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**Publication date**

2019

**Document Version**

Author accepted manuscript

**Published in**

East West Perspectives on International Justice: Papers from Conferences in Beijing and Hangzhou

[Link to publication](#)

**Citation for published version (APA):**

Sluiter, G. K. (in press). Should we give the investigating judge a chance in international criminal proceedings? In S. Linton, & L. Daqun (Eds.), *East West Perspectives on International Justice: Papers from Conferences in Beijing and Hangzhou* China University of Political Science and Law Press.

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3296825](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3296825)

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UNIVERSITY OF AMSTERDAM



# SHOULD WE GIVE THE INVESTIGATING JUDGE A CHANCE IN INTERNATIONAL CRIMINAL PROCEEDINGS?

Göran Sluiter

Amsterdam Law School Legal Studies Research Paper No. 2019-29

Amsterdam Center for International Law No. 2019-13

## **SHOULD WE GIVE THE INVESTIGATING JUDGE A CHANCE IN INTERNATIONAL CRIMINAL PROCEEDINGS?**

**Göran Sluiter\*<sup>1</sup>**

### **1. Introduction**

The model of international criminal proceedings has, since the inception of the post WW II Military Tribunals of Nuremberg and Tokyo, as good as consistently been based on the adversarial approach towards criminal justice. This means that the collection and presentation of evidence is put in the hands of two opposing parties, the prosecution and the defence, and the judge has no or very limited powers in terms of fact-finding.

With the international criminal justice system coming of age, we witness the introduction of some elements in the procedure which are unfamiliar to the adversarial model, such as victims participation and the creation of a Pre-Trial Judge or Pre-Trial Chamber. However, in practically all international criminal tribunals, these variations are not of the degree to

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substantially change the organisation of fact-finding; this remains essentially a matter for the parties.

There is one exception to the above orientation on the adversarial approach to criminal proceedings and that is the organisation of fact-finding at the Extraordinary Chambers in the Courts of Cambodia ('ECCC'). Contrary to all other international criminal tribunals, the ECCC has a procedural system in which fact-finding is put in the hands of Co-Investigating Judges. This procedural set-up is based on Cambodian national law of criminal procedure, which in turn is—as a former colony—borrowing largely from French law. This strong orientation on national law in the procedural design of the ECCC could make it less suitable as possible guidance for other—both present and future—mechanisms of international criminal justice. Yet, with all investigations having been finished by the ECCC's Investigating Judges, it is nevertheless worth addressing the question whether we should give the Investigating Judge a chance in international criminal proceedings.

The present paper intends to provide a—tentative—answer to that question. In order to do that it is first necessary to provide an overview of the different modalities and forms of Pre-Trial Judges in the pre-trial phase of certain national criminal justice systems (Section 2). Next, I will provide an overview of the role and position of the judiciary in the pre-trial phase at the ICTY, ICC and—of course—the ECCC (Section 3). The evaluative part of this paper will start with addressing two current problems in international criminal proceedings for which a stronger judicial role prior to trial could be a remedy (Section 4). A number of disadvantages in the creation and functioning of Investigating Judges in international criminal proceedings will also need to be discussed (Section 5). The balance sheet will be drawn up in the concluding observations (Section 6).

## 2. The judge in the pre-trial phase: domestic approaches and developments

The approaches of national criminal justice systems to the role of the judge in the pre-trial phase can differ considerably. It exceeds the scope of this paper to conduct a comprehensive comparative analysis on this matter. I will focus on three types of judicial involvement in the pre-trial phase and in doing that I will inevitably make some generalisations and simplifications.

These three types of roles the judge can play in the pre-trial phase of criminal proceedings, go from a very limited role to a very strong one, in the form of full judicial investigations.

It is self-evident that in the party-driven, adversarial, criminal justice systems, the judge's role prior to trial is very limited. The rationale is that the collection of evidence, the preparation of one's case, is left to the parties, without much need for judicial involvement.<sup>2</sup> Yet, the judge is not fully absent in the adversarial pre-trial phase. For example, the judge will need to authorise warrants that infringe on the right and liberties of individuals, such as arrest warrants and search and seizure warrants.<sup>3</sup> In that role, the judge will review the application

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<sup>2</sup> For excellent background to and explanation of the origins and rationales of the adversarial and inquisitorial criminal justice systems, see Mirjan R. Damaška, *The Faces of Justice and State Authority – A Comparative Approach to the Legal Process*, Yale University Press, Newhaven, 1986.

<sup>3</sup> See, for search and seizure operations, Rule 41 of the US Federal Rules of Criminal Procedure.

of warrants for probable cause, which means there must be a sufficient degree of suspicion and the warrant must be necessary for the investigations.<sup>4</sup> This role enables the judge to supervise, be it to a very limited degree, the investigations by the parties, especially the prosecutor who will more often apply for warrants than the defence. But it is clear that besides this limited role, there is no place for the judge in the pre-trial investigations.

At the other end of the spectrum is the Investigating Judge, i.e. the judge who, often at the exclusion of the parties, is conducting the investigations prior to trial and is determining whether or not the case should be sent to trial. The judge is in this configuration the pre-trial *dominus litis*, in charge of the investigations; as such, he or she is combining the role of judge and investigator.<sup>5</sup> The rationale for putting the judge in charge of investigations is the importance attached to neutral and objective fact-finding in inquisitorial justice systems, which—as is the view in the inquisitorial tradition—can best be done under the authority of the State.

The Investigating Judge, and his or her essential role in both fact-finding and charging, is best exemplified in the French criminal justice system. That justice system, including its *juge d'instruction*, has—sometimes with modifications—been 'exported' to other countries, including a number of continental European countries under French rule or influence in the past, such as the Netherlands, but also the former colonies of France, such as Cambodia. In

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<sup>4</sup> See Rule 41 (d) (1) of the US Federal Rules of Criminal Procedure.

<sup>5</sup> See *Rapport du Comité de réflexion sur la justice pénale*, 1 September 2009 (also known as the *Comité Leger* and hereinafter referred to as such), p. 6.

France, the Investigating Judge is however not conducting investigations in every criminal case; only the more severe crimes.<sup>6</sup>

In the adversarial system there appears hardly to be any discussion about moving towards a judge-led criminal investigations, but there seems to be growing critique in continental justice systems on the Investigating Judge. In France, the origin and home of the Investigating Judge, the *Comité Leger*, at least a majority of its member, has advised to abolish the judge-led investigation, and thus also the *juge d'instruction*:

The majority of the Committee members find that the procedure of investigation - which hardly exists anywhere else in Europe- is no longer suitable to this day and age in that it is neither conducive to efficient investigations nor to the protection of rights of suspects and victims. (translation by the author)<sup>7</sup>

This advice was based in considerable part on a fundamental view of the Committee, at least its majority: the roles of investigator and judge cannot be combined. In the words of the Committee:

( . . . ) a judge, responsible for a criminal investigation, cannot act with strict neutrality and is not fully a judge. (translation by the author)<sup>8</sup>

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<sup>6</sup> Article 79 of the French *Code de Procédure Pénale*.

<sup>7</sup> *Comité Leger*, p. 7.

<sup>8</sup> *Ibid.*

The majority of the Committee has advised to shift the responsibility for the investigations from the Investigating Judge to the prosecution service. Although this advice has not been implemented in France, it appears nevertheless indicative of increasing criticism on the combination of the roles of judge and investigator.

This brings us to a criminal justice system which can be considered to hold a middle ground between the aforementioned extremes of the US and France on the role of the judge in pre-trial investigations. In the Netherlands, reforms in criminal procedure have resulted in abolishing the pre-trial judicial investigation—in all cases—and to replace it with a 'judge in the pre-trial investigation'.<sup>9</sup> Thus, the Pre-Trial Judge, called *rechter-commissaris* in Dutch, is no longer conducting, nor responsible for fact-finding, but he or she is nevertheless given an important mandate in supervising pre-trial fact-finding by the parties. In line with the conclusion of the—majority of the—*Comité Léger* in France, the Dutch legislator makes the prosecution service unconditionally and in all cases *dominus litis*, responsible for fact-finding and charging decisions. Hereby, conflation of the investigative role with the judicial role is avoided and it confirms a clear allocation of the investigative responsibility to one (State) organ, the prosecution service. Nevertheless, the judge in the Dutch pre-trial phase continues to have an important role in the pre-trial stage and has the following powers:

\* supervising the lawfulness of the pre-trial investigation by reviewing the exercise of investigative powers by the Prosecutor;<sup>10</sup>

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<sup>9</sup> This legislative reform was introduced on the proposed Act Reinforcing the Position of the Pre-Trial Judge (*Wet versterking positie rechter-commissaris*) in 2007 and entered into force shortly after its introduction. On the rationale behind this procedural reform see the explanatory memorandum to that Act: *Kamerstukken II*, 2009-2010, 32 177, nr. 3.

<sup>10</sup> *Ibid.*, p. 10.

\* ensuring that sufficient progress is made in the pre-trial investigations;<sup>11</sup>

\* ensuring the pre-trial investigations are complete, be it that the role of the judge here is fully subsidiary and complementary to that of the prosecution service; but proprio motu completion of the investigations if the Pre-Trial Judge considers this is necessary remains possible.<sup>12</sup>

The present position of the Pre-Trial Judge in the Netherlands appears to have weakened his or her role in the pre-trial investigations, in that the judge no longer has powers, or very limited, subsidiary powers, when it comes to fact-finding. However, in this respect it must be borne in mind that judicial investigations were already quite exceptional in the Netherlands prior to these reforms, and limited to the most severe and complex cases. In a way, these reforms could indeed be considered to strengthen the role of the judge in pre-trial investigations in the Netherlands.

Looking at some of the national approaches and developments in relation to the role of the judge in pre-trial investigations, the question arises what the position of the judge is in the pre-trial phase of international criminal proceedings.

### **3. Increasingly important? The judge in the pre-trial stage of international criminal proceedings**

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*, p. 11.

It appears that in international criminal proceedings the role of the judge in the pre-trial phase is gaining in importance. As was already mentioned, the most prominent role in this regard can be found with the ECCC, in the form of its Office of Co-Investigating Judges. I will give an overview of the role of the judge in the pre-trial phase for the ICTY, ICC and ECCC.

The first exponent of the contemporary family of international criminal tribunals, the ICTY, has adopted an as good as fully adversarial procedure. Neither the Statute nor the first versions of the Rules of Procedure and Evidence provide for a substantive judicial role in the pre-trial investigations.<sup>13</sup> The organisational setup is limited, as far as the judicial branch is concerned, to a Trial Chamber and an Appeals Chamber. The pre-trial involvement of the judiciary at the ICTY was originally limited to confirming the indictment, pursuant to Article 19 of the Statute and Rule 47 of the Rules of Procedure and Evidence ('RoPE'), and the issuance of orders and warrants necessary for the investigations, pursuant to Rule 54 RoPE.<sup>14</sup>

While the judge had initially a very limited role in the ICTY's pre-trial stage, this gradually changed over the years. Rule 65ter was adopted in 1998, and is entitled the Pre-Trial Judge. In its present form,<sup>15</sup> Rule 65ter has developed into quite a lengthy provision. The Rule provides for nomination of one member of the Trial Chamber, who is responsible for the pre-trial proceedings, but only after the initial appearance of the accused. Clearly, prior to the initial appearance much has already been done in terms of investigations and it is already obvious from this fact that the Pre-Trial Judge's mandate in the ICTY framework will not

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<sup>13</sup> The first version of the ICTY Rules of Procedure and Evidence ('RoPE') is dated 11 February 1994.

<sup>14</sup> Reference to first version of the Rules.

<sup>15</sup> The final version of the ICTY RoPE was of July 2015.

concern the investigations; this remains the full responsibility of the parties. The role of the ICTY Pre-Trial Judge, as also described in the ICTY Manual on Developed Practices,<sup>16</sup> is focused on effective pre-trial management with a view to make the trial as expdient and efficient as possible.<sup>17</sup> To that end, the Pre-Trial Judge has been given a number of managerial powers, such as holding regular meetings, imposing deadlines as to pre-trial motions, ensuring submission of pre-trial briefs, registering—and also encouraging—agreed facts. As mentioned, all of this is of a managerial nature,<sup>18</sup> and not of much relevance in respect of investigations as they have been or are being conducted by the parties. As a result, there is, for example, no power for the Pre-Trial Judge to conduct investigations, or order the parties to conduct further investigations, in case he or she would feel this would be necessary to complete the investigations. In addition, the ICTY Pre-Trial Judge has no mandate to issue warrants as may be required for the investigations.

It is known that the ICC has adopted, on a number of important points, a less adversarial procedure than the ICTY. One for this purpose of this paper *essential* innovation compared to the ICTY is the incorporation in the Rome Statute of a Pre-Trial Chamber. The creation of a

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<sup>16</sup> See ‘ICTY Manual on Developed Practices Prepared in conjunction with UNICRI as part of a project to preserve the legacy of the ICTY’, UNICRI 2009, pp. 54-56 about the pre-trial proceedings.

<sup>17</sup> See Rule 65*ter* (B): ‘The pre-trial Judge shall ensure that the proceedings are not unduly delayed and shall take any measure necessary to prepare the case for a fair and expeditious trial.’

<sup>18</sup> On the managerial judge in International Criminal Law see Maximo Langer, ‘The Rise of Managerial Judging in International Criminal Law’, 2005 *American Journal of Comparative Law*, Vol. 53, p. 835

Pre-Trial Chamber makes sense in light of two vital pre-trial procedural stages at the ICC which are not available at the ICTY. First of all, there is the principle of complementarity and litigation that can occur in that framework, i.e. challenges to admissibility to a case by either the State or the defendant.<sup>19</sup> Second, the ICC has adopted a procedure for the confirmation of charges, which is not *ex parte* and far more elaborate than the confirmation of the indictment under the law and practice of the ICTY.<sup>20</sup> This important pre-trial litigation in and of itself fully justifies the introduction of a Pre-Trial Chamber.<sup>21</sup> The question arises as to whether the Pre-Trial Chamber is otherwise involved in the pre-trial investigations. Article 57 of the Statute empowers the Pre-Trial Chamber to rule on applications for warrants from either party that are necessary for the investigations.<sup>22</sup> In addition, the Pre-Trial Chamber may assist the parties, especially the defence, in obtaining cooperation from States.<sup>23</sup> These are important powers in the framework of the pre-trial investigations.

Article 57 (3) (c) of the Statute, furthermore, empowers the Pre-Trial Chamber, without an application from the parties being required, to protect witnesses, but also to preserve evidence. Arguably, this *proprio motu* power in the preservation of evidence could open the door to a more active judicial involvement in the (pre-trial) collection of evidence, getting closer to a

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<sup>19</sup> See Articles 17-19 of the ICC Statute.

<sup>20</sup> See Article 61 of the ICC Statute.

<sup>21</sup> At the Rome Conference, the idea of establishing a Pre-Trial Chamber was generally welcomed, see William A. Schabas, *The International Criminal Court – A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010 (‘Schabas, *The International Criminal Court – A Commentary on the Rome Statute*’) p. 698.

<sup>22</sup> Article 57 (3) (a) and (b) of the Statute.

<sup>23</sup> Article 57 (3) (b), (d) and (e).

true Investigating Judge. However, commentaries to the Rome Statute do not indicate the drafters envisaged such *proprio motu* role for the Pre-Trial Chamber in fact-finding.<sup>24</sup> Also in practice, the Pre-Trial Chamber has not actively made use of, or developed, *proprio motu* powers under Article 57 (3) (c).

We should not forget Article 56 of the Statute, entitled ‘Role of the Pre-Trial Chamber in relation to a unique investigative opportunity’. This provision was included to secure evidence prior to trial in case there is a strong risk it will not be available later on; the most mentioned example is that of a terminally-ill witness.<sup>25</sup> The Article 56-collection of evidence is in principle to be triggered by the Prosecutor, but can also be initiated on the Pre-Trial Chamber’s own initiative under Article 56 (3) of the Statute, subject to appeal by the Prosecutor.

Article 56 has rarely been used.<sup>26</sup> But it has been discovered not so long ago as a means to hear a number of witnesses prior to trial; this may amount to usurpation by the Pre-Trial

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<sup>24</sup> Schabas, *The International Criminal Court – A Commentary on the Rome Statute*, p. 700, see *supra* note 21.

<sup>25</sup> For the drafting history and rationale behind the provision, see *Ibid.*, pp. 691–694.

<sup>26</sup> For an exceptional use of Article 56, dealing with investigations by the Netherlands Forensic Institute in the DRC see ICC, Decision on the Prosecutor’s Request for Measures under Article 56, *Situation in the DRC*, P-T.Ch., . ICC-01/04, 26 April 2005, (<http://www.legal-tools.org/doc/e9b0f4/>).

Chamber of a greater role in pre-trial investigations.<sup>27</sup> In the context of risks of witness interference, the Pre-Trial Chamber was given significant discretion in hearing witnesses prior to trial:

The PTC Single Judge specified the Article 56(2) measures enabling him to take the Witnesses' testimony. Pursuant to Article 56(1)(a) of the Statute, he found a unique investigative opportunity to take the Witnesses' testimony in light of a risk that it may not be available subsequently for the purposes of a trial. In so finding, he considered specific meetings, publications and other events with the potential to taint the Witnesses' evidence, in conjunction with the risks inherent in the passage of time, in particular, the possible recurrence of events with the potential to taint the Witnesses' evidence.<sup>28</sup>

The expanded use of Article 56 is not uncontroversial; the question arises whether hearing witnesses prior to trial out of fear for interference later on amounts to 'unique investigative opportunities' as intended by the drafters and whether the defence is not significantly disadvantaged by having to cross-examine these witnesses without proper preparation and knowledge of the Prosecution's case. It will be interesting to follow the future use of Article 56 and whether it could develop into a *sui generis* form of pre-trial judicial investigations in the context of the ICC.

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<sup>27</sup> ICC, Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute, *Prosecutor v. Ongwen*, T.Ch. IX, . ICC-02/04-01/15, 10 August 2016 (<http://www.legal-tools.org/doc/c47593/>).

<sup>28</sup> *Ibid.*, para. 8.

On the basis of the above, we can conclude that the ICC's Pre-Trial Chamber can definitively exercise a far more firmer grip on the pre-trial investigations than the ICTY's Pre-Trial Judge. The legal framework of the ICC allows for an active judicial role in the collection of evidence and recent use of Article 56 for hearing witnesses pre-trial may confirm the development towards an even stronger role of the Pre-Trial Chamber in fact-finding prior to trial. However, we are still very far from full judicial investigations; the investigations as such remain at the ICC the prerogative of the parties.

This is different with the ECCC, which has opted for full and exclusively *judicial* investigations. The legal framework of the ECCC provides for an Office of two Co-Investigating Judges ('OCIJ'), one Cambodian and one international; this is based first and foremost on the starting point that the procedure of the ECCC is to be governed by Cambodian law.<sup>29</sup> It is generally known that the Cambodian and international side, including within the OCIJ, are sometimes in disagreement about the exercise of functions and powers. This has been particularly acute in Cases 003 and 004 of the ECCC. This may cast a shadow over the functioning of the ECCC, and makes it at times difficult to analyse that court's procedure on the basis of its legal merits.

The details of the ECCC procedure, including the functioning of the OCIJ, can be found in the Internal Rules ('IR') of the ECCC. The IR stipulate that judicial investigations are obligatory

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<sup>29</sup> See Article 12 of the ECCC Agreement between the UN and Cambodia; for further analysis of the (origins of the) procedural design of the ECCC, see Göran Sluiter, "Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers", *Journal of International Criminal Justice*, 2006, Vol. 4, Issue 2, pp. 314–326.

and shall remain confidential.<sup>30</sup> The relationship with the Co-Prosecutors is such that the latter have the power to conduct preliminary examinations with a view to determine which cases and suspects need to be part of judicial investigations.<sup>31</sup> Thus, the Co-Prosecutors remain *domini litis*, in the sense that the *droit de poursuite*, the power to initiate criminal investigations, is reserved to them. It is via so-called introductory submissions that the Co-Prosecutors can open a judicial investigation.<sup>32</sup> A judicial investigation cannot be opened *proprio motu* or at the request of a victim.

The judicial investigation, following receipt of an introductory submission, is limited to the facts set out therein.<sup>33</sup> New facts may be added through a supplementary introductory submission. In the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth.<sup>34</sup> All investigative actions, including interrogation of witnesses, shall be recorded in the case file to which the Prosecutor and the charged person have access.<sup>35</sup> When the judicial investigations are being conducted, the parties, Prosecution and the charged person, are not allowed to conduct parallel investigations, but they can submit a request for investigative action with the OCIJ.<sup>36</sup>

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<sup>30</sup> Internal Rules 55 (1) and 56 (1).

<sup>31</sup> Internal Rule 50 (1).

<sup>32</sup> Internal Rule 53.

<sup>33</sup> Internal Rule 55 (2).

<sup>34</sup> Internal Rule 55 (5).

<sup>35</sup> Internal Rule 55 (6) and (11).

<sup>36</sup> Internal Rule 55 (10).

The IR further regulate in detail the charging of a suspect, the interrogation of witnesses and other investigative activities by the OCIJ.<sup>37</sup> When the judicial investigations are concluded, the OCIJ sends a notice of conclusion to the parties.<sup>38</sup> After having received submissions from the parties, the Co-Investigating Judges shall conclude the investigations by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case.<sup>39</sup>

The role and powers of the OCIJ in the pre-trial phase of the ECCC are thus enormous. Within the confines of the introductory submission by the Co-Prosecutor, the OCIJ fully runs the investigations and decides whether or not the investigations will result in an indictment. The parties are marginalised once the judicial investigations start; they can follow the results via the case file, but can only seek to influence the investigations by filing so-called investigative requests. For all prosecution and defence lawyers used to and having experience in international criminal proceedings this highly subsidiary and dependent role in pre-trial investigations is a tremendous change and requires adaptation. Whether or not this judge dominated pre-trial investigations has been a relatively successful experiment in international criminal justice and may be worth repeating is at the heart of this paper and will be examined in the two sections below.

#### **4. How a tighter judicial grip on pre-trial investigations could remedy some of the current challenges and problems in international criminal proceedings**

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<sup>37</sup> Internal Rule 57-62.

<sup>38</sup> Internal Rule 66.

<sup>39</sup> Internal Rule 67.

I will discuss two rather problematic aspects of current investigations at international criminal tribunals which could benefit from a stronger judicial role in the pre-trial phase.

First, there is the issue of the review of the legality of the investigations. In national criminal justice systems, at least those which try to be in compliance with human rights law, there is generally a system of judicial warrants which need to be obtained if the parties wish to make use of investigative measures which infringe on the rights of individuals.<sup>40</sup> The best known examples are ‘search and seizure’ operations and the interception of telecommunications.<sup>41</sup> Pursuant to human rights law, notably the European Court of Human Rights, judicial involvement in investigative actions infringing on individual rights, such as the right to privacy, is strongly desirable.<sup>42</sup> Judicial review is especially required in case the conditions under which investigative actions which infringe on human rights may be exercised are not regulated in detail in laws accessible to all. With the exception of the ECCC, we notice in international criminal proceedings no requirement—in law or practice—of judicial review of investigative actions infringing on human rights. Nor are there—detailed—regulations on, for example, search and seizure operations and the interception of telecommunications. De Meester has concluded that this absence of a supervisory role of the judge on the legality of

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<sup>40</sup> See above, Section 2.

<sup>41</sup> In respect of other investigative measures which could pose risks for the integrity or reliability of investigations, such as infiltration operations, it can also be considered necessary to have some judicial review.

<sup>42</sup> On dealing with the issue of procedural legality from a human rights perspective, see Karel de Meester, *The Investigation Phase in International Criminal Procedure – In Search of Common Rules*, Intersentia, Cambridge, 2015, pp. 105–111.

investigative actions in the pre-trial phase of international criminal proceedings is seriously problematic:

More precisely, international human rights law requires a regulation which is sufficiently detailed and precise (foreseeable) as well as adequately accessible for any infringement of the rights of individuals. It is doubtful whether the current state of international criminal procedure is in full conformity with this requirement.<sup>43</sup>

This lacuna can be filled by attributing these review powers to the existing pre-trial judicial mechanism, such as the Pre-Trial Chamber with the ICC. It would not even require an amendment of the Statute or the RPE, as the power to issue warrants has already been attributed to the ICC's Pre-Trial Chamber under Article 57. All that is needed is a reversal of the prevailing view and practice that no judicial warrant is needed for search and seizure operations and the interception of telecommunication.<sup>44</sup> In the model of judicial investigations, as they exist at the ECCC, this concern about judicial review of investigative action appears in principle to be accommodated, as the expectation is that the judge will use coercive investigative powers impartially and with restraint. In addition, in case the parties would be of the opinion that investigative action by the judges is unlawful, they can move for annulment of the investigative action.<sup>45</sup>

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<sup>43</sup> *Ibid.*, p. 878.

<sup>44</sup> De Meester has on the basis of interviews with Prosecution staff and judges and staff at international criminal tribunals concluded that it was generally not found necessary to obtain judicial authorization for coercive investigative measures requested by the prosecution to national authorities: *ibid.*, pp. 478–486.

<sup>45</sup> Internal Rules 48 and 76.

The second problem in which a stronger judicial involvement in pre-trial investigations could play a positive role relates to interference with witnesses, or witness tampering. Witness interference can be described as threats, bribes or other inducements to witnesses with a view to prevent or influence their testimony. This has been a problem plaguing a significant amount of contemporary international criminal tribunals, but has received most attention in the context of the ICC; reports and academic articles have been published on this problem.<sup>46</sup> Cryer has described how at the ICTY, prosecution witnesses were intimidated not to testify in the *Haradinaj* case, and he has paid attention to the interference and intimidation that occurred in the *Lukić* and *Šešelj* cases.<sup>47</sup> He also addresses the problems at the ICTR, where the defence raised general assertions that the Rwandan government prevented defence witnesses from giving exculpatory evidence or that their evidence had been manipulated by the Rwandan government.<sup>48</sup>

Most attention is at present going to witness tampering at the ICC. It has been a big problem since the ICC's first case, the *Lubanga* trial, where some witnesses admitted being influenced by so-called intermediaries working for the prosecution.<sup>49</sup> The bribing of witnesses in the *Bemba* case has resulted in the prosecution of five suspects, including Mr. Bemba himself and

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<sup>46</sup> See Open Society Justice Initiative (OSJI), *Witness Interference in Cases before the International Criminal Court*, November 2016 ('OSJI Report') and Robert Cryer, "Witness Tampering and International Criminal Tribunals", *Leiden Journal of International Law*, 2014, Vol. 27, Issue 1, pp. 191 - 203.

<sup>47</sup> *Ibid.*, pp. 193-194.

<sup>48</sup> *Ibid.*, p. 195

<sup>49</sup> See Caroline Buisman, "Delegating Investigations: Lessons to Be Learned from the Lubanga Judgment", 2013, *Northwestern Journal of Human Rights*, Vol. 11, p. 30.

his—former—lawyer, for offences against the administration of justice.<sup>50</sup> The collapse of the *Kenya* case, the cases against 6 suspects being terminated prior to a final judgement, also has been attributed to witness tampering.<sup>51</sup> The ICC Prosecutor’s strategic plan 2016-2018 notes that ‘almost all cases in the confirmation of charges and trial phases have been or are confronted with incidents of obstruction of justice – in particular witness tampering.’<sup>52</sup> In its 2016 Report on witness interference in cases before the ICC, the Open Society Justice Initiative noted:

Witness interference can undermine the rule of law, obstruct the court’s truth-finding function, and distort case outcomes, leading to wrongful convictions or acquittals, or unfair termination of cases for other reasons. Our research suggests that the outcomes of the *Lubanga*, *Ngudjolo*, *Ruto & Sang*, and *Muthaura & Kenyatta* cases could have been affected by witness interference.<sup>53</sup>

The above indicates how serious the problem of witness interference at the ICC is. It must be borne in mind that in reality the problems may even be bigger. ‘Successful’ witness interference schemes are those that do not raise suspicion or have not been discovered. There is simply no way of telling how many of the witnesses who have testified before the ICC have

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<sup>50</sup> This case is at the time of writing in the appellate phase; in first instances all suspects have been convicted: ICC, Judgement pursuant to Article 74 of the Statute, *Prosecutor v. Bemba and others*, T. Ch. III, ICC-01/05-01/08-3343, 21 March 2016 (<http://www.legal-tools.org/doc/edb0cf/>).

<sup>51</sup> OSJI Report, p 2, see *supra* note 46.

<sup>52</sup> ICC OTP Strategic Plan 2016-2018, 6 July 2015, p. 13.

<sup>53</sup> OSJI Report, p 5, see *supra* note 46.

done so completely truthfully or have been under the influence of intimidation, threats or bribes. In reality, the problem may thus even be bigger than what is at present reported.

At the ECCC, the problem of witness interference does not appear to exist. This is in my view one of the greatest benefits of judicial investigations for international criminal proceedings. In this regard it must be noted that there is strict jurisprudence at the ECCC which forbids parties, in this case the defence, to conduct even preliminary inquiries when the judicial investigations are ongoing; the parties can thus not approach or question witnesses and have no—or in the case of the Prosecutor very limited—budget for investigators.<sup>54</sup> According to the Co-Investigating Judges:

However, the permissible preliminary inquiries envisioned by the CIJ s and the PTC are limited to inquiries aimed at seeking and reviewing documents: reviewing publicly-available documents, inquiring as to whether states and/or individuals possess relevant documents, and (at least in the case of states) seeking copies of such documents. In essence, they relate to actions by the Defence which are meant to provide an initial trigger for the CIJs own and detailed investigative action. Questioning witnesses and conducting site visits as described by the Defence, on the other hand, are already investigative actions, the more so the longer an investigation has been ongoing. ( . . . ) The Defence proposal - conducting a site visit with a witness as a guide, questioning a witness about a site, and questioning a witness about his

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<sup>54</sup> ECCC, [REDACTED] Decision on Meas Muth's Request for the Co-Investigating Judges to Clarify whether the Defence May Contact Individuals Including, *Prosecutor v. Meas Muth*, OCIJ, 003/07-09-2009-ECCC-OCIJ, 4 December 2015 (<http://www.legal-tools.org/doc/5a276d/>).

previous statements - is thus prohibited. The same applies to approaching persons who have not been previously contacted by the CIJs.<sup>55</sup>

This prohibition of contact with witnesses, arguably, may reduce problems with witness interference. When introduced at the ICC, a system of judicial investigations could thus significantly help in remedying the problem of witness tampering.

That said, one should also realistically acknowledge that other factors than party-driven investigations may account for the phenomenon of witness tampering. These factors may include the distance between court and witnesses, the degree of authority and power of an accused, whether or not testimonial evidence is essential to the case, what is at stake for the accused, the need to make use of intermediaries, the budget available for both investigations and staff, the degree of poverty/vulnerability of the witness etc. These factors may play a much stronger role in the context of (certain) ICC investigations than in the ECCC investigations and could also explain why witness tampering is a far bigger problem at the ICC than at the ECCC.

Nevertheless, one can conclude that introduction of judicial investigations in the context of the ICC can be expected to have a positive impact on reduction of witness interference, as it will overall amount to a much tighter grip on the investigative phase and will in principle prohibit the contact between parties and witnesses.

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<sup>55</sup> *Ibid.*, p. 4.

## **5. The cure worse than the disease? Some problems with the introduction of a Investigating Judge in international criminal proceedings**

This Section deals with possible disadvantages that accompany a stronger role for the judge in the pre-trial phase of criminal proceedings.

I do not see substantive disadvantages in giving a judge a stronger role in the supervision of the legality of investigative actions by the parties and in ensuring sufficient progress in the investigations. It will improve legal protection, efficiency and can be done with relatively modest resources.

Things are different with judicial investigations, thus the introduction of a true Investigating Judge (in French: *juge d'instruction*). I will deal with a number of problems.

The fundamental debate that is being conducted in France, namely whether the roles of investigator and judge can be combined, is equally valid for the international criminal justice system. Also in that context, one can wonder whether the investigative judge can remain neutral and objective and may in practice, for example, not be concentrating too much on incriminating evidence. In this regard one can draw the attention to a ruling of the ECCC on an attempt of the Nuon Chea defence team to disqualify international Co-Investigating Judge Lemonde, claiming that he had instructed his team to focus on incriminating evidence.<sup>56</sup>

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<sup>56</sup> ECCC, Decision on Nuon Chea's Application for Disqualification of Judge Marcel Lemonde, *Prosecutor v. Nuon Chea*, P-T.Ch., 002/29-10-2009-ECCC/PTC (04), 23 March 2010 ([www.legal-tools.org/doc/d49deb/pdf/](http://www.legal-tools.org/doc/d49deb/pdf/)).

Although the application was rejected, it illustrates that vulnerability of the judge as an investigator.

However, to counter the aforementioned criticism, it should be noted that protagonists of the Investigating Judge claim that these roles can effectively be combined and that the *juge d'instruction* in France may not be 'kicking', but certainly is still 'alive'.

A more important problem that explains why the Investigating Judge has not been introduced outside the special context of the ECCC has to do with the organisational set-up of an international criminal tribunal and related resources. Introducing (an office of) Investigating Judges will add another organ to a structure in which prosecution, trial chamber, appeals chamber and registry will already have to be created, and staffed. This is complex, and therefore not attractive, to those creating an international criminal tribunal, because they need to figure out how this additional organ relates to defence and especially prosecution in terms of investigative powers. Moreover, this will by definition also cost more than just a party-driven investigation; even in the situation of full judicial investigations at the ECCC, this will need to be preceded by preliminary investigations by the prosecution, which will require sufficient investigative powers and resources for the prosecution to fulfill that task. All in all, in the context of an international criminal tribunal—which when of a temporary, ad hoc nature, should be up and running as fast as possible—these complex and expensive experiments may scare off drafters.

And there is the matter of efficiency. The idea behind judicial investigations is that it helps providing for an efficient criminal justice system, as the presentation of evidence at trial can be seriously reduced in scope and time. Simply, the trial can be confined to discussing the

results of the judicial investigation, without much need for further fact-finding at trial. This logic—thorough pre-trial investigations, resulting in a relative lengthy pre-trial phase, but followed by a short and efficient trial—has also been addressed in Lemonde’s memoirs of his period as Co-Investigating Judge at the ECCC.<sup>57</sup> However, this logic is not likely to work in international criminal justice and has certainly not worked at the ECCC.

A first problem in this regard is that incriminating witnesses heard by the Investigating Judge have not been subjected to cross-examination by the defence. Incriminating witnesses, especially those testifying on the acts and conduct of the accused, may thus have to be heard again at trial, to ensure fairness towards the defence, but also in the interests of proper fact-finding. This duplication of work -and burden for the witness- can be avoided if the defence is given the opportunity to participate in the interrogation of -important incriminating- witnesses during the judicial investigations.

But there is an additional, and more important problem. Especially in international criminal proceedings, external publicity—the fact that the public can follow the presentation of evidence—is considered to be of crucial importance. This is very difficult to realise with collection of evidence through judicial investigations; reading out at trial the results of these judicial investigations, or a summary, cannot have the same role and impact as real live testimony at trial. It is in this light fully understandable that in the practice of the ECCC many witnesses were also heard—again—at trial. From an efficiency and systematic point of view this proved to be quite dramatic as it resulted in very lengthy pre-trial *and* trial stages at the ECCC.

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<sup>57</sup> Marcel Lemonde and Jean Reynaud, *Un juge face aux Khmers rouges*, Le Seuil, 2013.

In addition to this fundamental problem with judicial investigations in international criminal proceedings in general, namely its devastating consequences for external publicity, it also needs to be pointed out that the way in which judicial investigations are conducted at the ECC have other shortcomings as well.

One of them relates to the participation of the defence in ECCC judicial investigation. As was already mentioned, the defence is not allowed to conduct its own investigations. It can participate in the investigations by filing requests for investigative action, for example requesting the OCIJ to hear a certain witness. It follows from ECCC jurisprudence that these requests for investigative action need to be sufficiently specific.<sup>58</sup> This puts the defence in a predicament. Without the right—leaving aside the issue of resources—to conduct preliminary investigations it is impossible for the defence to meet the standard of specificity in filing investigative requests. This is a serious problem in ensuring balanced and fair judicial investigations.

## **6. Concluding observations**

The objective of this paper was to answer—tentatively—the question whether we should give the Investigative Judge a chance in international criminal proceedings, or, more broadly: is it

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<sup>58</sup> ECCC, Decision on Appeal against the Decision on [REDACTED] Application to Annul the Entire Investigations, *Prosecutor v. [REDACTED]*, P-T. Ch., 5 September 2017, Case File No. 004/2/07-09-2009-ECCC/OCIJ(PTC43) ([www.eccc.gov.kh/en/document/court/PTC](http://www.eccc.gov.kh/en/document/court/PTC)).

worthwhile to give the judge a stronger role in the pre-trial phase in international criminal proceedings.

In order to give that answer in these concluding observations I have first provided a simple overview of the role of the judge in a few different national criminal justice systems in Section 2. It can be concluded that in all criminal justice systems the judge has some role in the pre-trial phase, but the most far-reaching judicial involvement in criminal investigations can be found in inquisitorial justice systems with judicial investigations, such as in France. However, there appears to be growing criticism on this phenomenon of judicial investigations, even in France, because of, among other things, the difficulty of combining the roles of investigator and judge.

In Section 3 the role of the judge in the pre-trial phase at the ICTY, ICC and ECCC was examined. It was found that in general the judge has become more important in the pre-trial phase. First and foremost, this increasing involvement is aimed at a managerial role of the pre-trial phase (ICTY), but there is arguably a development in the direction of greater judicial involvement in the investigations at the ICC, without this fundamentally changing the party-led fact-finding. This fundamental change towards judge-led fact-finding was made at the ECCC.

Identifying the purported advantages of a greater judicial role in the pre-trial phase of international criminal proceedings was the object of Section 4. I have argued that two positive contributions can be made by stronger judicial involvement. First, judicial supervision on the legality of investigative actions by the parties can contribute to the quality and legitimacy of the investigations. Second, a stronger judicial role in investigations could greatly assist in the

reduction of one of the biggest problems at present for accurate fact-finding, and that is witness tampering.

However, there are also disadvantages to a stronger judicial involvement in the pre-trial phase and those have been analysed in Section 5. The most important of them is the fact that judicial investigations will have devastating effects on external publicity, i.e. the ability of the public to properly follow and understand the presentation of evidence at trial. Unless one wishes to duplicate the judicial investigations at trial—which will be highly inefficient—judicial investigations will mean that hardly any witness—or other evidence—will be presented at trial. This appears to me not to be a good development for international criminal justice.

Balancing Sections 4 and 5, I have to conclude that the disadvantages outweigh at present the advantages. Thus, importing the French system, i.e. a system with full judicial investigations, is not in the interests of the international criminal justice system. That said, there is definitely room—and maybe in a specific context also need—for developing otherwise a stronger judicial role in the pre-trial phase of international criminal proceedings. Three short recommendations are made.

First, there is a need to give the judge a stronger role in supervising the legality of the investigative actions by the parties, by making it compulsory to obtain a judicial warrant for all investigative activities infringing on individual rights. As was mentioned, this can be done quite easily, it does not require significant additional resources and it falls within the existing legal framework of the ICC.

Second, inclusion of judicial investigations in the procedural design remains an option in the context of an internationalised criminal tribunal, when the procedure has to be based on – or follow the national justice system’s procedure and judicial investigations are part of the national procedure. This was the case with the ECCC.

Third and finally, it may be wise to insert a degree of flexibility in the procedural set-up which would allow for judicial investigations of some type in case the circumstances so require. The obvious example is a situation of a high risk of interference with witnesses or other serious threats to accurate fact-finding, which justify a stronger judicial role. While it may be difficult to practically organise this and it may create procedural uncertainty, the problems of witness interference at the ICC are at present of such magnitude that this procedural flexibility is in my view fully justified. Interestingly, without this probably being the intentions of the drafters, the ICC’s legal framework, notably Article 57 (3) (c) and Article 56 of the Statute, already appears to provide for this flexibility and enables the Pre-Trial Chamber to be more involved in pre-trial investigations. These provisions may even enable the Pre-Trial Chamber to preserve evidence *proprio motu*. It will be interesting to see whether this may develop, at some point, in *sui generis* judicial investigations in certain ICC cases.