals' legal instruments, or developed in their case law. There is a number of isolated examples of search warrants issued by the Tribunals, but these do not suffice to support the conclusion that such warrants are required before the Prosecutor may ask states to execute coercive measures on her/his behalf.²¹⁹ Several authors argue in favor of a requirement of judicial authorization for search and seizure operations and coercive action in general.²²⁰ However, although practice shows some examples of judicial warrants for coercive action, no general requirement of judicial authorization by the ad hoc Tribunals for coercive action can be deduced from the Tribunals' law and practice.²²¹ As has been noted, the ICTY has explicitly rejected this requirement.²²² Furthermore, the limited amounts of warrants that have been issued by the Tribunals do not address the factual motivation for the search, or questions such as the proportionality or necessity of the search, or the specificity of the warrant. Finally, the case law of the ad hoc Tribunals has not addressed the right to privacy in the context of covert operations, such as the interception of communications.²²³ No warrants can be identified that authorized such coercive measures, nor have Chambers ever examined their legality from the perspective of the right to privacy.

see eg ICTY, Decision Stating Reasons for Trial Chamber's Ruling of 1 June 1999 Rejecting Defence Motion to Suppress Evidence, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), 25 June 1999, 5; ICTY, Decision on Application for Leave to Appeal, *Kordić and Čerkez* (IT-95-14/2- AR73.4), 23 August 1999, 3; ICTY, Decision, *Prosecutor v. Stakić* (IT-97-24-AR73.5), 10 October 2002, 3.

²¹⁸ De Meester and others (n 145), 284; Stroh (n 202), 255.

²¹⁹ ICTR, Warrant of Arrest and Orders for Transfer and Detention and for Search and Seizure, *Prosecutor v. Ndindabahizi* (ICTR-2001-71-I), 5 July 2001, 2; see also case law cited above; Alamuddin (n 141), 287.

²²⁰ De Meester (n 1), 518-540; Safferling and others (n 178), 278; Sluiter, *International Criminal Adjudication and the Collection of Evidence* (n 80), 112, 125-128.

²²¹ Cryer and others (n 146), 526; Klamberg (n 4), 252; De Meester and others (n 145), 284, 293.

²²² ICTY, Decision on Defence Request to Exclude Evidence as Inadmissible, *Prosecutor v. Stakić* (IT-97-24-T), 31 July 2002, 2; ICTY, Decision, *Prosecutor v. Stakić* (IT-97-24-AR73.5), 10 October 2002, 2.

²²³ Alamuddin (n 141), 289.

The only regulation of search and seizure operations at the ICTR appears to be the requirement that the Prosecutor draw up an inventory afterwards.²²⁴ The ICTY has confirmed this requirement, but it has also held that the absence of an inventory will not lead to the exclusion of evidence.²²⁵ The Tribunals' legal frameworks provide no further specification as to the form or content of requests for coercive measures, nor do they incorporate any checks or guarantees to protect the (privacy) rights of persons subject to the requested measures. Where most domestic codes of criminal procedure provide a threshold of a certain level of suspicion and tests of proportionality of the coercive measure in question, no safeguards are in place to limit the Prosecutor's exercise of such powers. The legal frameworks of the Tribunals do not even specify which coercive measures the Prosecutor may request or execute. The only threshold for the execution of coercive measures is arguably the threshold for the commencement of an investigation, which is that there must be 'sufficient basis to proceed'.²²⁶ There is no other requirement enshrined in the Tribunals' legal frameworks for coercive action and no need for an underlying justification or specific basis for the use of a specific measure, such as the existence of reasonable grounds or probable cause.²²⁷

However, according to the ICTY Manual on developed practices, internal guidelines have been developed by the OTP, which emphasized, amongst other things, 'the need to provide a legal framework for an investigation'.²²⁸ These guidelines seemingly also address search and seizure operations, specifically, and are said to lay down the 'legal procedures for search warrant applications, the execution of search warrants, including guidelines on cooperation with international bodies, and the use of reasonable force'.²²⁹ However, given the

²²⁴ Rule 41(B) ICTR RPE. See also ICTR, Decision on Defence Motion for Restitution of Personal Effects, *Prosecutor v. Ruggiu* (ICTR-97-32-I), 7 July 1998, 6, where the ICTR found that the requirement that an inventory be made was absent from the Statute and that this was a lacuna; therefore, the ICTR directed the OTP to make inventories in the future, based on 'an international practice' to that effect'; ICTR, Decision on Defence Motion for Restitution of Items and Documents Seized, *Prosecutor v. Kabiligi* (ICTR-97-34-I), 5 October 1998, 3; 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. Nzizorera* (ICTR-98-44-T), 7 September 2000, 33; ICTR, Warrant of Arrest and Orders for Transfer and Detention and for Search and Seizure, *Prosecutor v. Nindabahizi* (ICTR-2001-71-I), 5 July 2001, 2.

²²⁵ ICTY, Order to the Registry of the Tribunal to Provide Documents, *Prosecutor v. Stakić* (IT-97-24-T), 5 July 2002, 3; ICTY, Decision on Defence Request to Exclude Evidence as Inadmissible, *Prosecutor v. Stakić* (IT-97-24-T), 31 July 2002, 3.

²²⁶ De Meester and others (n 145), 287; ICTY, Manual on Developed Practices (2009) <http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf> accessed 13 March 2014, 11.

²²⁷ De Meester and others (n 145), 286-287; idem: Alamuddin (n 141), 286; De Meester (n 1), 542, where he notes that 'these triggering mechanisms or minimum thresholds are remarkably absent in international criminal procedure'.

²²⁸ ICTY, Manual on Developed Practices (2009) <http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf> accessed 13 March 2014, 13

²²⁹ *ibid.*, 18

non-public nature of these guidelines, it is impossible to assess their content.²³⁰ Apparently, these guidelines are also unknown to the defence, as a result of which the defence cannot rely on them to monitor the OTP's conduct. In a 2005 appeal brief, the defence lamented this absence of a threshold for coercive action and sought 'the establishment of some standard of review for search warrants in order to protect against prosecutorial capriciousness and seal', and for the installment of probable cause as a minimum requirement for coercive action.²³¹ However, neither the Prosecutor nor the Chamber addressed these concerns.²³²

The power of the Prosecutor to request any form of cooperation s/he deems necessary in the interests of the investigation is thus not subject to any legal limits. This broad power is coupled with a broad and absolute obligation on the part of states to cooperate with the Tribunals, the implications of which will be further explored below.²³³ This duty of cooperation extends to all organs of the Tribunal. In practice, however, state cooperation has not always been forthcoming. In such cases, the Prosecutor has the possibility to seek a binding order from a Trial Chamber.²³⁴ However, that does not mean that the Prosecutor has an obligation to seek such orders instead of turning to states her/himself. Quite the contrary, Rule 54*bis* explicitly requires the parties to seek cooperation independently, before turning to the Chamber for a binding order.

Rule 54 of both Tribunals' RPEs grants Trial Chambers the power to 'issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial', which the Chamber may do at the request of either party, or *proprio motu*. Rule 54*bis* of the ICTY RPE codifies the Chamber's power to issue binding orders for the production of documents or information. This provision is not concerned with the manner in which the documents or information is to be gathered by the state, but only with conditions that the parties must satisfy before a Chamber will issue an order. Such orders could theoretically require states to execute coercive measures to gather the information or documents sought. However, the provision does not include any guarantees to protect the privacy rights of persons implicated by possible coercive measures. In relevant part, the provision does require the party seeking an order to identify as far as possible the documents or information to which the application relates, and to indicate their relevance, and their necessity for a fair determination of a matter before the

²³⁰ Alamuddin (n 141), 286; De Meester and others (n 145), 285-286.

²³¹ ICTY, Mladen Naletilić's Revised Appeal Brief, *Prosecutor v. Naletilić and Martinović* (IT-98-34-A), 6 October 2005, 23; similarly Alamuddin (n 141), 286; De Meester and others (n 145), 287.

²³² Alamuddin (n 141), 286; De Meester and others (n 145), 287

²³³ Art 29 ICTY Statute; Art 28 ICTR Statute; see *infra* section 4.1.2.

²³⁴ Rule 39(iii) ICTY RPE; Rule 39(iii) ICTR RPE.

judge.²³⁵ The purpose of the specificity criterion is to enable the state to identify the documents sought.²³⁶ In addition, requests should not be unduly onerous for the state, and the state must be given sufficient time to comply with the order.²³⁷ The requirements for a valid request for an order are all concerned with protecting the interests of states, rather than individuals. However, their implications might serve as somewhat of a proportionality requirement. For example, it has been held that that the Prosecutor cannot go on fishing expeditions.²³⁸ The requirements of specificity and relevance may therefore operate as requirements that, in practice, may ensure the proportionality of cooperation orders. However, the provision asks the Chamber to balance the interests of the party requesting the order with the interests of the state, not of individuals. Its possible protective effect of the human rights of individuals implicated should therefore not be overestimated.

4.1.2. Execution of the request

That the law of the Tribunals does not regulate—requests for—coercive measures may be explained in part by the fact that the Tribunals were not expected to independently execute such measures and would have to rely on states to do so on their behalf. This led to the assumption that domestic law would govern the execution of coercive measures.²³⁹ The ICTY has explicitly adhered to this position.²⁴⁰ Like in regular situations of inter-state cooperation in criminal matters, the requested state is expected to follow its domestic procedures for the authorization of coercive measures pursuant to foreign requests. These domestic procedures are expected to protect the privacy rights of persons implicated by the investigative measures. States' relevant obligations under IHRL are thought to apply to their execution of requests of

²³⁵ Rule 54 *Bis* (A)(i) and (ii). See also ICTY, Decision of the President on the Prosecution Motion for the Production of Notes Exchanged between Zejnir Delalić and Zdravko Mucić, *Prosecutor v. Delalić et al* (IT-96-21-T), 11 November 1996, 40; 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* (IT-95-14-AR108 bis), 29 October 1997, 32; ICTY, Decision on the Request of the Republic of Croatia for Review of a Binding Order, *Kordić and Čerkez* (IT-95-14/2- AR108bis), 9 September 1999, 38; May and Wierda (n 146), 56-57.

²³⁶ ICTY, Decision on the Request of the Republic of Croatia for Review of a Binding Order, *Kordić and Čerkez* (IT-95-14/2- AR108bis), 9 September 1999, 38.

²³⁷ 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* (IT-95-14-AR108 bis), 29 October 1997, 32; ICTY, Decision on the Request of the Republic of Croatia for Review of a Binding Order, *Kordić and Čerkez* (IT-95-14/2- AR108bis), 9 September 1999, 34; see further: May and Wierda (n 146), 56-57.

²³⁸ ICTY, Decision of the President on the Prosecution Motion for the Production of Notes Exchanged between Zejnir Delalić and Zdravko Mucić, *Prosecutor v. Delalić et al* (IT-96-21-T), 11 November 1996, 40; Alamuddin (n 141), 289.

²³⁹ Klamberg (n 4), 225.

²⁴⁰ ICTY, Decision on Defence Request to Exclude Evidence as Inadmissible, *Prosecutor v. Stakić* (IT-97-24-T), 31 July 2002, 2: where the Chamber noted that the Statute and RPE do not regulate search and seizure because of the expectation that such operations would be governed by the law of the state.

the ad hoc Tribunals.²⁴¹ However, the relationship between states and the ad hoc Tribunals is fundamentally different from that between states *inter se*, as a result of which the operation of such human rights guarantees may be hampered. What is more, the protection of privacy rights in the context of inter-state cooperation is already fraught with problems, as has been shown above, and it will be shown below that these problems are exacerbated in the cooperation between states and the ad hoc Tribunals.

The expectation thus seems to be that the obligation to protect the rights of persons affected by the investigative and coercive action on behalf of the Tribunals rests primarily with the states that execute these measures.²⁴² The focus of this Chapter is on the obligations of the Tribunals to ensure respect for the privacy rights of persons implicated in the investigative process. However, there are a number of obstacles to the effective protection of the right to privacy inherent in the way in which states address cooperation requests emanating from the Tribunals. In order to provide a complete picture of the actual protection of privacy rights in this context, it would be necessary to examine the domestic legal frameworks states have used for the processing and execution of requests and orders for assistance by the ICTs. Although this is not possible within the scope of the present inquiry, a number of observations can be made.

Only a limited number of states have enacted legislation to implement their obligations pursuant to the Statutes and RPEs of the ad hoc Tribunals. The website of the ICTY shows that twenty-one states have done so regarding this Tribunal.²⁴³ It is more difficult to ascertain how many states have enacted specific legislation pertaining to the ICTR. In 2003, thirteen states had done so, several of which have a single consolidated act that pertains to cooperation with both Tribunals.²⁴⁴ Be that as it may, it seems safe to conclude that relatively few states have enacted specific cooperation legislation, and that most of them are found among European and North American states. However, this does not mean that states that have not done so cannot or will not cooperate with the Tribunals.²⁴⁵ Such states will generally

²⁴¹ Sluiter, *International Criminal Adjudication and the Collection of Evidence* (n 80), 215.

²⁴² See also De Meester (n 145), 532, who shows, based on interviews with staff of the OTP of the ICTR, that the expectation is that the state requested to execute coercive measures will do so with full respect of its domestic law and procedures.

²⁴³ ICTY Website, 'Member State Cooperation' <<http://www.icty.org/sections/LegalLibrary/MemberStatesCooperation>> accessed 14 September 2014; see also Stroh (n 202), 271, who noted that, in the summer of 2000, 23 states enacted a law or similar legal instrument authorizing cooperation with the ICTY.

²⁴⁴ Stroh (n 202), 271; L Dushimimana, 'States' Cooperation with the International Criminal Tribunal for Rwanda' (2013) 1 *Rwanda Journal, Series B Social Sciences* 71, 84, who states that 'very few' states have enacted legislation.

²⁴⁵ Göran Sluiter, 'Obtaining Evidence for the International Criminal Tribunal for the Former Yugoslavia: An Overview and Assessment of Domestic Implementing Legislation' (1998) 45 *Netherlands Int'l L Rev* 87, 93,

fall back on the legislation in place for the processing of ‘regular’ requests for legal assistance. In addition, the majority of the implementation legislation that is currently in place is modeled after legislation governing regular cooperation in criminal matters.²⁴⁶ The different relationship between the ad hoc Tribunals and states has thus generally not resulted in a fundamentally different legal framework that applies to the assistance provided by states to the Tribunals.²⁴⁷

In practice, the law of the requested state will govern the execution of requests for coercive measures.²⁴⁸ According to the ICTR, this means that the Tribunal has no obligations or responsibilities regarding the protection of human rights in the execution of such measures by the state. In one of its earliest decision on this issue, the ICTR did find that the OTP’s involvement in a search and seizure operation entailed that the law of the Tribunal applied to it.²⁴⁹ However, in subsequent case law, the ICTR has consistently held that the responsibility for the execution of coercive measures rested with domestic authorities, and that therefore, domestic law alone governed the execution of the operation, even if the OTP had also participated.²⁵⁰ According to a Trial Chamber: ‘whoever executed the search and seizure, they were able to so proceed only in the presence and under the auspices of Kenyan authorities’.²⁵¹ The ICTR thus holds the view that a legal basis under national law suffices for the execution of a search and seizure operation incidental to the arrest proceedings, without requiring any form

who notes that other states have indicated that they are able to provide the tribunal with the necessary legal assistance on the basis of their existing laws and procedures.

²⁴⁶ *ibid*, 112; Swart (n 187), 1593; Cryer and others (n 146), 527.

²⁴⁷ Swart and Sluiter (n 146), 114, who note that the ad hoc Tribunals’ Prosecutors have sweeping powers to conduct on-site investigations, although, at the same time, implementation legalisation generally requires consent of national authorities and does not allow the direct execution of coercive measures by tribunal officials. However, there are several exceptions. On this, see eg Sluiter, ‘Obtaining Evidence for the ICTY’ (n 245), 108, who notes that two states have granted Tribunal investigators a fairly broad authority to conduct independent investigative acts on their territory; and three other states also allow this, subject to their prior consent; Cryer and others (n 146), p 525.

²⁴⁸ De Meester and others (n 145), 291; see also Sluiter, ‘Obtaining Evidence for the ICTY’ (n 245), 100; Sluiter, *International Criminal Adjudication and the Collection of Evidence* (n 80), 299, where the author notes that most states’ implementation legislation require investigative acts to be carried out under national authority and control.

²⁴⁹ ICTR, Decision on Defence Motion for Restitution of Personal Effects, *Prosecutor v. Ruggiu* (ICTR-97-32-I), 7 July 1998, 2.

²⁵⁰ ICTR, Decision on the Defence Motion for Annulment of Proceedings, Release and Return of Personal Items and Documents, *Prosecutor v. Ntabakuze* (ICTR-97-34-T), 25 September 1998, 2, 7; 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*, (ICTR-98-44-I), 10 December 1999, 4.1; ICTR, Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Materials, *Prosecutor v. Ngirumpatse* (ICTR-97-44-I), 10 December 1999, 73.

²⁵¹ ICTR, Decision on Defence Motion for Exclusion of Evidence and Restitution of Property Seized, *Prosecutor v. Nyiramasuhuko* (ICTR-97-21-T), 12 October 2000, 26.

of judicial authorization by the Tribunal.²⁵² Accordingly, if any human rights guarantees are to be in place, these should be offered by the state, not by the Tribunal.²⁵³

However, several factors complicate the effective functioning of such guarantees in the context of assistance to the Tribunals. The content of such guarantees differs between states: some will provide for a judicial check of the measure's necessity and its proportionality, but it is by no means a given that all states with which the Tribunals cooperate offer such guarantees.²⁵⁴ In addition, it is questionable whether states will be able to effectively offer such guarantees when a Tribunal requests coercive measures. Requested states are generally hesitant to conduct checks of other states' assessments of the legality, proportionality and necessity of coercive measures.²⁵⁵ It can be expected that such hesitation be as much, or even more, present when it comes to requests from the ad hoc Tribunals.²⁵⁶ After all, states have an absolute and hierarchically superior obligation to cooperate with the tribunals and, in principle, have no possibility to review, let alone refuse their requests. If there is no room for refusal, why would states bother to conduct a check at all? Whatever the outcome of the check, the request, in principle, has to be granted. In addition, although some domestic cooperation laws provide that the state may, or even must refuse cooperation, these grounds for refusal relate to sovereignty and national security concerns, and not to the possible infringement of the rights of individuals.²⁵⁷

Furthermore, there are no formal requirements for the content of a request from the Tribunal. The Tribunals are not obliged to inform states of the reasons for a coercive measure, which will render it difficult, if not impossible, for the relevant state authorities to assess whether the measure meets its domestic requirements.²⁵⁸ How is a state supposed to assess the necessity of a given investigative measure if it is unaware of the factual motivation for the measure? Furthermore, implementation legislation generally does not attach legal consequences to incomplete requests, as a result of which requests that do not provide sufficient

²⁵² De Meester and others (n 145), 289.

²⁵³ *ibid.*

²⁵⁴ See also De Meester (n 1), 534-535, who notes that one ICTR Judge relied on the different standards that exist in African states, applicable to the execution of coercive measures, as a reason to strengthen the role of the Judges of the Tribunal in the initiation and execution of coercive measures.

²⁵⁵ See *infra* section 2.2.2.

²⁵⁶ De Meester (n 1), 536; see also Alexander Zahar, 'International Court and Private Citizen' (2009) 12 *New Crim L Rev* 569.

²⁵⁷ Sluiter, 'Obtaining Evidence for the ICTY' (n 245), 97-98; Stroh (n 202), 272, who notes that two implementation laws authorize – and even oblige – national authorities to refuse to cooperate, if cooperation might endanger national interests, although the rights of citizens are not mentioned explicitly.

²⁵⁸ See also Sluiter 2002 (dissertation), 125; De Meester (n 1), 536, who notes that '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.'

information to assess the legality of a measure under domestic law may still be executed.²⁵⁹ Implementation legislation does not specifically address the operation of guarantees, such as the conditions under which homes may be searched or communication may be intercepted. Instead, regular laws of criminal procedure may apply by analogy, and this may afford a certain measure of protection to individuals. The operative term, however, is ‘may’. The Tribunals’ legal frameworks do not ensure that states employ such guarantees in their execution of requests of the Tribunal.²⁶⁰ While the Tribunals’ legal instruments regulate the procedures for arrest and surrender and the questioning of persons by domestic authorities,²⁶¹ they do not provide procedures or guarantees applicable to the execution of coercive measures.²⁶² This warrants the conclusion that when it comes to state assistance for the purpose of gathering evidence, there is less focus on the rights of the individual.²⁶³

As such, the ad hoc Tribunals’ legal framework do nothing to ensure that the privacy rights of persons affected by investigative measures conducted on their behalf are respected. The protection of the right to privacy in the context of coercive measures therefore fully depends on the willingness and ability of the executing state. In addition, even where states theoretically provide such guarantees, these may not be able to operate effectively because states may have too little information at their disposal to conduct actual checks of the lawfulness, necessity and proportionality of the measure. There are thus significant gaps in the protection of the right to privacy in the Tribunals’ law and practice.

4.1.3. *Evaluating evidence obtained*

The determination of admissibility of evidence obtained through an alleged violation of the right to privacy is the final stage where the Tribunals may interpret and apply this right. However, the legal framework applicable to the admission and exclusion of evidence raises distinct issues, many of which fall beyond the scope of the present inquiry. In IHRL, the admissibility of evidence is an issue that is governed by the right to a fair trial and the right to a remedy for human rights violations, not the right to privacy. The decision to admit or exclude

²⁵⁹ Sluiter, ‘Obtaining Evidence for the ICTY’ (n 245), 96.

²⁶⁰ De Meester (n 1), 535, who notes that ‘there is no guarantee that this judicial authorisation [ie domestic judicial authorization in the requested state] is required for the specific measure sought *or that this authorisation will in practice be sought*. 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.’

²⁶¹ See eg Rules 40*bis*, 42(A) ICTY RPE and ICTR RPE.

²⁶² De Meester (n 1), 535, who also notes that the ICTs’ legal frameworks ‘contain no binding obligations for states to adopt certain procedural requirements or thresholds for the adoption of non-custodial coercive measures.’

²⁶³ Sluiter, ‘Obtaining Evidence for the ICTY’ (n 245), 104.

evidence is informed by parameters that are different from those used to determine whether or not a violation of the right to privacy has occurred. The use of illegally obtained evidence in a criminal trial may or may not constitute a violation of the right to a fair trial, but this question is less relevant for present purposes. What is interesting to ascertain, however, is in how far the Tribunals are willing to assess the manner in which evidence was obtained, their discussions of the law applicable to obtaining evidence, as well as their determinations of which actors are primarily responsible for its collection.

As shown above, the ICTR initially developed a consistent line of case law according to which the execution of coercive measures was the exclusive responsibility of the state executing the request. The execution of the measure was subject to domestic law alone, and the Tribunal bore no responsibility for possible procedural violations that may have occurred.²⁶⁴ This meant that the ICTR refused to assess the manner in which evidence was collected, and thus did not assess possible violations of the right to privacy in that regard. The ICTY's approach to the admission of evidence displays a different attitude to the interplay between national and international standards governing the collection of evidence. Initially, the standards applicable to the collection of evidence, in so far as they were relevant for the Tribunal when admitting it, were held to emanate from the law of the Tribunal and IHRL. For example, a Chamber excluded evidence that was obtained in accordance with the relevant domestic law, but did not adhere to the standards enshrined in the Tribunal's legal framework.²⁶⁵ Although this example relates to the right to counsel enshrined in the RPE, it suggests that the collection of evidence should, as a minimum, be in accordance with the right of suspects and accused persons provided by the legal framework of the Tribunal itself.

However, in another decision, the Chamber admitted evidence that was obtained through a search and seizure operation that did not adhere to Austrian criminal procedure. According to the Chamber, excluding evidence because of 'a minor breach of procedural rules which the Trial Chamber is not bound to apply' would 'constitute a dangerous obstacle to the administration of justice.'²⁶⁶ It was thus irrelevant that domestic procedures for search and seizure operations had not been followed. Instead, the Chamber held that the governing consideration was 'the interests of justice' and since the evidence in question was relevant

²⁶⁴ See *supra* section 4.1.2.

²⁶⁵ ICTY, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, *Prosecutor v. Delalić et al* (IT-96-21-T), 2 September 1997, 55: this case pertained to an accused who was questioned in Austria without his lawyer present. This was permissible under Austrian law but Rule 42 RPE explicitly provides the right to counsel during questioning, which led the Chamber to exclude the statements from the evidence.

²⁶⁶ ICTY, Decision on the Tendering of Prosecution Exhibits 104-108, *Prosecutor v. Delalić et al* (IT-96-21-T), 9 February 1998, 20.

and had probative value, it should be admitted.²⁶⁷ The Chamber did note that it retained the right to exclude evidence if it was obtained in violation of internationally protected human rights, but it did not assess whether the search and seizure had violated the right to privacy.²⁶⁸ This reluctance may be explained by the fact that, unlike the right to counsel, the right to privacy is not enshrined in the Tribunals' legal frameworks. The domestic procedural violations thus went without a remedy, and the Tribunal only assessed the accordance of the evidence's collection with its own legal framework, not IHRL.

The ICTY has also considered the admission of telephone conversations, intercepted by the internal security personnel of the Bosnian government before and during the war.²⁶⁹ This is one of the few examples in the case law of the ICTY where the Tribunal considered the right to privacy in the context of the admissibility of evidence. The Chamber considered this right to be applicable, because it was enshrined in the ICCPR, ECHR, and ACHR.²⁷⁰ At the same time, the Chamber noted that the right to privacy is not absolute and may be derogated from in times of emergency, 'of which wartime is an example *par excellence*', and may also be limited, as provided by Article 8(2) ECHR.²⁷¹ The Chamber considered an array of approaches in domestic criminal procedure to the use of evidence obtained in violation of the right to privacy, as well as the approach of the ECtHR. However, the Chamber held that the legal framework of the Tribunal mandated its own specific approach to the admissibility of evidence, which had been developed in light of what it called 'the important mission of the Tribunal'. According to the Chamber, Rules 89(C) and 95 do not provide for automatic exclusion of illegally obtained evidence; instead, the manner and surrounding circumstances in which evidence is obtained, as well as its reliability and effect on the integrity of the proceedings, will determine its admissibility.²⁷²

Instead of assessing whether the intercepts had been collected in violation of the right to privacy, the Chamber held that, even if the intercepts had been obtained 'illegally', there were a number of reasons that would militate in favor of its admission regardless. The Chamber reiterated 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 [domestic] procedural rules which the Trial Chamber is not bound to ap-

²⁶⁷ *ibid*, 21.

²⁶⁸ *ibid*, 23.

²⁶⁹ ICTY, Decision on the Defence 'Objection to Intercept Evidence', *Prosecutor v. Brđanin* (IT-99-36-T), 3 October 2003, 1.

²⁷⁰ *ibid*, 29.

²⁷¹ *ibid*, 30.

²⁷² *ibid*, 55.

ply'.²⁷³ It emphasized the Tribunal's mandate to prosecute and try persons accused of serious violations of international law, to render justice to the victims, to deter such crimes in the future and contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia. In light of the Tribunal's important mission, 'it would be utterly inappropriate to exclude relevant evidence due to procedural considerations, as long as the fairness of the trial is guaranteed.'²⁷⁴ It also relied on the gravity of the charges brought against the accused and the Tribunal's mandate to adjudicate serious violations of International Humanitarian law (IHL) when it concluded that 'intercepted evidence, even where obtained in a pre-armed conflict period in violation of the applicable domestic law, should be admitted in evidence.'²⁷⁵ In justifying its decision not to attach any consequences to illegality under national law, the Tribunal stated that domestic exclusionary rules serve, in part, to discourage and punish 'over-reaching law enforcement'. It was considered pointless for the Tribunal to exclude evidence on that basis, since it would not have that discouraging effect: 'the function of this Tribunal is not to deter and punish illegal conduct by domestic law enforcement authorities by excluding illegally obtained evidence.'²⁷⁶ The decision contained only superficial references to IHRL and did not assess whether the evidence in question had been obtained in violation of internationally recognized human rights.

The approach developed in this decision has been leading in the subsequent case law of the ICTY. Many decisions have emphasized that legality under national law is not determinative of the admissibility of evidence before the Tribunal.²⁷⁷ At the same time, read together, those decisions require at least some sort of examination of whether evidence was obtained in a manner that is in line with legal framework of the Tribunal itself. However, such examinations have rarely taken place. The focus is on the 'extremely high' threshold for the exclusion of evidence, which is often relied on as a reason to not even assess the manner in which the evidence was collected, because it will be admitted regardless.²⁷⁸

²⁷³ *ibid.*, 63.

²⁷⁴ *ibid.*

²⁷⁵ *ibid.*; reiterated in: ICTY, Decision on the Accused's Motion to Exclude Intercepted Conversations, *Prosecutor v. Karadžić* (IT-95-5/18-T), 30 September 2010, 10.

²⁷⁶ At the same time, this Trial Chamber stated that should the intercepts in question have been obtained illegally, their admission into evidence did not mean, and should not in any way be interpreted, as implying approval by the Tribunal of the way in which they were obtained.

²⁷⁷ See eg ICTY, Decision on the Tendering of Prosecution Exhibits 104-108, *Prosecutor v. Delalić et al* (IT-96-21-T), 9 February 1998, 14; ICTY, Appeals Judgement, *Prosecutor v. Haraqija and Morina* (IT-04-84-R77.4-A), 23 July 2009, 24; ICTY, Decision Denying the Stanišić Motion for Exclusion of Recorded Intercepts, *Prosecutor v. Stanišić and Župljanin* (IT-08-91-T), 16 December 2009, 14.

²⁷⁸ ICTY, Decision on Defence Request to Exclude Evidence as Inadmissible, *Prosecutor v. Stakić* (IT-97-24-T), 31 July 2002, 3; ICTY, Preliminary Decision of Intercepted Communications, *Prosecutor v. Milošević* (IT-

The ICTY has also examined the legality of the interception of communication with covert listening devices of persons standing trial for contempt, which was executed by national police forces in consultation with the Prosecutor.²⁷⁹ The intercepts were not obtained in accordance with national law because they had not been authorized by a judge.²⁸⁰ The Trial Chamber relied on *Brđanin* and reiterated that the approach of the Rules is ‘clearly in favor of admissibility’.²⁸¹ At the same time, the Trial and Appeals Chamber relied on IHRL and reiterated the ECtHR’s approach that the admission of evidence obtained in violation of the right to privacy does not necessarily violate the right to a fair trial.²⁸² Instead, the Chamber will assess ‘the manner and surrounding circumstances in which evidence is obtained’.²⁸³ In this context, the Chamber considered that the police acted in ‘good faith’.²⁸⁴ However, it failed to address the separate interference with the right to privacy, or the Tribunal’s responsibility for it.²⁸⁵ In *Brđanin*, the evidence had been collected without any involvement of the Tribunal, but the Chamber did not acknowledge or assess this arguably crucial difference.

In *Karadžić*, the Chamber held that the admission of certain intercepted conversations into evidence, even if obtained in contravention of domestic law, would not ‘violate the accused’s right to privacy to such an extent that the integrity of the proceedings would be damaged’, thus emphasizing the high standard of Rule 95.²⁸⁶ In support of this contention, the Chamber reiterated *Brđanin* and held that in IHRL, the right to privacy is derogable in times of emergency, and not absolute.²⁸⁷ Subsequently, the Chamber considered its jurisdiction ‘to prosecute and adjudicate serious violations of international law’, and ‘the charges brought against the Accused’, and concluded that even if illegal under domestic law, the intercepted

02-54-T), 16 December 2003, 2-3; ICTY, Decision Denying the Stanišić Motion for Exclusion of Recorded Intercepts, *Prosecutor v. Stanišić and Župljanin* (IT-08-91-T), 16 December 2009, 21.

²⁷⁹ ICTY, Decision on Morina and Haraqija Second Request for a Declaration of Inadmissibility and Exclusion of Evidence, *Prosecutor v. Haraqija and Morina* (IT-04-84-R77.4), 27 November 2008, 1; ICTY, Appeals Judgement, *Prosecutor v. Haraqija and Morina* (IT-04-84-R77.4-A), 23 July 2009, 17.

²⁸⁰ ICTY, Decision on Morina and Haraqija Second Request for a Declaration of Inadmissibility and Exclusion of Evidence, *Prosecutor v. Haraqija and Morina* (IT-04-84-R77.4), 27 November 2008, 7.

²⁸¹ ICTY, Decision on Morina and Haraqija Second Request for a Declaration of Inadmissibility and Exclusion of Evidence, *Prosecutor v. Haraqija and Morina* (IT-04-84-R77.4), 27 November 2008, 15.

²⁸² ICTY, Decision on Morina and Haraqija Second Request for a Declaration of Inadmissibility and Exclusion of Evidence, *Prosecutor v. Haraqija and Morina* (IT-04-84-R77.4), 27 November 2008, 18; ICTY, Appeals Judgement, *Prosecutor v. Haraqija and Morina* (IT-04-84-R77.4-A), 23 July 2009, 27.

²⁸³ ICTY, Decision on Morina and Haraqija Second Request for a Declaration of Inadmissibility and Exclusion of Evidence, *Prosecutor v. Haraqija and Morina* (IT-04-84-R77.4), 27 November 2008, 19.

²⁸⁴ ICTY, Decision on Morina and Haraqija Second Request for a Declaration of Inadmissibility and Exclusion of Evidence, *Prosecutor v. Haraqija and Morina* (IT-04-84-R77.4), 27 November 2008, 20; ICTY, Appeals Judgement, *Prosecutor v. Haraqija and Morina* (IT-04-84-R77.4-A), 23 July 2009, 28.

²⁸⁵ Similarly Alamuddin (n 141), 289.

²⁸⁶ ICTY, Decision on the Accused’s Motion to Exclude Intercepted Conversations, *Prosecutor v. Karadžić* (IT-95-5/18-T), 30 September 2010, 11.

²⁸⁷ *ibid.*

evidence should not be excluded.²⁸⁸ According to the Chamber, the Tribunal must ‘balance the fundamental rights of the accused with the essential interests of the international community in the prosecution of persons charged with serious violations of [IHL]’.²⁸⁹

The ICTR has nuanced its initial refusal to assess the legality of the collection of evidence in situations where members of the OTP were involved in execution of the coercive measure in question. It has considered that in cooperation between states and the Tribunal, a combination of domestic and international law applies.²⁹⁰ However, in considering the admission of evidence obtained during a search and seizure operation, the Trial Chamber held that the domestic law of the United Kingdom, where the search in question took place, provided sufficient grounds for it, without assessing international standards.²⁹¹ The defence bore the burden of proving the illegality of the search and had failed to meet it. Similarly, the ICTR has admitted intercepts of telephone conversations, although it held that it could not assess the legality of the intercepts because it had no information about the Rwandan law applicable to the interception, nor did it assess whether the interception had been interfered with the right to privacy.²⁹² Like the ICTY, the ICTR emphasized that its inability to assess the legality of the collection of these intercepts was irrelevant, because such illegality would not in itself lead to the evidence’s exclusion. According to the Trial Chamber, there were no indications that the admission would be antithetical to, or would seriously damage the integrity of the proceedings.²⁹³ In a subsequent decision, it was also held that illegally obtained evidence did not necessarily have to be excluded.²⁹⁴ The Chamber reiterated that ‘the 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 [IHL].’²⁹⁵

The Tribunals have displayed unwillingness to assess possible violations of the right to privacy in the course of the collection of evidence. In its early case law, the ICTR employed a rule of non-inquiry with regard to the execution of investigative measures by domes-

²⁸⁸ *ibid.*, 12.

²⁸⁹ *ibid.*, 7.

²⁹⁰ ICTR, Decision on Prosecutor’s Motion Pursuant to Trial Chamber’s Directives of 7 December 2005 for the Verification of the Authenticity of Evidence Obtained out of Court Pursuant to Rules 89 (C) & (D), *Prosecutor v. Muvunyi* (ICTR-2000-55A-T), 26 April 2006, 24.

²⁹¹ *ibid.*

²⁹² ICTR, Decision on Exclusion of Testimony and Admission of Exhibit, *Prosecutor v. Renzaho* (ICTR-97-31-T), 20 March 2007, 16.

²⁹³ *ibid.*, 16.

²⁹⁴ ICTR, Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 25 January 2008, 11.

²⁹⁵ *ibid.*

tic authorities. These authorities execute such measures under domestic law, and international review of domestic measures is a sensitive issue.²⁹⁶ The ICTR has somewhat softened its initial refusal to address this issue at all, while the ICTY generally appears more ready to assess procedural violations.²⁹⁷ However, the latter's initial case law, where the fruits of domestic investigative measures were tested for accordance with the law of the Tribunals and IHRL has not been followed consistently in later years, or at least not with respect to the right to privacy. In addition, the ad hoc Tribunals have adopted an approach where the defence bears the burden of proof for establishing the illegality of coercive measures, while IHRL requires the defence only to establish that there has been an interference with a certain right, subsequent to which the interfering authority must show that this interference was justified and permissible under IHRL.²⁹⁸ Furthermore, the high threshold for exclusion is often used as a justification for not assessing the manner in which the evidence was collected. The bottom line seems to be that even if privacy rights are violated during the investigation, such violations are not sufficiently serious to warrant the exclusion of evidence, which is used as a justification not to address possible violations at all. Not only does this approach fail to appreciate that violations of privacy rights are distinct from issues related to evidence admission, it also creates a situation where the protection of the right to privacy is completely absent from the Tribunals' law and practice. The effect of this approach is that 'the tribunals' 'law' on interferences with the right to privacy is unclear and lacking in guarantees against arbitrariness.'²⁹⁹ There are no *ex ante* guarantees to prevent arbitrary interferences, nor an effective system to provide *ex post facto* remedies for possible violations.

4.2. The International Criminal Court

4.2.1. Formulating and submitting a request for assistance

The ICC Prosecutor has a general power to 'conduct on-site investigations on the territory of a state' in accordance with part 9 of the Statute, which governs the cooperation between the

²⁹⁶ Cryer and others (n 146), 526, who note that this may be caused by the sensitivity in international law of review of domestic measures.

²⁹⁷ De Meester and others (n 145), 289.

²⁹⁸ ICTR, Decision on Prosecutor's Motion Pursuant to Trial Chamber's Directives of 7 December 2005 for the Verification of the Authenticity of Evidence Obtained out of Court Pursuant to Rules 89 (C) & (D), *Prosecutor v. Muvunyi* (ICTR-2000-55A-T), 26 April 2006, 23; ICTY, Decision, *Prosecutor v. Stakić* (IT-97-24-AR73.5), 10 October 2002, 3; ICTY, Decision on Popović Motion for Relief from Searches Conducted with Excessive Force, *Prosecutor v. Popović et al* (IT-05-88-T), 25 June 2007, 3; ICTR, Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence, *Prosecutor v. Karemera et al* (ICTR-98-44-T), 25 January 2008, 16.

²⁹⁹ Alamuddin (n 141), 287.

Court and states parties.³⁰⁰ In addition, Article 54 provides a broad power to ‘collect and examine evidence’ and to seek the cooperation of states, including through entering into agreements, as long as these are not inconsistent with the Statute.³⁰¹ Part 9 of the Statute specifies the forms of cooperation that the Prosecutor may seek from states. States parties’ obligation to cooperate extends only to those forms of cooperation explicitly provided for by the Statute.³⁰² However, states are of course free to provide broader support to the Court. Article 93 specifies the forms of cooperation related to the collection of evidence by states and provides a list of ‘other forms of cooperation’, which includes ‘the execution of searches and seizures’.³⁰³ It also refers to more general categories of activities, such as assistance in the ‘identification and whereabouts of persons or the location of items’, ‘the taking of evidence’, ‘the service of documents’, and the ‘the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes’.³⁰⁴ Finally, Article 93(1)(l) provides that states shall provide ‘any other type of assistance ... with a view to facilitating the investigation’; however, this obligation only applies where the cooperation requested is not prohibited under domestic law. This catch-all provision has been argued to include modern investigative techniques such as the interception of communication.³⁰⁵ In the provision of all the above-mentioned categories of cooperation, states may have to resort to coercive measures in order to be able to fully comply with requests of the court, but search and seizure operations are the only coercive measure with a specific legal basis.

The Rome Statute provides no substantive or procedural requirements that must be met before the Prosecutor can issue a request for assistance that may require the execution of coercive measures that interfere with a person’s right to privacy. Although several authors have argued that s/he should obtain a judicial warrant prior to issuing such a request,³⁰⁶ this

³⁰⁰ Arts 54(2) and 54(2)(a) ICC Statute.

³⁰¹ Arts 54(3)(a), (b), (c), and (d) ICC Statute.

³⁰² Art 86 ICC Statute. See also Annalisa Ciampi, ‘The Obligation to Cooperate’ in Antonio Cassese, Paula Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002), 1608; Swart (n 187), 1594; Claus Kress and Kimberly Prost, ‘Article 86: General Obligation to Cooperate’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd edn, Beck 2008), 1514.

³⁰³ Art 93(1)(h) ICC Statute.

³⁰⁴ Arts 93(1)(a), (b), (d), and (k) ICC Statute, respectively.

³⁰⁵ Claus Kress and Kimberly Prost, ‘Article 93, Other Forms of Cooperation’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd edn, Beck 2008), 1574, who note that Art 93(l) ICC Statute was intended to cover modern intrusive methods like telephone interception.

³⁰⁶ Sluiter, *International Criminal Adjudication and the Collection of Evidence* (n 80), 112, 125-128; Safferling and others (n 178), 278; De Meester (n 1), 518-540.

contention finds little support in the law or practice of the Court thus far.³⁰⁷ The Court has explicitly confirmed that there is no requirement for the Prosecutor to obtain judicial authorization prior to requesting states to conduct any investigative measure enumerated in article 93(1) of the Statute.³⁰⁸ For example, one application for an arrest warrant by the Prosecutor has been identified that specifically requested authorization from the Pre-Trial Chamber to issue a warrant to France to search the apartment where the suspect resided, as well as ‘other relevant premises, as part of or in conjunction with the arrest’.³⁰⁹ However, neither the subsequent decision to issue an arrest warrant nor the warrant itself refer to a search or to any measure other than the arrest of the suspect.³¹⁰ Subsequent decisions do clarify that the premises of the accused have actually been searched, regardless of the absence of a warrant authorizing this.³¹¹ This seems to have been the only—public—application thus far where the Prosecutor sought judicial authorization to conduct coercive measures.³¹² The Pre-Trial Chamber’s failure to address this issue, in combination with the fact that search and seizure operations did take place without explicit authorization from the judicial organs of the Court support the conclusion that there is no requirement for judicial authorization, in law or in practice, for the execution of coercive measures by the Court.

The preparatory works of the Rome Statute show that it initially included a provision on the execution of search and seizure operations. The 1997 compilation of proposals from states featured a provision guaranteeing the right of persons to be ‘secure in their homes, papers, and effects against entries’. The provision also provided that searches and seizures required a warrant issued by the Court, which had to include ‘adequate cause’ and had to par-

³⁰⁷ Similarly Cryer and others (n 146), 526; Klamberg (n 4), 252; De Meester and others (n 145), 302: ‘no obligation can be discerned in the law or practice of the ad hoc Tribunals and the ICC to obtain judicial authorization from the tribunal before the Prosecutor can initiate non-custodial coercive measures.’

³⁰⁸ ICC, Decision on Prosecution’s applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, *Prosecutor v. Kenyatta* (ICC-01/09-02/11-908), 31 March 2014, 28: ‘It is noted that certain articles in Part 9 of the Statute, such as Article 89 relating to arrest and surrender, do explicitly envisage the need for judicial intervention by a Chamber of the Court - through, for example, the requirement for a warrant of arrest having been issued. However, that is not the case in relation to Article 93(1) of the Statute and there is no basis for reading such a requirement into that article.’

³⁰⁹ ICC, Public Redacted Version of Prosecution’s Application under Article 58, *Prosecutor v. Mbarushimana, Situation in the Democratic Republic of Congo* (ICC-01/04-01/10-11-Red), 20 August 2010, 202.

³¹⁰ ICC, Decision on the Prosecutor’s Under Seal Application for a Warrant of Arrest against Callixte Mbarushimana, *Prosecutor v. Mbarushimana* (ICC-01/04-01/10-1), 28 September 2010; ICC, Warrant of Arrest for Callixte Mbarushimana, *Prosecutor v. Mbarushimana* (ICC-01/04-01/10-2-tENG), 28 September 2010.

³¹¹ See eg ICC, Decision on the Confirmation of Charges, *Prosecutor v. Mbarushimana* (ICC-01/04-01/10-465-Red), 16 December 2011, 54ff.

³¹² One further exception has been the interception of communication between the defence team of Bemba, who were suspected of offences against the administration of justice. These decisions, however, are not public, as a result of which it is impossible to assess whether the Pre-Trial Chamber applied any substantive or procedural requirements. In addition, the concerns raised by these decisions related to lawyer-client privilege, rather than to the suspects’ right to privacy.

ticularly describe the place to be searched and things to be seized.’³¹³ The subsequent recommendations of the Working Group on procedural matters to the Statute’s preparatory committee included an almost identical provision, which specified that a Pre-Trial Chamber should issue search warrants.³¹⁴ This provision remained in place in the ‘final consolidated draft’ that served as a basis for the negotiations in Rome, and was a part of Article 67, which enshrined the rights of the accused.³¹⁵ Ultimately, however, the provision was not adopted.³¹⁶ It is unclear why the provision did not make it to the final draft. According to Edwards, the drafters considered Part 9 of the Statute to protect privacy rights sufficiently.³¹⁷ With the provision, the requirement of judicial authorization for search and seizure operations, the substantive requirements for the issuance of a warrant, and the only explicit reference to the right to privacy also disappeared from the legal framework of the ICC.

None of the subsidiary legal instruments of the ICC provide procedures for the issuance, authorization, or execution of requests for assistance that may entail coercive measures.³¹⁸ In addition, there are no public records of requests for assistance issued by the Prosecutor, and the states that receive them are obliged to keep these confidential.³¹⁹ The only reference to the execution of coercive measures on behalf of the Court can be found in its case law and in transcripts of court hearings, where such operations are sometimes mentioned.³²⁰ On a general level, the Statute imposes an obligation on the Prosecutor to ‘fully

³¹³ UNGA, ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II Compilation of proposals’ (13 September 1996) UN Doc A/51/22, 200-201; see also 217, on Japan’s proposal for an identical provision in the context of a provision on evidence.

³¹⁴ Preparatory Committee on the Establishment of an International Criminal Court, Report of the Informal Group on Procedural Questions, Fair Trial and Rights of the Accused (27 August 1996) UN Doc A/AC.249/CRP.14, 35: Art 41(3): ‘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 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.’

³¹⁵ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court’ (14 April 1998) UN Doc A/CONF.183/2/Add.1, 107, Art 67(3); the provision was also included in the so-called ‘Zutphen Draft’, the result of a meeting in early 1998 in Zutphen, the Netherlands: Preparatory Committee on the Establishment of an International Criminal Court, ‘Report of the inter-sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands (4 February 1998) UN Doc A/AC.249/1998/L.13, 115, Art 60(3).

³¹⁶ Edwards (n 7), 351.

³¹⁷ *ibid.*, 352.

³¹⁸ See also Claus Kress, ‘The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise’ (2003) 1 J Int’l Crim Just 603, 615, who also deplores the absence of any formal or material conditions to apply to the issuance of requests for coercive measures.

³¹⁹ Art 87(3) ICC Statute.

³²⁰ See eg ICC, Warrant of Arrest for Dominic Ongwen, *Prosecutor v. Kony et al* (ICC-02/04-01/05-57), 8 July 2005, 11; ICC, Warrant of Arrest for Joseph Kony as Issued on 8 July 2005 and Amended on 27 September 2005, *Prosecutor v. Kony et al* (ICC-02/04-01/05-53), 27 September 2005, 11, where reference is made to radio communications intercepted by Ugandan authorities; ICC, Decision Regarding the Disclosure of Materials Pursuant to Article 67(2) of the Rome Statute and Rule 77 of the Rules of Procedure and Evidence, *Prosecutor v.*

respect the rights of persons arising under this Statute'.³²¹ However, the right to privacy is not explicitly included in the Statute. Arguably, it is an 'internationally recognized human right', within the meaning of Article 21(3), as a result of which the Court, including its organs, must interpret and apply the Statute in a way that is in accordance with this right. In addition, the Code of conduct for ICC Prosecutors includes an obligation to ensure that investigators respect the rights of persons.³²² However, such obligations are too broad and undefined to function as effective guarantees against arbitrary interferences with the right to privacy. IHRL requires clear substantive and procedural limitations to apply to the execution of coercive measures, and the legal framework of the ICC does not provide these.

Article 96 of the Statute does provide several content requirements for requests for assistance. The provision is very similar to Article 5 of the UN Model Treaty.³²³ The Court must specify the purpose of the request and the assistance sought, including the legal basis and the grounds for the request.³²⁴ By implication, this suggests that the relevant organ of the Court, prior to requesting cooperation, must actually formulate the grounds and legal basis for its request. So where the Prosecutor wants a coercive measure to be executed by a state, s/he must specify the legal basis for this measure under the Rome Statute and mention the grounds for the request. This presumably includes a motivation for the measure as well as the desired results of the measure. In addition to the grounds and legal basis, the request must include a concise statement of the 'essential facts underlying the request'.³²⁵ These requirements should enable the state to which the request is addressed, to obtain domestic authorization for the measure in question.³²⁶ They could function as implicit or *de facto* guarantees to prevent arbitrary resort to the investigative power by the Court. However, this depends on the way the provision is employed in practice, which, due to the lack of the public record of requests for assistance, is impossible to assess. In addition, the rationale of these requirements is to protect the interests of the states to whom the requests will be issued, rather than the

Bemba (ICC-01/05-01/08-241), 12 November 2008, 7, where reference is made to a search and seizure operation conducted at the home of the accused 'by the Prosecutor'.

³²¹ Art 54(1)(c) ICC Statute.

³²² See eg Art 8(e) Code of Conduct for ICC Prosecutors (5 September 2013) ICC Doc OTP2013/024322 < <http://www.icc-cpi.int/iccdocs/ot/otp-COC-Eng.PDF> > accessed 8 December 2013.

³²³ See *supra* section 2.2.1. See also Claus Kress and Kimberly Prost, 'Article 96, Content of Request for Other Forms of Assistance Under Article 93' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Beck 2008), 1596.

³²⁴ Art 96(2)(a) ICC Statute.

³²⁵ Art 96(2)(a) ICC Statute.

³²⁶ Kress and Prost, 'Article 96' (n 323), 1597.

interests of individuals who might be affected by the measures.³²⁷ Still, these requirements may have the effect of limiting the exercise of coercive power by the organs of the Court and thus to prevent arbitrary interferences with the right to privacy. Other than this, the Rome Statute does not include any substantive or procedural threshold of necessity or proportionality, or a certain level of suspicion before specific coercive measures may be ordered. Like before the ad hoc Tribunals, the only threshold is the general threshold for the commencement of an investigation: investigative activities may only be employed if the criteria set out in Article 53(1) have been met.³²⁸ In relevant part, this implies that a threshold of ‘reasonable grounds to believe that a crime within the jurisdiction of the Court has been committed’ must be met before the Prosecutor can initiate an investigation and execute coercive measures.³²⁹

Finally, the ICC Statute allows the Court to request states to follow certain procedures in their execution of requests for assistance. This theoretically allows the Court to ensure the observance of human rights standards in the execution of its requests. However, states only have an obligation to abide by such procedures where this is not prohibited by their domestic law.³³⁰ The domestic law of the requested state primarily governs the execution of requests for legal assistance. Like with the ad hoc Tribunals, the expectation is that national authorities will apply their regular domestic procedures for the authorization and execution of coercive measures.³³¹ However, the content of such domestic procedures obviously differs significantly among states parties to the Rome Statute. It is by no means a given that the domestic procedures governing the execution of domestic measures of all states parties with whom the Court cooperates are in line with IHRL. What is more, even if the procedures are in line with IHRL, it is not a given that these procedures are followed in the execution of requests by the Court.³³² In that regard, the possibility envisaged in Article 96 for the Court to request certain procedures to be followed could be an effective way to help ensure the domestic observance of IHRL in the execution of coercive measures. However, obtaining state assistance is al-

³²⁷ *ibid*, 1596-1597. This can be contrasted with the procedure that the Prosecutor must follow to obtain authorization for the arrest of suspects. Such arrest may only be ordered by a Pre-Trial Chamber, which is guided by a number of procedural and substantive criteria that must be present before it can issue an arrest warrant. See Art 58 ICC Statute.

³²⁸ De Meester and others (n 145), 294.

³²⁹ Art 15(3) ICC Statute; Art 53(1)(a) ICC Statute.

³³⁰ Art 99(1) ICC Statute; Swart and Sluiter 1999, 116; see also Kress and Prost, ‘Article 99’ (n 195), 1623, who note that the goal of this possibility is to ensure admissibility of the evidence.

³³¹ Bruce Broomhall and Claus Kress, ‘Implementing Cooperation Duties Under the *Rome Statute*: A Comparative Synthesis’ in Claus Kress and others (eds), *The Rome Statute and Domestic Legal Orders - Volume II: Constitutional Issues, Cooperation and Enforcement* (II Sirente 2005), 526: the dominant feature of the cooperation regime regarding ‘other forms of cooperation’ is the prominence given to domestic law. This implies that, where coercive measures are requested, national judges will apply national law in order to determine whether and how the request is to be executed.

³³² See further *infra* section 4.2.2.

ready a challenge for the ICC. It is unlikely that the Court would complicate its requests for assistance with extensive requirements directed at national authorities. Even more so given that, as will be seen below, human rights violations committed in the course of an investigation do not necessarily lead to the exclusion of evidence and hence there is no impetus for the Court to be strict in that regard. In addition, there is no evidence so far of the Court having used this possibility to ensure the protection of privacy rights in the execution of coercive measures on its behalf.

By contrast, the ICC Statute does provide for procedures that are to be followed by states parties in their execution of requests for arrest and surrender of suspects. This procedure includes a number of human rights obligations that the Statute specifically imposes on states. For example, states must promptly bring arrested persons before a judicial authority, which must determine the legality of the arrest, and must assess whether the person's rights have been respected. In addition, states must allow the arrested person to apply for interim release pending surrender.³³³ Furthermore, the issuance of an arrest warrant by the Court is subject to several requirements that serve to protect the rights of persons subject to such a warrant, and a warrant may only be issued by a (Pre-)Trial Chamber.³³⁴ Such requirements do not apply to the issuance of requests entailing coercive measures that infringe upon the right to privacy, nor does the Statute impose any human rights obligations on states that execute such measures. Clearly, the impact of coercive measures on behalf of the Court on the (privacy) rights of persons implicated by such measures has not been given the same degree of attention as the arrest of persons. Although the rights at stake in an arrest are arguably more prominent than with respect to investigative measures, this lack of attention may still result in violations of internationally recognized human rights, in contravention of Article 21(3) of the Statute.

4.2.2. *Execution of the request*

ICC member states' obligation to cooperate with the Court is less absolute than with respect to the ad hoc Tribunals. This arguably grants states more options to protect the—privacy—rights of persons implicated by the investigative activities of the Court. States may refuse to cooperate if the cooperation requested is prohibited under domestic law by 'a fundamental

³³³ Arts 59(2) and (3) ICC Statute.

³³⁴ Art 58 ICC Statute.

legal principle of general application'.³³⁵ Furthermore, the Rome Statute recognizes competing treaty obligations as a ground for refusal.³³⁶ These grounds for refusal could theoretically operate to protect (privacy) rights of persons implicated by requested investigative measures.

Domestic procedural standards that govern the execution of coercive measures, including judicial authorization and tests of proportionality and necessity, could fall within the category of 'fundamental legal principles'.³³⁷ Theoretically, states can refuse to execute a request for coercive measures if it does not meet their domestic standards, or if they consider the measure to violate the right to privacy. It is unclear, however, whether states are actually prepared to do this, and whether this has happened to date. One exception has been identified, where the Republic of Kenya refused to execute investigative measures requested by the Prosecutor, based, among others, on the fact that they conflicted with the right to privacy, as enshrined in the Kenyan constitution.³³⁸ However, the Chamber did not include this observation by Kenya in its analysis as a result of which it is not possible to draw any conclusions from this development. The same goes for conflicting treaty obligations. If states are requested to execute investigative measures that would violate their international human rights obligations, they may request the Court to modify their request, pursuant to Article 97. Given the confidential nature of many requests for assistance, it is difficult to assess the operation of these grounds for refusal in practice. Still, the Rome Statute leaves more room for states to refuse to cooperate, and human rights related concerns might serve as grounds for refusal. As a result, the possibilities for states to protect the human rights of persons within their jurisdiction against coercive action requested by the Court are less unlikely than before the ad hoc Tribunals, and the danger of states being 'forced' into cooperation in ways that might violate individual rights is slightly diminished.

In addition, the Rome Statute's content requirements for requests for assistance in Article 96 mitigate the risk that states that receive a request for coercive measures may not be able to provide the guarantees they normally do, for lack of information. As stated above, the

³³⁵ Art 93(3) ICC Statute; Sluiter, *International Criminal Adjudication and the Collection of Evidence* (n 80), 161-162, who notes that states may refuse to cooperate if 'an existing fundamental legal principle of general application' prohibits the execution of a particular measure, and that such principles may include human rights norms.

³³⁶ Art 97(c) ICC Statute.

³³⁷ Broomhall and Kress (n 331), 531.

³³⁸ ICC, Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, *Prosecutor v. Kenyatta* (ICC-01/09-02/11-908), 31 March 2014, 37; see also ICC, Response of the Government of the Republic of Kenya Pursuant to Trial Chamber V (B) 'Decision requesting observations from the government of Kenya' on the Prosecution's Application for a Finding of Non-Compliance Pursuant to Article 87 (7) Against the Government of Kenya, *Prosecutor v. Kenyatta* (ICC-01/09-02/11-877-Anx2-Red), 20 December 2013, 9-11.

Statute obliges the Court to provide the ‘grounds’ for a request, as well as a concise statement of the facts underlying the request.³³⁹ This is meant to enable states to process requests in accordance with their domestic procedure. However, a similar obligation applies to requests in inter-state cooperation, with respect to which numerous authors have concluded that states receiving such requests may still be unable to truly and effectively test the necessity and proportionality of the request because the information at their disposal is limited.³⁴⁰ Furthermore, states might be unwilling to perform a genuine test upon the requests for political reasons or because of the prominence of mutual trust and the rule of non-inquiry in the field of inter-state cooperation in criminal matters. These concerns can be expected to apply to requests emanating from the ICC as well. The fact that states are formally allowed to refuse to cooperate with the Court where human rights are at stake does not necessarily mean that they will.³⁴¹ Generally, states are simply obliged to provide cooperation requested by the Court.³⁴²

Several aspects of the ways in which states have—or have not—implemented their obligations under the Rome Statute suggest that the protection of human rights in the context of such cooperation is all but guaranteed. States have an obligation to enable the execution of requests from the Court under their domestic law.³⁴³ States are expected to enact legislation to implement their obligations under the Rome Statute. However, most member states have not done so, including some states in which the Court is conducting investigations.³⁴⁴ As such, many states do not have specific procedures in place for the processing of requests from the Court, as a result of which the protection of the privacy rights of persons implicated by the requested investigative measures is not guaranteed either. In the absence of legislation, there is an increased risk that overly cooperative states will neglect the protection of human rights in their efforts to support the Court. Similarly, states that are hostile to defendants before the ICC will surely be less focused on ensuring full respect for their procedural rights in

³³⁹ Art 96 ICC Statute.

³⁴⁰ See *supra* section 2.2.2.

³⁴¹ In fact, it has often been noted that states are allowed to cooperate much more broadly with the court than would be strictly required by their obligations under the Rome Statute: Ciampi, ‘Other Forms of Cooperation’ (n 82), 1739.

³⁴² Kenneth Gallant, ‘Individual Human Rights in a New International Organization: The Rome Statute of the International Criminal Court’ in Mahmoud Bassiouni (ed), *International Criminal Law - Volume II: Enforcement* (2nd edn, Transnational Publishers 1999), 708, who also identifies the problem that states, based on obligations under the Rome Statute, will *have* to comply with requests for search and seizure by the court; similarly De Meester (n 1), 536.

³⁴³ Art 88 ICC Statute; Ciampi, ‘Other Forms of Cooperation’ (n 82), 1731.

³⁴⁴ See eg Coalition for the International Criminal Court, ‘Chart on the Status of Ratification and Implementation of the Rome Statute and the Agreement on Privileges and Immunities (APIC)’ (May 2012) < http://www.coalitionfortheicc.org/documents/Global_Ratificationimplementation_chart_May2012.pdf > accessed 3 October 2014, which shows that in 2012, only 41 Member States had implemented cooperation legislation. Only two countries under investigation by the Court had done so (Uganda and Kenya).

the execution of coercive measures, let alone 'stand up' for the rights of these persons if the execution of ICC requests might violate them. For example, Libya's provisional authorities arrested and jailed defence investigators working on the case of Saif Al-Islam Gaddafi.³⁴⁵ Furthermore, the dire human rights situation in a number of countries with which the ICC must cooperate is well-known. It therefore seems inappropriate for the Court to simply rely on states' domestic authorities to protect the rights of persons implicated in its investigations.

In the absence of implementation legislation, states are expected to deal with the Court's requests under their regular frameworks for inter-state legal assistance. At the same time, the legislation in states that did implement their obligations under the Rome Statute is actually very similar to legislation incorporating their inter-state obligations and does little to reflect the distinctiveness of cooperation with the ICC as opposed to inter-state cooperation.³⁴⁶ Therefore, the concerns raised with regard to the protection of human rights in inter-state cooperation in criminal matters practice also apply to cooperation with the ICC. Some states' implementing legislation, however, may cause distinct and additional problems. For example, the Swiss implementation legislation provides fewer appeals than in regular cases of inter-state cooperation in criminal matters, and its legislation is based on the premise that it is for the ICC to safeguard individual rights.³⁴⁷ However, this assumption is at odds with the ICC's position that states are the primary fora for the protection of the suspects' rights in the course of investigations, and neatly illustrates the gaps in human rights protection that may occur as a result of the fragmented nature of the investigation.

On the one hand, the legal framework of the ICC governing cooperation in the execution of coercive measures leaves states more room to ensure the protection of the right to privacy of persons implicated by such measures. However, the ICC itself provides no built-in safeguards to ensure such protection and thus seems almost indifferent towards this issue. The ICC legal framework, like those of the ad hoc Tribunals, operates on the assumption that states will protect the rights of persons implicated by the Court's investigative activities; but

³⁴⁵ This illustrates the uncooperative attitude that can be expected from states that are hostile to ICC defendants. See eg BBC, ICC staff 'in jail' in Libya after Saif Gaddafi visit' (11 June 2012) <<http://www.bbc.com/news/world-africa-18394191>> accessed 23 November 2013; they were released after several weeks in detention. See eg IBA, 'Release of ICC Staff in Libya welcomed by IBAHRI' (3 July 2012) <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=e32869cd-17ac-4f5e-aa53-0a29ada63d05>> accessed 23 November 2013.

³⁴⁶ Cryer and others (n 146), 527; Broomhall and Kress (n 331), 526.

³⁴⁷ Broomhall and Kress (n 331), 527, who note that Switzerland constitutes an exception. The Swiss implementation legislation takes the view that it is for the ICC to safeguard individual rights, and thus provides for 'blind execution' of requests.

it does not ensure that they will. Moreover, there are a number of practical obstacles as a result of which states are less able to effectively protect the right to privacy in this context.

4.2.3. *Evaluating evidence obtained*

The execution of coercive measures on behalf of the ICC has come up mainly when the evidence collected through the measure was being admitted into evidence, like before the ad hoc Tribunals. The ICC's provision on the exclusion of evidence is similar to those of the ad hoc Tribunals. In relevant part, Article 69(7) provides that evidence obtained in violation of either the Statute or internationally recognized human rights 'shall' be excluded if its admission 'would be antithetical to and would seriously damage the integrity of the proceedings'. For the purposes of admission by the Court, both the Statute and internationally recognized human rights thus apply to the collection of evidence. However, human rights violations in the evidence gathering process shall only be remedied through exclusion of such evidence if its admission would seriously harm the integrity of the proceedings. This is a very high standard that is not easily met.

Article 69 further provides that in deciding on the admissibility of evidence collected by a State, the Court shall not rule on the application of national law.³⁴⁸ This provision intends to prevent the Court from testing whether domestic authorities abided by domestic laws and standards in the collection of evidence. On the one hand, this ensures that the Court shall not adjudicate upon domestic courts' application of their own law. On the other hand, however, the provision does not prevent the court from assessing domestic compliance with the Rome Statute, or with internationally recognized human rights. As a result, the Court may have no choice but to assess the application of domestic safeguards in the execution of domestic measures, since these determine whether or not the coercive measure was executed in accordance with internationally recognized human rights.

The ICC has rarely addressed the legality of coercive measures. In *Lubanga*, the defence alleged that a search and seizure operation executed by Congolese authorities in the presence of the OTP members had violated IHRL. The issue was adjudicated upon by both the Pre-Trial- and the Trial Chamber, and both came to the same conclusion. The dispute revolved around the search and seizure that had been declared unlawful by the Congolese judicial authorities. However, the Pre-Trial Chamber held that it is not bound by decisions of national courts on evidentiary matters, relying on Article 69(8); instead, the Court must as-

³⁴⁸ Art 69(8) ICC Statute.

sess whether the evidence was obtained in violation of internationally recognized human rights.³⁴⁹ To determine whether the coercive measure in question was executed in accordance with internationally recognized human rights, the Court focused on the right to privacy. This right was considered an internationally recognized human right because it is enshrined in the ICCPR, the ECHR, the ACHR, and in many African constitutions.³⁵⁰ The reason for the domestic finding of illegality was that the person whose premises were searched—not Lubanga, the accused himself—had not been present during the search. However, according to the ICC, his absence may have violated Congolese criminal procedure, but not internationally recognized human rights. Instead, the Pre-Trial Chamber applied the principle of proportionality, one of the requirements for a permissible interference with the right to privacy under IHRL.³⁵¹ According to the Pre-Trial Chamber, the search had been indiscriminate and disproportionate to the aim pursued.³⁵² It therefore concluded that ‘in light of the ECHR jurisprudence, the infringement of the principle of proportionality can be characterised as a violation of internationally recognised human rights’.³⁵³

The Pre-Trial Chamber then turned to the question of exclusion. As stated, the Statute provides a high threshold for the exclusion of evidence, such that not all violations of human rights in the execution of investigative measures necessarily lead to exclusion. In that sense, the Court quoted case law of the ICTY, according to which ‘it would constitute a dangerous obstacle to the administration of justice if evidence which is relevant and has probative value could not be admitted merely because of a minor breach of procedural rules which the Trial Chamber is not bound to apply’.³⁵⁴ In addition, the Pre-Trial Chamber found that although there is no consensus in IHRL on the standards applicable to the exclusion of evidence, the

³⁴⁹ ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), 29 January 2007, 69-70.

³⁵⁰ *ibid.*, 74. In the next paragraph, the Court concludes that the right to privacy is a ‘fundamental internationally recognized human right’; similarly ICC, Decision on the Admission of Material from the ‘Bar Table’, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1981), 24 June 2009, 21, where the Chamber relied on the ICCPR, ECHR, and ACHR; see further: 22-27, where the ICC addresses case law of the ECtHR and IACtHR to assess the scope of the principle of proportionality and the right to privacy in IHRL.

³⁵¹ ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), 29 January 2007, 79.

³⁵² *ibid.*, 81.

³⁵³ *ibid.*, 82; similarly ICC, Decision on the Admission of Material from the ‘Bar Table’, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1981), 24 June 2009, 38, where the Chamber held that it saw no reason to depart from the Pre-Trial Chamber’s finding that the search violated the principle of proportionality, as a part of the right to privacy.

³⁵⁴ ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), 29 January 2007, 89; quoting: ICTY, Decision on the Defence ‘Objection to Intercept Evidence’, *Prosecutor v. Brđanin* (IT-99-36-T), 3 October 2003, 63.

majority view is that only ‘serious violations’ justify exclusion.³⁵⁵ Interestingly, the Trial Chamber subsequently disagreed that the seriousness of the violation was a factor to be taken into account under Article 69(7) of the Statute, since the Statute does not mention this criterion.³⁵⁶ Similarly, this Trial Chamber held that the seriousness of the crimes committed could not play a role either, since the ICC, by definition, only deals with serious crimes.³⁵⁷

Interestingly, both the Pre-Trial and the Trial Chamber dwelled on the role of the Prosecutor during the search. According to the Pre-Trial Chamber, the presence of members of the OTP contributed to the broadness of the search, which seemed to be one of the reasons it concluded that internationally recognized human rights had been violated. The Trial Chamber, however, emphasized that the actual role played by the members of the OTP during the search was limited: they were merely present and not in a position to ‘prevent improper or illegal activity’.³⁵⁸ According to the Chamber, one important goal of remedying procedural violations is deterrence, which was not relevant for the ICC, since it did not have authority over the domestic authorities that were in charge of the investigative measures.³⁵⁹

Ultimately, both Chambers admitted the evidence. The Pre-Trial Chamber held that a balance must be achieved between the seriousness of the violation and the fairness of the trial as a whole. It then admitted the evidence for the purposes of the confirmation hearing and left a further determination for the purposes of the actual trial to the Trial Chamber.³⁶⁰ The Trial Chamber also declined to exclude the evidence, considering that the violation had not been very serious, the fact that it was not the accused whose rights had been violated, and the fact that the acts had been committed by domestic authorities, not members of the OTP.³⁶¹

There appears to be an inconsistency between the two decisions. The Pre-Trial Chamber did consider that the presence of members of the OTP influenced the conduct of the

³⁵⁵ ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), 29 January 2007, 86.

³⁵⁶ ICC, Decision on the Admission of Material from the ‘Bar Table’, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1981), 24 June 2009, 35, where the Chamber quoted the Statute’s preparatory works, from which it appears that the word ‘serious’ was deliberately deleted from the provision.

³⁵⁷ *ibid.*, 44.

³⁵⁸ *ibid.*, 46: ‘the search was the sole responsibility of the Congolese authorities and they carried it out; in contrast, the prosecution’s investigator was only “permitted to assist”. There are no indicators that the investigator controlled, or could have avoided the disproportionate gathering of evidence, or that he acted in bad faith’.

³⁵⁹ Which, again, echoes the decision of the ICTY in *Brđanin*: ICTY, Decision on the Defence ‘Objection to Intercept Evidence’, *Prosecutor v. Brđanin* (IT-99-36-T), 3 October 2003, 63.

³⁶⁰ ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), 29 January 2007, 89-90.

³⁶¹ Decision on the Admission of Material from the ‘Bar Table’, *Prosecutor v. Lubanga* (ICC-01/04-01/06-1981), 24 June 2009, 47; reiterated in: ICC, Decision on the “Prosecution’s Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)”, *Prosecutor v. Lubanga* (ICC-01/04-01/06-2589), 21 October 2010, 30.

search,³⁶² while the Trial Chamber concluded they were not in a position to prevent illegal activities. Furthermore, the Trial Chamber's decision is self-contradictory. The Chamber stated that neither the seriousness of the violation itself, nor the fact that it was not the accused whose rights had been violated, were relevant factors in making a determination under Article 69(7). However, it did subsequently rely on both of these factors in declining to exclude the evidence.

In a later decision in *Mbarushimana* on the admissibility of evidence obtained through a search and seizure operation and through interception of communication, a Pre-Trial Chamber held that the defence allegations that the resulting evidence had been obtained illegally, had 'not been substantiated in any way', and dismissed all their arguments.³⁶³ According to the Chamber, 'it would exceed the limited scope and purpose of the confirmation hearing to require the Prosecution to introduce extensive evidence at this stage of the proceedings as to the work practices of national judicial systems in accordance with which the intercepts in question were carried out.'³⁶⁴ With regard to the alleged illegality of search and seizure operations, the Chamber stated that it may be presumed that investigative measures carried out by national authorities, be it for the purposes of a domestic investigation or pursuant to a request by the ICC, have been carried out in accordance with domestic law, thereby creating a presumption of domestic legality.³⁶⁵ The defence bears the burden of proof to demonstrate the illegality of domestic measures.³⁶⁶

The line of reasoning adopted in the *Mbarushimana* decision conflicts with the approach in the two earlier decisions in *Lubanga*. Instead of assessing whether the domestic measures were in line with internationally recognized human rights, the Chamber presumed that the measures had been conducted lawfully, emphasizing that the defence had failed to establish otherwise. This can be likened to the rule of non-inquiry, often employed by domestic courts when assessing the execution of requests for assistance by foreign authorities. Although requiring the defence to prove the illegality of a measure is not the same as categorically refusing to assess it, such a presumption of legality still limits the scope and extent of the obligation of the ICC to assess, and take responsibility for, the way investigative measures are executed. In IHRL, the defence bears the burden to establish that there has been

³⁶² ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), 29 January 2007, 80.

³⁶³ ICC, Decision on the Confirmation of Charges, *Prosecutor v. Mbarushimana* (ICC-01/04-01/10-465-Red), 16 December 2011, 71.

³⁶⁴ *ibid*, 73.

³⁶⁵ *ibid*, 58.

³⁶⁶ *ibid*, 60.

an interference, whereupon the burden shifts to the state authorities to show that this interference was lawful, necessary and proportionate, and pursued a legitimate aim.

In the absence of further case law on the issue, it is difficult to predict which line of reasoning the Court will follow in the future.³⁶⁷ Still, a number of conclusions can be drawn from these decisions. The inconsistency between the *Lubanga* and *Mbarushimana* decisions is problematic. The line of reasoning in *Lubanga* seems more in line with IHRL. According to these decisions, the standards applicable to coercive measures executed by domestic authorities, as far as the ICC is concerned, are internationally recognized human rights. Even coercive measures that were not requested by the ICC are held to this standard. Both *Lubanga* decisions suggest that the standards become stricter where the OTP influenced the execution of a coercive measure. Although the evidence was ultimately not excluded, the ICC did clarify that the principle of proportionality applies to search and seizures, as part of the right to privacy. It deduced this principle from ECtHR case law. However, the principle of proportionality is but one of the several requirements that are required to justify interferences with the right to privacy under IHRL. Others include lawfulness, necessity, and a legitimate aim, none of which were addressed by either Chamber. In addition, the *Lubanga* decisions established that the search was unlawful and that the right to privacy had thus been violated, but did not attach any consequence to this in the end. Admittedly, IHRL does not require the exclusion of evidence if it has been obtained unlawfully. The exclusion of evidence is a matter to be addressed in the context of the right to a fair trial. The problematic issue is that the ICC, like the ad hoc Tribunals, thus only seems to assess the right to privacy in the context of the admission of evidence. No independent remedy for its violation was granted.

5. Comparison and the ICTs' Use of IHRL

5.1. Comparing the ICTs' approach to the right to privacy to IHRL

None of the ICTs' legal instruments enshrine the right to privacy. This is a notable omission given the many interferences with the privacy of persons that criminal investigations necessarily entail. It is unclear why this right has not been codified in the Statutes or Rules. As has

³⁶⁷ One final interesting development before the ICC was the extensive interception of communication between the accused Bemba and several members of his defence team, resulting in charges of offences against the administration of justice. Several defence motions have alleged the illegality of these coercive measures in the ensuing *Bemba et al* case. However, the defence motions, as well as the decisions on them, focused on alleged violations of lawyer-client privilege, not the right to privacy, as a result of which these developments have limited to no implications for the present chapter. See eg ICC, Decision on "Defence Motion on Privileged Communications", *Prosecutor v. Bemba et al* (ICC-01/05-01/08-3080), 3 June 2014.

been seen above, the ICTs rely fully on states for the protection of the privacy rights of persons implicated by their investigative activities. IHRL requires interferences with the right to privacy to be lawful, to pursue a legitimate aim, and to be necessary and proportional. This means that states must provide a legal basis for, and regulate interferences with privacy, and create procedural guarantees in order to ensure that these requirements are met.

The ad hoc Tribunals have a power to carry out coercive measures independently from states, which has no explicit legal basis in the Statute.³⁶⁸ The Statutes and RPEs do not provide for any formal or material conditions that must be satisfied before such a measure can be executed. As a result, the legal standards applicable to coercive measures executed independently by the ICTs fall short of every requirement under IHRL for permissible interferences with the right to privacy. The measures are not ‘lawful’, because they have no specific legal basis. In addition, due to the absence of regulation of the ordering and execution of such measures, there are no tests of necessity and proportionality of such measures, as IHRL requires.³⁶⁹

The ICC Prosecutor lacks the power to conduct coercive measures independently from states. The one exception to this situation is the ‘failed state’ scenario, in which case authorization from the Pre-Trial Chamber is necessary prior to the execution of investigative measures.³⁷⁰ However, the legal instruments of the ICC do not contain any requirements that a Pre-Trial Chamber must apply in its decision on whether to grant requests of the Prosecutor for such measures. The only safeguard in place is a judicial check, but it is not clear which considerations should govern the Pre-Trial Chamber’s decision whether or not to authorize the coercive measure in question. It is therefore also uncertain whether the Chamber must assess the necessity and proportionality of the requested measure, in accordance with IHRL.

The legal frameworks of the ICTs similarly lack safeguards that apply to indirect coercive action, whereby states are requested to execute coercive measures on the ICTs’ behalf. The Statutes and RPEs of the ad hoc Tribunals are silent on this topic. Their case law provides occasional support for the claim that certain safeguards apply. For example, there is limited practice of judicial warrants having been issued to authorize search and seizure operations, although no such practice can be found regarding the interception of communica-

³⁶⁸ De Meester (n 1), 522, who notes that the ‘legal basis for non-custodial coercive measures seems conspicuously absent in international criminal procedure’.

³⁶⁹ Although such coercive measures might be ‘objectively’ justified, the ICTs do not adhere to the requirement of IHRL that there are formal or material conditions for their imposition.

³⁷⁰ Art 57(3)(d) ICC Statute.

tions.³⁷¹ At the same time, the ICTY has denied that judicial warrants are required for coercive measures, and the ICTR has generally considered the execution of coercive measures a matter for regulation under domestic law. Furthermore, no substantive threshold exists for the imposition of coercive measures. The Tribunals' Prosecutors are not required to motivate their requests for such measures, and their legal frameworks do not specify any formal or material requirements that must be met.

The ICC Statute constitutes a partial improvement, in that it provides some regulation. For example, it does provide an explicit legal basis for the Court's power to request states to execute search and seizure operations, although it does not mention other coercive measures. In addition, the Statute provides some guidelines for the content of requests for assistance, which could operate as a *de facto* guarantee, since the Prosecutor must formulate the reasons for her/his requests and provide additional information intended to enable states to execute the measure in a manner that is consistent with their domestic law.³⁷² Still, the Statute does not provide any formal or material conditions that must be satisfied before the Prosecutor may request states to conduct coercive measures that interfere with the right to privacy.

The ICTs thus operate on the assumption that it is primarily for states that execute their requests for assistance to ensure the protection of the privacy rights of persons affected by coercive measures. While the Statutes and RPEs of the ICTs do envisage procedures to be followed by states in the course of arrest, questioning and surrender of suspects, they are silent on the protection of the privacy rights of individuals that may be affected by other coercive measures. The concerns that have been raised with regard to the protection of the right to privacy in inter-state cooperation in criminal matters therefore equally apply to legal assistance to the ICTs. Although requested states are expected to offer their regular domestic guarantees, it is questionable whether they will be willing and able to actually do so, particularly given their obligation to cooperate with the ICTs.³⁷³ This is of particular concern with regard to the ad hoc Tribunals, whose legal frameworks do not recognize any grounds for refusal of requests for assistance except national security, and with whom states have an absolute and unconditional obligation to cooperate. Moreover, the ability of states to provide domestic guarantees in the execution of coercive measures pursuant to an requests for assistance in practice is questionable, because the requesting authority, be it a state or an ICT, is in

³⁷¹ See *supra* section 4.1.1.

³⁷² Art 96 ICC Statute.

³⁷³ See also Gregory Gordon, 'Towards an International Criminal Procedure: Due Process Aspirations and Limitations' (2007) 45 Colum J Transnat'l L 635, 671, who notes that the fragmentation inherent in the ICTs' legal frameworks governing the investigation 'could lead to the trampling of privacy rights by sovereign nationals'.

a far better position to assess the necessity and proportionality of any given measure, given the limited information at the disposal of the requested authorities. Finally, it is not a given that the domestic law of all states with whom the ICTs cooperate is in line with IHRL, and even where it is, states may still end up violating the right to privacy in practice. It is therefore questionable whether it is appropriate for the ICTs, who have an obligation to adhere to internationally recognized human rights, to simply rely on states for the protection of the right to privacy in the context of their investigations.

One possible remedy for these gaps in their law and practice could be for the ICTs to conduct checks of the manner in which evidence is obtained. In that regard, there has not been one consistent approach before the ICTs. The ICTR initially considered the execution of investigative measures to be a matter of domestic law alone,³⁷⁴ although it subsequently nuanced this approach.³⁷⁵ However, it still applied a presumption of legality of domestic measures.³⁷⁶ The ICTY, on the other hand, initially seemed willing to test the domestic collection of evidence for accordance with its own legal framework and internationally recognized human rights. Outside the context of questioning of suspects, however, it has never found a violation of either the Statute or human rights. Instead, the ICTY has generally relied on the high threshold for exclusion of evidence to justify its refusal to conduct an in-depth assessment of the way in which the evidence in question has been obtained. The assumption seems to be that violations of the right to privacy will never be sufficiently serious to warrant exclusion.

It is also difficult to draw a singular conclusion from the ICC's approach to this issue. On the one hand, the ICC has tested the legality of a coercive measure executed in the course of the *Lubanga* investigation and found a violation of the principle of proportionality as part of the right to privacy.³⁷⁷ At the same time, the high threshold for exclusion of illegally obtained evidence led the Court to admit the evidence. However, in a subsequent decision, the Court followed the ICTR in applying a presumption of legality of domestic investigative

³⁷⁴ See eg ICTR, Decision on Defence Motion for Exclusion of Evidence and Restitution of Property Seized, *Prosecutor v. Nyiramasuhuko* (ICTR-97-21-T), 12 October 2000, 26.

³⁷⁵ ICTR, Decision on Prosecutor's Motion Pursuant to Trial Chamber's Directives of 7 December 2005 for the Verification of the Authenticity of Evidence Obtained out of Court Pursuant to Rules 89 (C) & (D), *Prosecutor v. Muvunyi* (ICTR-2000-55A-T), 26 April 2006, 24.

³⁷⁶ ICTR, Decision on Exclusion of Testimony and Admission of Exhibit, *Prosecutor v. Renzaho* (ICTR-97-31-T), 20 March 2007, 16.

³⁷⁷ ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), 29 January 2007, 82; similarly ICC, ICC, Decision on the Admission of Material from the 'Bar Table', *Prosecutor v. Lubanga* (ICC-01/04-01/06-1981), 24 June 2009, 38.

measures.³⁷⁸ It imposed the burden of proof on the defence to show irregularities and substantiate their claim that the violation in question was so serious as to warrant exclusion of the thus obtained evidence. The refusal to inquire into possible violations of the right to privacy because of the high threshold for exclusion of evidence fails to acknowledge the separate and distinct importance of this right in the context of a criminal investigation. Whether or not the evidence should be excluded is not a question of primary importance in this Chapter because it is a distinct question from whether or not a violation took place; the main concern is the ICTs' recurring refusal to properly assess possible violations of the right to privacy.

5.2. The ICTs' use of IHRL on the right to privacy

Compared with their interpretation and application of the other human rights norms discussed in this study, the ICTs' treatment of the right to privacy has not been as heavily impacted on by IHRL. This could be partly explained by the absence of the right to privacy from the legal instruments of the ICTs. IHRL has thus had no legislative influence on the ICTs' legal frameworks regarding the right to privacy. Interestingly, earlier drafts of the Rome Statute included both a provision enshrining the right to privacy and a provision requiring the Prosecutor to obtain judicial authorization for search and seizure orders, as well as some formal and material conditions for granting such authorization. However, these provisions were removed from the draft and the reasons for this remain unclear.

The question remains why the drafters of the ICTs' legal instruments failed to provide regulation regarding interferences with the right to privacy. One explanation is that coercive measures were considered to be within the exclusive competence of the state executing them and that the state would therefore be responsible for ensuring the rights of persons affected by such measures. However, the legal instruments of the ICTs do contain detailed rules regarding the arrest of suspects and their questioning by domestic authorities. In addition, the violation of these rules have been judged more harshly by the ICTs than interferences with the right to privacy.³⁷⁹ Similarly, the ICC Statute provides several human rights obligations incumbent upon states that execute the arrest of suspects on behalf of the Court. In these areas, therefore, the legal frameworks of the ICTs do contain human rights obligations for states, so the question remains why the right to privacy is not subject to similar regulation. One expla-

³⁷⁸ ICC, Decision on the Confirmation of Charges, *Prosecutor v. Mbarushimana* (ICC-01/04-01/10-465-Red), 16 December 2011, 58.

³⁷⁹ Alamuddin (n 141), 299; for example, the ICTY has excluded evidence for having been obtained by domestic authorities in contravention with the right to be questioned in the presence of counsel, enshrined in Rule 42(A)(i) of the RPE, but has never excluded evidence based on violations of the right to privacy.

nation could be that the right to privacy was simply considered to be of lesser importance to ICTs. Even though it may be violated in the course of investigations, such violations may rarely be so serious as to affect the fairness of the trial proceedings. The ICTs seem to have endorsed such reasoning. This is illustrated by the fact that they have exclusively assessed interferences with the right to privacy in the context of the admission of evidence, and have consistently decided not to exclude the evidence in question. The right to privacy is thus not considered a self-standing right that is strictly binding on the Court. Instead, its main relevance lies in the effect of its possible violation on the right to a fair trial.

The actual interpretation and application of the right to privacy by the ICTs further strengthens this conclusion. First, the limited number of search warrants issued by the ICTY that have been identified neither contain any reference to IHRL nor suggest an ‘implicit’ impact of IHRL: there is no mention of formal or material conditions for interferences with the right to privacy that are required by IHRL. The only mention of the right to privacy can be found in decisions assessing the admissibility of evidence, which are few in number. However, the decisions that mention privacy that have been identified do generally refer to various sources of IHRL, mostly to treaty provisions.

When it comes to the actual discussions of the right to privacy in case law, there is a difference between the ad hoc Tribunals and the ICC. The ad hoc Tribunals’ decisions that have been identified discuss the right to privacy in a brief, superficial, and rather selective manner. For example, two main decisions citing the right to privacy devoted little attention to the alleged violation of this right.³⁸⁰ Instead, one of the Chambers extensively argued that even if the right to privacy had been violated, the evidence thus gathered would still not have had to be excluded. One argument to support this conclusion was that the right to privacy can be derogated from and can be limited in accordance with IHRL.³⁸¹ This neatly illustrates the selective approach of the Tribunals, because the decisions do not clarify the relevance of these observations, other than to support the contention that the evidence would not have to be excluded. Although it is true that the right to privacy can be derogated from and can be limited, there are several substantive and procedural conditions that must be met for such derogations and/or limitations to be permissible.³⁸² The decisions mentioned none of these conditions, nor did they clarify the conclusion that would follow from the claim that the right

³⁸⁰ ICTY, Decision on the Tendering of Prosecution Exhibits 104-108, *Prosecutor v. Delalić et al* (IT-96-21-T), 9 February 1998; ICTY, Decision on the Defence ‘Objection to Intercept Evidence’, *Prosecutor v. Brđanin* (IT-99-36-T), 3 October 2003.

³⁸¹ ICTY, Decision on the Defence ‘Objection to Intercept Evidence’, *Prosecutor v. Brđanin* (IT-99-36-T), 3 October 2003, 30

³⁸² See *supra* section 2.1.

can be subject to limitations and derogations. Was the ICTY claiming to be derogating and/or limiting this right itself, or did it contend that the state that had collected the evidence had done so? Both considerations could potentially be valid, but absent any further explanation, it is difficult to properly assess the reasoning of the Tribunal.

The few decisions of the ICC on the right to privacy also referred to IHRL and engaged more seriously with international law and case law. In *Lubanga*, the Court applied the right to privacy based on its being an ‘internationally recognized human right’ within the meaning of Article 21(3).³⁸³ The Court interpreted and applied its own provisions, particularly those governing the exclusion of evidence, in line with such international standards. The specific—domestic—procedural violation was found not to be in contravention of internationally recognized human rights, but the search violated the requirement of proportionality, as developed by the ECtHR. The ICC thus imported this requirement from the case law of the ECtHR, and found a violation of the right to privacy. However, this approach is also selective since other requirements for lawful coercive measures under IHRL were not mentioned. What is more, a subsequent decision regarding allegedly unlawful coercive measures failed to assess their legality at all, and simply dismissed the defence arguments for lack of substantiation.³⁸⁴

6. Conclusion

The right to privacy is significantly under-protected in the context of an international criminal investigation. Despite the limited availability of information regarding the operational details of investigative measures executed by or on behalf of the ICTs, it is clear that the protection of the right to privacy does not have a prominent place in the legal framework governing the investigation, and that this gap in protection has not been remedied in the ICTs’ case law.

The legal frameworks of the ICTs do not contain any formal or material conditions that would apply to the ordering of coercive measures that interfere with persons’ right to privacy, as is required under IHRL. None of the ICTs contain a specific legal basis for the interception of communication, and it is clear that these measures have been employed, and the ad hoc Tribunals’ legal frameworks also lack a specific legal basis for the ordering of search and seizures. Instead, the assumption is that the state that is requested to conduct coer-

³⁸³ ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), 29 January 2007, 74-75.

³⁸⁴ ICC, Decision on the Confirmation of Charges, *Prosecutor v. Mbarushimana* (ICC-01/04-01/10-465-Red), 16 December 2011, 71.

cive measures on behalf of an ICT will apply its normal domestic procedures. There are two important problems with this approach from the perspective of IHRL. It has been shown that there are significant obstacles to requested states' ability to effectively protect the right to privacy in the context of requests for coercive measures. These obstacles exist in the context of inter-state cooperation in criminal matters, and are exacerbated in the context of assistance to ICTs due to several particular aspects of the relationship between states and the ICTs. Essentially, however, the problem is that the ICTs operate on the assumption that states will protect the rights of persons implicated by their investigative activities, but do nothing to ensure that the right to privacy will actually be respected. There are no *ex ante* guarantees at the level of the ICT, and the *ex post facto* checks by the ICTs are almost absent since they generally decline to exercise supervision over the investigative measures. Instead, the ICTs have often considered that 'minor breaches of procedural rules' should not bar the admission of evidence, and have often failed to properly consider possible violations of the right to privacy or to offer remedies for its violation.

Overall, the ICTs' approach to the right to privacy seems to be geared towards preventing possible violation of—domestic—procedural rules from hampering their trial proceedings by barring the admission of potentially relevant evidence. The 'extremely high' threshold for the exclusion of evidence is frequently employed as a justification to not even assess alleged violations of the right to privacy, or to assess them superficially. This approach ignores the fundamental purpose of such 'procedural rules', which is to prevent unlawful and arbitrary interferences with the right to privacy of persons implicated by investigative measures. On top of that, by only assessing privacy violations in the context of the admission of evidence, the approach denies the distinct value of this right as separate and independent from the right to a fair trial.

The particular context in which the ICTs operate should militate towards stronger guarantees for the protection of the right to privacy at the level of the ICTs, not weaker ones. First of all, the effective protection of this right would require that the legal frameworks of the ICTs themselves clearly define formal and material conditions for the execution of coercive measures and themselves check whether these conditions are met in specific cases. Requested states are not well-placed to conduct such checks because their strong obligation to provide assistance to the ICTs may render them disinclined or unable to strictly check the lawfulness, necessity and proportionality of the requested measures. An ICT itself is much better placed to conduct such an assessment, simply because it has more information at its disposal on the specifics of each case. If the ICTs would wish to comply with their obligation

to respect the internationally recognized human right to privacy, they should thus provide strong *ex ante* checks on the ordering of coercive measures that interfere with this right. Arguably, they should also strengthen the *ex post* checks of the manner in which evidence has been collected. Particularly in cases where the OTP has been involved in the process of conducting coercive measures, it is inappropriate for the ICTs to refuse to assess the lawfulness of this operation, as this ignores the responsibility of the OTP. In addition, the particular context of an ICT makes that much of the evidence used at trial may have been gathered without the involvement of the ICT in question. For example, human rights monitors, international organizations, intelligence agencies and the parties to a conflict may have gathered information that is later identified as potentially relevant evidence before an ICT.³⁸⁵ The complete lack of a legal framework applicable to such evidence gathering should arguably prompt the ICTs to design a strict approach to the admissibility of evidence thus obtained. If they do not, the protection of the right to privacy in such a context will be completely absent. The ICTs themselves have denied that such an approach is warranted, arguing that the exclusion of evidence by an ICT will not have a deterrent effect on such situations. This might be true, and arguably, a too strict approach to the exclusion of evidence gathered during ongoing conflicts, when there might have been a legal vacuum, may imply too much of a burden for the ICTs. However, in the current situation, the protection of the right to privacy is completely absent from the frameworks of the ICTs, which is in direct contravention of their obligation to respect internationally recognized human rights. What is more, such strict *ex post* checks might encourage the Prosecutor to properly monitor the domestic collection of evidence, which would strengthen the protection of the rights of persons affected by the ICTs' investigative activities.³⁸⁶

³⁸⁵ Fujiwara and Parmentier (n 3), 581, 596, who note that most international Prosecutors use information and evidence gathered by 'external entities' regardless of the exact legal provisions on evidence gathering; see also Alamuddin (n 141), 231: who points out that much of the information that was subsequently admitted as evidence before the ICTY and the ICTR had been collected prior to the creation of a tribunal or any rules governing admissibility.

³⁸⁶ Karel de Meester, 'Coercive Measures, Privacy Rights and Judicial Supervision in International Criminal Investigations: in Need of Further Regulation?' in Göran Sluiter and Sergey Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (Cameron May 2009), 305, who argues that due to limited possibilities for redress, the proper response would be to exclude such evidence before the ICTs. This would encourage the Prosecutor to properly supervise national collection of evidence.